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Consolidation of Proceedings in Brazilian Publicly Listed Coporations' Arbitration

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Abstract- The objective of this Article is to demonstrate how arbitration proceedings involving publicly listed corporations, multiple shareholders, and consolidation of proceedings are being processed in Brazil. Some listed companies in Brazil are required to submit to arbitration all corporate disputes, and there is no procedural rule set forth by law or by the rules of some of the arbitration chambers in Brazil on how to consolidate similar proceedings initiated by different parties on the same issues, and how to decide on the jurisdiction of the arbitral tribunals. This issue has since been discussed by scholars, legislators, and arbitration chambers, that propose different solutions, and has recently been ruled by The Brazilian Superior Court of Justice. Within this context, a deductive approach will be applied to the Article, with bibliographic and case-law research.

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Consolidation of Proceedings in Brazilian Publicly Listed Coporations' Arbitration

Leading Competence Conflict Case Ruled by the Brazilian Superior Court of Justice

Renata Moquillaza da Rocha Martins

Abstract- **The objective of this Article is to demonstrate how arbitration proceedings involving publicly listed corporations, multiple shareholders, and consolidation of proceedings are being processed in Brazil. Some listed companies in Brazil are required to submit to arbitration all corporate disputes, and there is no procedural rule set forth by law or by the rules of some of the arbitration chambers in Brazil on how to consolidate similar proceedings initiated by different parties on the same issues, and how to decide on the jurisdiction of the arbitral tribunals. This issue has since been discussed by scholars, legislators, and arbitration chambers, that propose different solutions, and has recently been ruled by The Brazilian Superior Court of Justice. Within this context, a deductive approach will be applied to the Article, with bibliographic and case-law research.**

Keywords: brazil, arbitration, publicly listed companies, shareholders, corporate disputes, consolidation of arbitrations.

Introduction

The aim of this Article is to demonstrate how arbitration proceedings involving publicly listed companies are being processed in Brazil, specifically regarding the consolidation of arbitrations involving the same object and/or requests, and on deciding which arbitral tribunal has jurisdiction to rule the consolidated proceedings.

The problem was recently raised before the Superior Court of Justice while reviewing Competence Conflict Proceeding No. 185.702/DF (*Conflito de Competência*), when three (3) different arbitration proceedings were initiated against the same listed corporation by different shareholders to discuss the same issue before two (2) different arbitral tribunals. Both arbitral tribunals declared themselves competent to rule the proceedings, and the problem was taken to the Judiciary to be resolved.

The main issue is that there is no domestic law regulating if and how the arbitral proceedings should be consolidated, and how their jurisdiction should be determined. Also, the rules of the Brazilian Arbitration Chamber competent to hear such proceedings (*Câmara de Arbitragem do Mercado - CAM*) does not foresee such possibility and, for this reason, does not have any rule to decide on the jurisdiction of consolidated arbitration proceedings initiated against the same listed companies by different shareholders.

Although the possibility of publicly listed companies participating in arbitration proceedings was, by itself, a very important evolution in Brazil, the lack of procedural rules by the only arbitration chamber competent to rule on the arbitration proceedings is a problem.

Therefore, in this Article, we will detail (i) in chapter 1, the current legal situation regarding the submission to arbitration of corporate disputes in Brazil; (ii) in chapter 2, the need for specific rules for the definition of jurisdiction on consolidated arbitrations and the problem raised before the Brazilian Superior Court of Justice on Competence Conflict Proceeding No. 185.702/DF (*Conflito de Competência*); and (iii) in chapter 3, the legislative and arbitration chambers' response and actions to the problem raised by the Brazilian Superior Court of Justice (laws and rules). Finally, we will conclude that the Brazilian Securities and Exchange Commission, some arbitration chambers, and the legislative system are presenting a well-suited response to grant the Brazilian stock market and its investors legal security, to avoid future problems on the issue.

For this study, a deductive approach will be used, with bibliographic and case-law research.

I. The Submission to Arbitration of Corporate Disputes in Brazil

In Brazil, as of 2001, listed corporations' bylaws can determine that any disputes arising between the corporation and its shareholders or between the controlling shareholders and minority shareholders must be resolved through arbitration (Federal Law No. 10.303/2001 included article 109, § 3 to Federal Law No. 6.404/1976 – Brazilian Corporation's Act– *Lei das S.A.*).

