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Brazil's CIESP/FIESP New Arbitration Rules on the Autonomous Taking Of Evidence

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On September 4, 2024, the Chamber for Conciliation, Mediation and Arbitration of CIESP/FIESP (the Federation of Industries of the State of São Paulo, Brazil) released a new set of arbitration rules for the autonomous taking of evidence through arbitral proceedings (the "Rules"). This development, and the general trend it tends to set, builds on the continuous improvement of Brazil as a favorable seat of arbitration, providing parties with an expedited, yet flexible, means of autonomous taking of evidence away from State Courts.

We discuss the content and implications of the Rules below.

Background: The Framework for Autonomous Taking of Evidence

The 2015 Brazilian Civil Procedure Code (the "2015 CPC") is based on the principle of cooperation (Art. 6 of the 2015 CPC). Following its enactment, the CPC was hailed as innovative by introducing common law procedural tools to an otherwise strictly civil law jurisdiction, such as by expanding on binding precedents and allowing for the direct examination of witnesses.

The 2015 CPC also provides rules for the autonomous taking of evidence, inspired by the discovery rules of common law countries (Arts. 381 *et seq*. of the 2015 CPC). Prior to the 2015 CPC, Brazilian procedural law only allowed for the *early* production of evidence, in order to preserve evidence that could otherwise perish or be difficult to produce at a later stage of proceedings (similar to Art. 26.2(d) of the UNCITRAL Rules, as amended in 2021). Consequently, the requesting party had to show urgency.

On the other hand, the autonomous taking of evidence is based on the idea that parties have a right to the evidence: the right to produce documents, expert reports, or testimonies even if they are not tied to, or intended to be used in, ongoing disputes. In fact, autonomous evidence may even prevent a dispute from occurring, either by facilitating settlement, or by resolving doubts as to controverted facts. For example, the autonomous production of an expert report may find the cause of defects in a construction contract, and this knowledge may allow parties to reach a settlement and save costs by averting a potential dispute.

Therefore, pursuant to the 2015 CPC, parties can rely on the autonomous taking of evidence when there is a need to preserve evidence (Art. 381, I, of the 2015 CPC); the production of evidence may

facilitate settlement or other means of adequate dispute resolution (Art. 381, II, of the 2015 CPC); previous knowledge of the facts may justify or avoid the filing of a suit (Art. 381, III, of the 2015 CPC).

Another important aspect of the autonomous taking of evidence is that courts shall not rule on the merits of any disputed issue of fact or law, but only oversee the production of evidence (Art. 382, para. 2, of the 2015 CPC). Due to this feature, many commentators consider it to be a non-contentious (or voluntary) procedure. This opinion is backed by the 2015 CPC provision which states that defenses and appeals are inadmissible in this procedure (Art. 382, para. 4, of the 2015 CPC). However, this rule has been set aside on some occasions to allow for discussions on the requesting party's right to the evidence itself, whenever there is a conflict.

Autonomous Taking of Evidence and Arbitration: Superior Court of Justice's Ruling on Special Appeal No. 2,023,615/SP

Because of the (apparently) non-contentious nature of the autonomous production of evidence, there was doubt over whether these proceedings were (or should be) submitted to arbitration, whenever the production of evidence was connected to underlying contracts containing arbitration agreements.

In truth, although it was designed as a mechanism for cooperation and settlement facilitation, autonomous production of evidence quickly became a low-costs, low-stakes tool for guerrilla tactics. Due to the (apparently) non-contentious nature and restrictions on the admissibility of defenses, parties used these proceedings to sidestep discussions on their right to access certain information (*e.g.*, in corporate disputes involving minority shareholders' rights to information). Therefore, it became increasingly common that the production of evidence was prefaced by some kind of conflict on the merits of the requesting party's right to the evidence, which, then, raised the question: do these proceedings fall under the objective scope of the arbitration agreement?

