

Early Production of Evidence: From Urgent Measure to Litigation Strategy

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In this article we revisit the topic of early production of evidence (EPE), originally discussed in BMA Review 66 (June/September 2019). At that time, the case law had not yet absorbed the changes introduced by article 381 of the Code of Civil Procedure of 2015 (CPC), which expanded the use of EPE beyond urgent situations where evidence was at risk of being lost to establish an "autonomous right to evidence", contemplating circumstances where early access to evidence could facilitate a negotiated settlement or where advance knowledge of the facts could be critical in the decision to file a lawsuit (or not). The expansion positioned EPE as a valuable tool for strategic dispute planning and litigation avoidance, but we saw in the said issue of BMA Review the need for clear guidance from the courts to prevent potential misuse.

Over the past six years, Brazil's Superior Court of Justice (*STJ – Superior Tribunal de Justiça*, the highest court in non-constitutional matters) has issued several important rulings that clarify the limits and proper use of EPE. In landmark decisions such as Appeal REsp 2.037.088/SP and Appeal REsp 2.043.440/RJ, the court addressed the interpretation of Article 382§4 of the CPC, which restricts the filing of defenses and appeals in EPE proceedings except where the application has been dismissed in its entirety. The STJ held that while the law generally limits appeals, it should not be interpreted as an absolute ban: in the STJ's view, the best interpretation of the law is that appeals are permitted where the party ordered to produce the evidence argues that the legal requirements for EPE have not been met.

The intersection of EPE and arbitration has also drawn judicial attention. In cases such as Appeal REsp 2.023.615/SP and Conflict of Jurisdiction proceeding CC 197434/SP, the STJ considered whether state courts have jurisdiction to hear EPE applications when an arbitration clause is in place. The court concluded that in such circumstances only the arbitral tribunal has jurisdiction to decide on EPE applications, although the ordinary courts may intervene in urgent cases and on a provisional basis, pending the constitution of the arbitral tribunal.

EPE has become a common feature in corporate disputes, particularly in cases involving partial dissolution of companies, appraisal rights, and management liability. In these situations, EPE can be instrumental in securing access to corporate and financial documents needed to file the main lawsuit. However, the courts have also emphasized the need to prevent abuse. The São Paulo Court of Appeals (*TJSP – Tribunal de Justiça do Estado de São Paulo*), for example, has rejected overly broad or speculative EPE applications, as in Appeal 1006977-16.2022.8.26.0100, where the court held that the EPE application was a classic a "fishing expedition."

As the case law evolves, the contours of the legal landscape surrounding early production of evidence in Brazil are becoming more defined. Keeping a

close eye on these developments is essential, especially for legal practitioners involved in complex litigation.

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