Since then, the Brazilian Securities and Exchange Commission (CVM) has determined that any corporation participating in the New Market (*Novo Mercado*), Level 2 of Corporate Governance (*Nível 2 de Governança Corporativa*), Bovespa Plus (*Bovespa Mais*)

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or in the Bovespa Plus Level 2 (*Bovespa Mais Nível 2*)[1] programs must include an arbitration clause in its bylaws, as per article 109, § 3, of the Brazilian Corporation's Act.

The programs mentioned above were created by CVM to protect investors, with the creation of a more rigid governance policy and a set of new practices with the scope of improving the information provided to investors and to foster the stock market. Thus, corporations participating in these programs must resolve through arbitration all disputes between shareholders, managers, members of the fiscal board, and B3 (the Brazilian stock corporation), according to article 39 of the B3 New Market Regulation.

Article 40 of the B3 New Market Regulation also states that "*the investiture of managers and the effective and alternate members of the supervisory board is subject to the signing of a term of investiture that must include their subjection to the statutory arbitration clause*".

Moreover, article 136-A of the Brazilian Corporation's Act provides that there is a specific quorum for the approval of the insertion of the arbitration clause in the corporation's bylaws (as per article 136 of the Brazilian Corporation's Act[2]) and assures dissident shareholders the right to withdraw from the corporation if they disagree with the inclusion of the clause.

Thus, any new shareholder of the corporation is aware of the arbitration clause when purchasing shares, and any older shareholder of the corporation who disagreed with the inclusion of the arbitration clause in the corporation's bylaws has the right to leave the corporation.

At first, there was a lot of debate whether all shareholders would be bound by the arbitration clause - even those who did not explicitly agree to the arbitration clause. Notwithstanding the academic discussion, the prevailing opinion among scholars is that the arbitration clause is binding to all shareholders if the legal quorum was properly obeyed (FRANZONI, 2015, p. 58).

However, in 2015, Federal Law No. 13.129/2015 (which altered a few of the Brazilian Corporation's Act articles) was enacted, and its article 136-A sets out that the approval of the inclusion of the arbitration clause in the corporation's bylaws obliges all of its shareholders, and the dissident shareholder has assured the right to leave the corporation and be properly reimbursed of the value of his stocks (as mentioned above), with a few exceptions[3], what diminished the discussions on the matter.

Currently, the main discussion about the binding arbitration clause regards the high cost of the arbitration proceeding to minority shareholders, who could be, in practice, deprived of their right to have a legal dispute decided by an arbitration court (MUNIZ, 2020).

It is essential to highlight that, even though confidentiality is the norm in arbitration proceedings, under the full disclosure principle, reflected, for example, in CVM Resolution No. 80 of March 29, 2022, publicly listed corporations must follow the rules on disclosing relevant information for stockholders and the market in general, even when it comes to arbitration proceedings. The corporation is not required to disclose information on the business itself, but information that could be relevant to the market, that could protect investors and maintain a fair market.

For this reason, the disclosure of information regarding arbitration proceedings to the market is prioritized over confidentiality:

> "We conclude that confidentiality should be set aside in corporate arbitration conducted within the scope of publicly listed companies to allow the disclosure of relevant information to the market. Moreover, such information should be disclosed by the company itself, which in many cases will be involved in the dispute as a party. It is the responsibility of the management to provide the market with all relevant information regarding the arbitration process that may influence the buying and selling of shares and other securities issued by the company. The controller may also be held accountable if such disclosure is not practiced." (our translation) [4]

One must be cautioned when disclosing information to the market to avoid unnecessary and unexpected negative repercussions, but when the criteria of CVM resolutions (such as No. 80/2022) are observed, the information must be disclosed. If the requirement has been met, there should be no top-management discretion on whether to disclose or not.

The arbitration clause included in the corporation's bylaws, according to the B3 New Market Regulation, states that CAM is fit to rule on the arbitration proceedings (article 39). CAM was created with the purpose to expedite corporate disputes and

[1] https://www.b3.com.br/pt_br/produtos-e-servicos/solucoes-para-emissores/segmentos-de-listagem/sobre-segmentos-de-listagem/. Access on October 5, 2023.

[2] The quorum for approval is shareholders representing at least half of the shares with voting rights.

