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News on Brazilian Contract Law – Procedural Conventions

The possibility of parties regulating certain matters related to existing or potential court proceedings is not new under Brazilian legislation, but has been recently boosted following the enactment of the current Brazilian Civil Procedure Code in 2015 (the "CPC"). This doctrine, which has a German footprint, is recognized in several European jurisdictions and might flourish in Brazil in the near future.

"Procedural Conventions" can be defined as the agreements pursuant to which parties exercise a statutory right to negotiate certain matters related to court proceedings either in the course of those proceedings or even before they are initiated, i.e., during the contractual negotiation phase. In this latter case, procedural conventions can be inserted as part of the underlying transaction documents or be entered into as standalone contracts.

The now-defunct Civil Procedure Code of 1973 already allowed parties to agree on specific matters on a limited basis, such as the definition of the venue for court disputes (article 111), the applicable term to perform certain acts (article 181) or the voluntary stay of the proceedings (article 265, II). The choice of arbitration instead of litigation as the dispute resolution method could also be seen as a procedural convention.

Not only has the CPC replicated those provisions, it has further extended the reach of procedural conventions. This principle is now enshrined as a general provision ("cláusula geral") under article 190 of the CPC, broadly allowing the parties to modify matters related to the proceedings so that these can be adjusted to the specific nature of the underlying dispute and to agree on each party's onuses, obligations, faculties and powers in the context of litigation, whether in advance of the dispute or while it is already pending.

The only limitations under article 190 of the CPC are that (a) procedural conventions are only applicable to disputes involving claims that the parties are allowed to settle pursuant to statute, and (b) the courts have the power to void abusive procedural conventions in standard form contracts (the so-called "adhesion contracts") and in contracts in which there is a clear imbalance between the signatory parties.

Procedural conventions are potentially a very useful resource in transactional matters, since pursuant to the CPC parties may agree, for example: (a) on the venue for disputes (article 63); (b) on the production of a consensual expert report, or the name of the expert to be appointed by the court in case expert evidence must be taken (article 471); (c) to set a procedural timetable (article 191); and (d) how to allocate the burden of proof (article 373)

The importance of article 190 of the CPC is that its wording refers to a general permission, which entails a broader array of arrangements depending on the nature of the deal being negotiated. For instance, in the transaction documents the parties may also agree in advance on the allocation of the costs of the lawsuit, on which documents must be disclosed in court and on restrictions to their ability to appeal against interim decisions or even the final award, despite the fact that none of these issues are expressly set forth in statute.

The use of this new tool is particularly important, for example, in deals that are time – or cost-sensitive. Due to the slowness of the Brazilian Judiciary and the complexity of court proceedings (which includes a considerable array of appeals), the possibility of agreeing the applicable procedure, especially in advance, may considerably encourage the due and timely performance of the contract, as it removes the incentive that the parties would otherwise have to let the dispute reach the courts instead of fulfilling their contractual obligations. It also allows the parties to reach a solution to disputes that may arise in a more tailor-made fashion.

Whenever the procedural convention involves acts to be performed by the court (e.g., the term to enter an award on the merits), effectiveness of the procedural convention is contingent upon approval by the court (article 191 of the CPC). Also, considering that (a)

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procedural conventions may not be agreed if parties are statutorily forbidden from settling the underlying claims to be brought and that (b) likewise some procedural rules have a mandatory nature and may not be waived or disregarded by the parties, an assessment of the limits within which the parties can set forth the steps of any future court proceedings is recommendable while the transaction documents are being drafted.

Although the CPC was enacted in 2015 and has been in force for almost two whole years now, procedural conventions are still a novelty in Brazilian contract law. Well-educated transactional lawyers should resort to this tool in order to strengthen the position of their clients when negotiating deals or at least to avoid some of the hurdles of the Brazilian Judiciary system.

Although Brazil follows the civil law system, the true scope and reach of article 190 of the CPC is a "work in progress" given its nature as a general provision. Its interpretation (especially as regards its limits) will be tested in concrete cases in courts in the next years. A stricter interpretation is likely to prevail in the first rulings, but hopefully courts will safeguard the parties' rights to define how their disputes should unfold to the greatest extent possible under the CPC.

The more this new instrument is used by individuals and businesses, and the more courts are required to review and eventually validate those deals, then the fewer lawsuits will be brought, the more efficient the judicial process will be as regards those lawsuits and as a result the more accessible the court system will become to everyone – as it was sought by the CPC lawmakers.

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