The question was answered by the Superior Court of Justice, the highest court that deals with Federal Law matters. When ruling on Special Appeal 2,023,615/SP, the Superior Court decided that autonomous production of evidence proceedings:[1)]

> "*involved, in themselves, conflicts of interest around the evidence, in which the right to produce is the cause of action*". Therefore, the Court stated that "*absent any urgency, […] any and all claims – including the one related to the autonomous right to the evidence, which is exercised by the autonomous taking of evidence proceedings, […] – should be submitted to the Arbitral Tribunal, pursuant to the parties' intent*" (courtesy translation)

The ruling raised practical issues:

- Does it make sense to ask for one (or, usually, three) arbitrator(s) to serve, not as adjudicators, but as mere supervisors of the taking of evidence?
- How to accommodate the inherently expeditious nature of autonomous taking of evidence and the longer process of appointing and confirming arbitrators?

- How to assess the amount in dispute in such proceedings?
- Is it economically reasonable, for both parties and the arbitrators, to submit the autonomous taking of evidence to costlier arbitration?

CIESP/FIESP's New Arbitration Rules on the Autonomous Taking of Evidence

As always, leave it to arbitration practitioners and they will solve the issue.

On September 4, 2024, the Chamber for Conciliation, Mediation and Arbitration of CIESP/FIESP released a specific set of arbitration rules for autonomous taking of evidence proceedings. It is the first of its kind. Other institutions, such as Center for Arbitration and Mediation of the AMCHAM, decided that the emergency arbitration rules would apply to the autonomous taking of evidence, with some adjustments. Some of its key features are described below.

As stated in the preamble, and in several of its specific rules, the CIESP/FIESP Rules take into special consideration "the expedited nature" of the taking of evidence proceedings. This feature is seen throughout the Rules, which state the provisions for the commencement of proceedings (art. 1), appointment and confirmation of the Evidence Arbitrator(s) (art. 2), the conduct of proceedings, the nature and requirements of the decision (art. 3), the Evidence Arbitrator's jurisdiction (art. 4), and the costs of proceedings (art. 5).

The Evidence Arbitrator decides on the production of evidence and oversees its production, if determined. They have a short period of 30 days to decide on the production of evidence, counting from the counterparty's answer to the request for evidence production (art. 3.2 of the Rules). Their decision is issued by means of a procedural order, and not by an arbitration award, dispensing with the formal requirements for such (art. 3, header, of the Rules). The procedure shall not last more than six months counting from the Evidence Arbitrator's confirmation (art. 3.6 of the Rules).

The Rules also provide for flexibility on the formation of the Tribunal: parties are invited to state whether they agree to a sole Evidence Arbitrator, whenever the arbitration agreement provides for three arbitrators (art. 2.1 of the Rules). As such, depending on the nature and complexity of the evidence, parties can tailor the arbitral tribunal to fit their specific needs. If, say, there is a severe conflict of interest on the right to the evidence itself, the case may have the complexity of a standard arbitration and require a full arbitral tribunal. If, on the other hand, parties only want to produce evidence under the supervision of an authority, a sole Evidence Arbitrator may suffice.

If an arbitration is commenced to discuss the underlying issue on the merits, the Evidence Arbitration's jurisdiction ceases to exist, and that Arbitral Tribunal, exercising its powers concerning production of evidence, decides on the continuance of the evidentiary proceedings (art. 4, header, of the Rules). The Evidence Arbitrator is precluded from acting as arbitrator in this subsequent dispute (art. 4.1 of the Rules).

Once the evidence is produced, the Evidence Arbitrator shall confirm it by a final arbitration award, which will not analyze, nor decide, the underlying factual issues. The Evidence Arbitrator shall rule on arbitrators' fees and procedural costs allocation, provided that each party shall bear their own attorneys' and experts' expenses (art. 3.4 of the Rules).

Conclusion

The CIESP/FIESP Rules on the Autonomous Taking of Evidence are the first of its kind to bridge the gap between arbitration and the (often-accessory) procedure for autonomous evidence production. They serve to give effect to parties' right to the evidence, while preserving their common intent to resolve disputes (in this case, surrounding a party's right to the evidence) through arbitration. For those who practice arbitration in Brazil, this comes as a favorable development, and one that tends to set a trend to be followed by other institutions, promoting the use of arbitration as an adequate means of dispute resolution.

References

?1 See STJ, Special Appeal 2,023,615/SP, Rep. Justice Marco Aurélio Bellizze, 3rd Chamber, judgment of March 14, 2023, free translation

This entry was posted on Wednesday, November 13th, 2024 at 8:44 am and is filed under Brazil, Latin America
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