[3] § 2nd. The right to withdrawal as set forth on the article's caput will not be applicable:

I – in case the inclusion of the arbitration clause in the corporation's bylaws represents a condition for securities issued by the corporation to be admitted to trading on a stock exchange or organized over-the-counter market listing segment that requires a minimum shareholding dispersion of 25% (twenty-five percent) of the shares of each type or class;

II – if the inclusion of the arbitration clause is made in the bylaws of a public-held corporation whose shares are liquid and dispersed in the market, in accordance with paragraphs "a" and "b" of item II of article 1367 of this law.

[4] FRANZONI, Diego. Arbitragem Societária: Fundamentos para uma Possível Regulação. Faculdade de Direito da Universidade de São Paulo, 2015. p. 145.

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having arbitrators specialized in the issues commonly discussed[5].

To illustrate the result of the incentive of CVM and Brazilian law for companies to include arbitration clauses in its bylaws, in 2021 Brazil had 381 companies listed in the stock exchange and trading shares in the stock market, of which 234 (approximately 61%) had arbitration clauses in their bylaws. Also, 158 companies (41% of the total listed companies) had shareholders' agreements, out of which 122 (approximately 77%) had arbitration clauses[6].

Additionally, from the 202 companies registered in B3's traditional segment and Level 1, 27% (55 companies) had arbitration clauses in their bylaws, and approximately 12% (25 companies) had arbitration clauses in their shareholders' agreements. Moreover, among those companies that have shareholders' agreements (49 companies), 51% (25 companies) included arbitration clauses in their agreements[7].

However, even though CAM was specifically created for the ruling of corporate disputes, important aspects of listed companies' corporate disputes were not foreseen by CAM procedural rules.

In the next chapter, the most critical unresolved procedural issues will be detailed.

II. The Need for Specific Rules for the Consolidation of Arbitration Proceedings – the Superior Court of Justice Ruling

In June 2022, the Brazilian Superior Court of Justice ruled on Competence Conflict Proceeding No. 185.702/DF (*Conflito de Competência*)[8], brought before the high court so that it could settle which arbitral tribunal had jurisdiction to rule on the same issue raised in three different arbitral proceedings initiated before CAM, and to decide if all proceedings should be consolidated or if the minority shareholders proceedings should be dismissed.

Proceedings No. 93/2017, 110/2018, and 186/2021 from CAM were all filed for the civil accountability of the controlling shareholders and managers of JBS S.A., a publicly listed corporation (hereinafter referred to as "JBS"), due to illicit acts previously confessed in a criminal lawsuit.

On October 30, 2020, a general meeting was held for the approval of the corporation to take the necessary legal matters, and JBS initiated arbitral proceeding No. 186/2020 before CAM on January 27, 2021, requesting the accountability of the controlling shareholders and managers, as well as for damages for the losses the corporation suffered, as per articles159[9] and 246[10] of the Brazilian Corporation's Act.

However, a minority shareholder (who owned 0,0000036% of JBS's shares) had already initiated arbitral proceeding No. 93/2017 to discuss the same matters, and another shareholder, who owned 0,26% of the corporation's shares, also had initiated arbitral proceeding No. 110/2018 to discuss the same issues and with the same requests, as per article 246 of the Brazilian Corporation's Act. On September 27, 2018, CAM's president ordered the consolidation of these two arbitral proceedings, to be ruled by the same arbitral tribunal (with the consent of the parties).

In this scenario, JBS requested CAM to dismiss the proceedings initiated by the minority shareholders and requested the recognition that the jurisdiction of arbitral proceeding No. 186/2021 should prevail and should be the only one ruled_-, since (1) the minority

[5] https://bvmf.bmfbovespa.com.br/pt-br/a-bmfbovespa/download/Folder_NovoMercado.pdf. Access on October 5, 2023.

[6] PARGENDLER, Mariana; PRADO, Vivine M.; SANTOS, Ezequiel F. and VIOL, Dalila M. Cláusulas Arbitrais em Números no Mercado de Capitais Brasileiro (Arbitration Clauses in Number in the Brazilian Capital Market). Revista Brasileira de Arbitragem, n. 75, jul-set. 2022, São Paulo, p. 63.

