

New rules on choice of forum and territorial jurisdiction generate uncertainty

13.03.2025 5 min read

Authors

Marina Coelho Reverendo
Vidal

Related areas

Dispute Resolution

Topics

Dispute Resolution BMA Review

Article 63 of the Brazilian Code of Civil Procedure (“CCP”), which deals the parties’ power to elect the courts that will have jurisdiction to decide dispute arising out of their rights and obligations, was amended by Law 14. 879/2024.

The most important change is the new requirement that the courts elected by the parties must be connected to the residence of one of the parties or to the place of performance of the contract, except in cases favorable to consumers. Under article 63§5 CCP, bringing action before a court that has no link to the domicile or residence of the parties or with the legal transaction in question is abusive and is grounds for the court, sua sponte, to decline jurisdiction to hear and decide the case.

The main advantage of the change, according to Rafael Prudente, the member of Congress who drafted the bill that became Law 14. 879/2024, is that it is designed to decongest the courts in the country’s major centers so they can better serve the local population, with due consideration for local needs.¹

The problem is that the change may have the opposite effect in the long term, since companies may choose to move their headquarters to the states where the high-demand courts are located in order to maintain access, with the result that the congestion in the courts will extend into the administrative levels.

Such forum shopping occurred in the state of Delaware, where more than 60% of the Fortune 500 companies are registered,² due to the state’s favorable laws, such as anonymous incorporation and quick registration.

Nothing in the law prevents “manipulation” of a company’s registered office. Accordingly, parties that wish to continue to have access to specialized courts can consider this option if there is no other element that connects them to the state where those courts are located.

The State of São Paulo Court of Appeal has already taken the position that the new rule does not affect claims filed before it came into force.³ In the court’s view, under article 5(XXXVI) of the Federal Constitution and article 6 of the Law of Introduction to the Rules of Brazilian Law, new legislation cannot affect acquired rights, perfected legal transactions, or res judicata.

To date, however, neither the São Paulo or the Rio de Janeiro Courts of Appeal have issued a decision on the application of Law 14.879/2024 in actions filed after the Law amended article 63 CCP.⁴

Given the uncertainty surrounding the question, the recommended course of

action is to review all agreements which contain a choice of forum clause that has no connection with the parties' residence or domicile, or with the obligations under the agreement.

In agreements that contain arbitration clause, the question that arises is whether the place of the arbitration, even if "random" with respect to the parties and their obligations, is a sufficient connection to justify choosing the same place as the forum for the purposes of article 63§1 CCP.

On one hand, since an arbitration agreement is understood to be separate from the contract in which it is contained,⁵ it can be argued that the obligation to resolve disputes via arbitration is effectively performed in the place of the arbitration. Consequently, a connection would exist between the legal transaction (the arbitration agreement) and the choice of forum for such matters as actions to set aside the arbitration award, or for precautionary relief before the arbitration proceeding has commenced.

On the other, when the contract submitted to arbitration is unconnected with the chosen forum, it can be argued that there is insufficient connection between the contract and the forum to satisfy the test under article 63§1 CCP, not least because it would allow the parties to artificially introduce an element of connection between the forum and the contract.

Until there is some case law to provide guidance, caution should be exercised in drawing up arbitration clauses that choose a place for the arbitration in which neither of the parties is domiciled and that has no connection with their contractual obligations.

Given the uncertain state of the law at the moment, the recommendation is to ensure that all contracts be drafted (or amended) to establish a clear connection between the forum chosen by the parties and either the contractual obligations or at least one of the party's domiciles. This precaution can help avoid long and unnecessary disputes over whether the court chosen by the parties has jurisdiction to resolve questions arising out of their contract.

>>> *This content is part of BMA Review #86. Click here for more.*

NOTES

1. See .

2. See .

3. "Law 14.879/2024 – Not applicable – No retroactive application – Agreement made and action filed before the change in the law" (TJSP – São Paulo Court of Appeal; Interlocutory Appeal Aino. 2227130-10.2024.8.26.0000; Judge Afonso Celso da Silva reporting; 37th Private Law Chamber; decided September 23, 2024; published September 23, 2024). See also TJSP, Interlocutory Appeal AI no. 2215581-03.2024.8.26.0000; Judge Claudia Carneiro Calbucci Renaux reporting; 24th Private Law Chamber; decided August 30, 2024; published August 30, 2024; and Federal District Court of Appeal – TJDF; Proceeding

4. We found a few articles on the question. Murilo Teixeira Avelino, for example, believes that a choice of forum provision in an agreement made prior to the change in the law should be upheld, even if legal proceedings are brought after the date of the change, by reason of the principles of legal certainty and foreseeability (see). No mesmo sentido, ver .

5. "In including an arbitration clause in a given contract, the parties insert a different legal relationship, in which they express their will only with respect to the resolution of conflicts by arbitration; that will, accordingly, has no link (other than being contained in the same instrument) with the principal subject matter of the legal transaction (a purchase and sale, a contract of association, a contract for provision of services), and accordingly a defect that results in the nullity of the main agreement will not affect the efficacy of the parties' decision (which will remain valid for all purposes and effects) to resolve their disputes (including any dispute over the nullity of their contract and its effects) by arbitration. In other words, the cause of the main contract is distinct from the cause which led the parties to stipulate arbitration for the resolution of future controversies." (Carlos Alberto Carmona. *Arbitragem e processo: Um comentário à Lei nº 9.307.96*. São Paulo: Ed. Atlas S.A., 2004, pp. 158-159). Our translation.

› PROFESSIONALS

Professionals who combine legal insight and market perspective



Marina Coelho Reverendo Vidal