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Foreign Jurisdiction Clause in International Contracts and the New Code of Civil Procedure

In a June 2015 decision the Fourth Chamber of the Superior Court of Justice (STJ) ruled that a foreign jurisdiction clause in an international contract does not exclude the possibility of the action being filed by the parties in Brazil.

The decision recognizes the impossibility of a party changing the international competency rules set forth in Article 88 of the Code of Civil Procedure now in effect, according to which the relevant Brazilian court will always have competence when (i) the defendant is domiciled in Brazil; (ii) performance of the contract must take place in Brazil; or (iii) the action originates from facts occurring or an act practiced in Brazil.

These hypotheses have concurrent competence, meaning that the Brazilian courts are considered competent to decide these cases, but not exclusively. Nothing impedes that the action be adjudicated, decided and closed in a foreign country. A court decision rendered in another country can produce effects in Brazil once homologated by the STJ. What the present legislation does not allow is that the parties exclude the competency of the Brazilian courts by way of a foreign jurisdiction clause.

The current rule will however be modified as of March 2016 when the new Code of Civil Procedure takes effect. Article 25 of the new code expressly permits the avoidance of Brazilian jurisdiction via a foreign jurisdiction clause. To be valid, the clause merely needs to appear in a written document and reference a specific contractual agreement.

Conflicts of exclusive competence cannot avoid Brazilian jurisdiction, notably questions involving real estate situated in Brazil and matters relating to family and non-family succession.

A contract's foreign forum selection clause will be valid, effective and mandatory even though one of the parties is Brazilian or domiciled in Brazil, the locale of the performance of the contract is Brazil, the grounds of the legal action are facts which occurred in Brazil or the defendant has assets in Brazil.

The Brazilian court must dismiss the case without review of the merits should the contract contain a foreign jurisdiction clause and the defendant argue for the same.

A foreign forum selection clause can only be disregarded by a Brazilian judge in the case of abuse. This occurs, for example, when the sole object of the clause is to render impossible the filing of the action by one of the parties.

This modification will necessitate additional care in the drafting of contracts. It is not unusual that the choice of a foreign jurisdiction can indirectly and unexpectedly alter the dictates of the contract itself given that what will also be applied are the criteria, understanding and interpretations of foreign courts.

As it is a procedural norm, the rule of the new code will have immediate effectiveness including relative to legal proceedings already in progress.

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