[7] PARGENDLER, Mariana; PRADO, Vivine M.; SANTOS, Ezequiel F. and VIOL, Dalila M. Cláusulas Arbitrais em Números no Mercado de Capitais Brasileiro (Arbitration Clauses in Number in the Brazilian Capital Market). Revista Brasileira de Arbitragem, n. 75, jul-set. 2022, São Paulo, p. 63.

[8] Second Panel of The Superior Court of Justice, Rapporteur Justice Marco Aurélio Belizze, ruled on June 22, 2022. https://scon.stj.jus.br/jurisprudencia/externo/informativo/?acao=pesquisar&livre=%28%22CC%22+adj+%28%22185702%22+ou+%22185702%22-DF+ou+%22185702%22%2FDF+ou+%22185.702%22+ou+%22185.702%22-DF+ou+%22185.702%22%2FDF%29%29.prec%2Ctext. Access on October 9, 2023.

[9] Article 159. By a resolution passed in a general meeting, the corporation may bring an action for civil liability against any officer for the losses caused to the corporation's property.
(…)
Paragraph 3. Any shareholder may bring the action if proceedings are not instituted within three months from the date of the resolution of the general meeting.
Paragraph 4. Should the general meeting decide not to institute proceedings, they may be instituted by shareholders representing at least five per cent of the capital.
Paragraph 5. Any damages recovered by proceedings instituted by a shareholder shall be transferred to the corporation, but the corporation shall reimburse him for all expenses incurred, including monetary adjustment and interest on his expenditure, up to the limit of such damages.
Paragraph 6. A judge may excuse the officer from liability, when convinced that he acted in good faith and in the interests of the corporation.
Paragraph 7. The action permitted under this article shall not preclude any action available to any shareholder or third party directly harmed by the acts of the officer.

[10] Article 246. A controlling corporation shall be obliged to compensate any damage it may cause to a controlled corporation by any acts infringing the provisions of article 116 and 117.
Paragraph 1. Proceedings for compensation may be brought by: (a) shareholders representing five per cent or more of the capital; (b) any shareholder, provided he guarantees payment of the legal costs in the event of the action being dismissed.
Paragraph 2. If the controlling corporation is held responsible, in addition to paying compensation and costs, it shall pay an indemnity in respect of lawyers' fees of twenty per cent of the compensation awarded and a further premium of five per cent to the plaintiff.

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shareholders would only have grounds to seek the accountability and claim damages against the controllers and managers if the corporation itself failed to take legal action within three months after the date of the general meeting in which the issue was discussed, as per article 159, § 3, of the Brazilian Corporation's Act; and (2) JBS did not have the opportunity to participate in the minority shareholders' proceedings as a party, but only as an intervener, thus not having all of the legal rights and duties a party had (for example, JBS claimed it did not have a chance to choose the arbitrator's panel in such proceedings).

On the other hand, the minority shareholders requested that Arbitral Proceeding No. 186/2001 be dismissed, since their claims were prior and JBS could participate as an intervening party, making itself a party to the arbitration(s) (*assistente litisconsorcial*).

The arbitral tribunal responsible for reviewing and deciding on Arbitral Proceedings Nos. 93/2017 and 110/2018 rejected JBS's request, did not recognize the jurisdiction of the arbitral tribunal formed in Arbitral Proceeding No. 186/2021, and decided that the ruling of Arbitral Proceedings Nos. 93/2017 and 110/2018 should be considered *res judicata* for the corporation.

Contrarily, the arbitral tribunal responsible for reviewing Arbitral Proceeding No. 186/2021 granted JBS's requests and acknowledged its jurisdiction and preference over the other arbitral tribunal competent to rule on the two proceedings initiated before by the minority shareholders, stating that the arbitral award of Arbitral Proceeding No. 186/2021 would be considered as *res judicata* for the corporation and its shareholders, considering JBS took the necessary legal measures within the three (3) months outlined in law.

Claiming that the arbitral tribunals could render different and conflicting awards on the same issues and requests, JBS filed Competence Conflict Proceeding No. 185.702/DF (*Conflito de Competência*) before the Brazilian Superior Court of Justice requesting the court to declare the arbitral tribunal of Arbitral Proceeding No. 186/2021 the sole competent to rule on the issue of accountability of the corporation's controllers and managers, with the dismissal of the other two proceedings initiated by the minority shareholders.

Initially, there was a discussion on whether the Brazilian Superior Court of Justice was competent to settle the conflict between arbitral tribunals since this was an unprecedented case[11]. On this matter, the Brazilian Superior Court of Justice settled on its competence to decide on the issue, according to article 105, I, d, of the Brazilian Federal Constitution[12], stating that the "courts" mentioned in this article include arbitral tribunals:

> "In delimitation to the constitutional attribution of the Superior Court of Justice, the jurisprudence of the Second Panel, *following the premise that the activity carried out within the scope of the arbitration has a jurisdictional nature,* acknowledges the competence of this Court of Justice to resolve conflicts of jurisdiction in which the Arbitration Court appears, either as the plaintiff or as the defendant." (our translation) [13]

While reviewing JBS's arguments, Justice Marco Aurélio Bellizze stated the following:

> "However, in the arbitral proceeding, the entity wielding adjudicative power is of the duly constituted arbitral tribunal, as indicated by the parties in the formation of the arbitral panel; the Arbitration Chamber merely administers the arbitral proceeding, without possessing any adjudicative power to resolve any impasse that may arise between the arbitral tribunals affiliated with it, rendering conflicting decisions.
>
> Ideally, the resolution of a jurisdictional conflict between arbitral tribunals affiliated with the same Arbitration Chamber would be governed and resolved by the Rules of the Stock Market's Arbitration Chamber (CAM), when elected by the parties to resolve their conflict of interests; this would naturally adhere to the principle of autonomy of wills, guiding all arbitration.
>
> However, in the specific case at hand, the Rules of the Stock Market's Arbitration Chamber (CAM) are entirely silent on governing the resolution of the impasse between the arbitral tribunals that may have rendered, in theory, irreconcilable decisions in arbitration proceedings with partially identical claims and causes of action. The Chamber's Presidency has rightly acknowledged its lack of authority to resolve this, following the Rules.
>
> It is noteworthy, in this regard, that the mentioned Rules are limited to regulating the possibility of consolidating cases in the event of a connection, provided it occurs before the constitution of the second arbitral tribunal and with the parties' agreement on the composition of the previously constituted arbitral tribunal, circumstances that are indisputably absent in this case. As stated, there is no regulatory framework to address a competence conflict between arbitral tribunals affiliated with the Stock Market's Arbitration Chamber (CAM) that, within each proceeding, may issue mutually exclusive deliberations."(our translation and underline)[14]

[11] The Brazilian Superior Court of Justice had already settled for its competence to rule conflicts of competence between a judiciary court and an arbitral tribunal (CC No. 111.230/DF and CC No.113.260/SP), but never between two arbitral tribunals.

[12] Article 105. The Superior Court of Justice has the competence to:
I – institute legal proceeding and trial, in the first instance, of:
(…)
d) conflicts of competence between any courts, except as provided in article 102, I, o, as well as between a court and the judges not subject to it and between judges subject to different courts;

[13] Competence Conflict Proceeding No. 185.702/DF, Second Panel of The Superior Court of Justice, Rapporteur Justice Marco Aurélio Belizze, ruled on June 22, 2022. - <https://scon.stj.jus.br/jurisprudencia/externo/informativo/?acao=pesquisar&livre=%28%22CC%22+adj+%28%22185702%22+ou+%22185702%22-DF+ou+%22185702%22%2FDF+ou+%22185.702%22+ou+%22185.702%22-DF+ou+%22185.702%22%2FDF%29%29.prec%2Ctext>. Access on October 9, 2023.

[14] Competence Conflict Proceeding No. 185.702/DF, Second Panel of The Superior Court of Justice, Rapporteur Justice Marco Aurélio

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Thus, the Brazilian Superior Court of Justice acknowledged the *kompetenz-kompetenz* principle and that the arbitration environment should regulate itself, but in this case, the sole arbitration chamber competent to decide on all of the disputes involving shareholders, managers, and members of the fiscal board of the corporations participating in the New Market (Novo Mercado), Level 2 of Corporate Governance (Nível 2 de Governança Corporativa), Bovespa Plus (Bovespa Mais) or in the Bovespa Plus Level 2 (Bovespa Mais Nível 2) simply did not have any specific rule on the matter.

The Brazilian Superior Court of Justice also acknowledged that the rules agreed by the parties and the rules of the arbitral chamber should govern the arbitral proceeding, not the Brazilian Civil Procedure Code, and also acknowledged that applying the basic consolidation rules of the Brazilian Civil Procedure Code to the case could lead to the ruling of the proceeding by an arbitral tribunal that was not chosen by the parties, what would violate one of the most basic principles of arbitration:

> "The arbitral procedure is, therefore, governed, in this order, by the agreements established between the litigating parties—whether at the time of the arbitration agreement or the signing of the arbitration clause, or during the course of the arbitral process—by the rules of the elected arbitral tribunal, and by the determinations issued by the arbitrator.
>
> Notwithstanding this observation, one must not forget, particularly, that the rules of connection or joinder established in the Brazilian Civil Procedure Code are inapplicable to the case at hand, as they represent a fundamental frustration of the basic tenet of arbitration, which is that the selection of the arbitral panel is made by the litigating parties.
>
> One can anticipate very clearly that the consolidation of the proceedings—contemplated by the Federal Public Prosecutor and rejected, however, by both litigating parties, each seeking, under different grounds, the termination of one of the mentioned proceedings—would lead to the unwarranted imposition of subjecting one of the parties to the judgment of an arbitral tribunal whose composition was not chosen by it, in clear violation of articles 13 and 19 of Law No. 9,307/1996.
>
> (…)
>
> A fundamental precept of arbitration is the prerogative of the litigating parties to choose the arbitrators who will decide on their conflict of interests, as a manifestation of private autonomy and the trust of the contracting parties. In arbitration, it is the arbitral tribunal, whose composition was freely chosen by the parties, that is connected to the case under judgment.
>
> The subjective effectiveness of the upcoming arbitral award is legitimized precisely by the trust placed by the parties, not only in the chosen arbitration chamber to resolve their dispute but primarily in the specific and designated arbitrators chosen by mutual agreement for the adjudication of the case.
>
> Thus, as already anticipated, it is impractical in the realm of arbitration to simply promote the consolidation of cases, improperly imposing on one of the parties the judgment by an arbitral tribunal whose composition was not chosen nor consented to by it." (our translation) [15]

Although the Brazilian Superior Court of Justice settled the conflict of competence, the court pointed out the importance of CAM fully regulating the consolidation of arbitral proceedings involving publicly listed corporations, with the same object and/or requests initiated by different shareholders and/or the corporation.

It is noteworthy that, in this particular case, the Brazilian Superior Court of Justice ruled in favor of JBS's requests, stating that the three (3) arbitral proceedings discussed the same facts but that proceeding No. 186/2021 had a broader scope, since JBS requested for the accountability of controllers, managers, and former managers of the company, seeking damages according to articles 159[16] and 246 of the Brazilian Corporation's Act, while the minority shareholders only asked for damages under article 246 of the Brazilian Corporation Act.

Belizze, ruled on June 22, 2022. - https://scon.stj.jus.br/jurisprudencia/externo/informativo/?acao=pesquisar&livre=%28%22CC%22+adj+%28%22185702%22+ou+%22185702%22-DF+ou+%22185702%22%2FDF+ou+%22185.702%22+ou+%22185.702%22-DF+ou+%22185.702%22%2FDF%29%29.prec%2Ctext. Access on October 9, 2023.

[15] Competence Conflict Proceeding No. 185.702/DF, Second Panel of The Superior Court of Justice, Rapporteur Justice Marco Aurélio Belizze, ruled on June 22, 2022. <https://scon.stj.jus.br/jurisprudencia/externo/informativo/?acao=pesquisar&livre=%28%22CC%22+adj+%28%22185702%22+ou+%22185702%22-DF+ou+%22185702%22%2FDF+ou+%22185.702%22+ou+%22185.702%22-DF+ou+%22185.702%22%2FDF%29%29.prec%2Ctext>. Access on October 9, 2023.

[16] *Article 159.* By a resolution passed in a general meeting, the corporation may bring an action for civil liability against any officer for the losses caused to the corporation's property.
Paragraph 1. The resolution may be passed at an annual general meeting and, if included in the agenda or arising directly out of any matter included therein, at an extraordinary general meeting.
Paragraph 2. The officer or officers against whom the legal action is to be filed shall be disqualified and replaced at the same general meeting.
Paragraph 3. Any shareholder may bring the action if proceedings are not instituted within three months from the date of the resolution of the general meeting.
Paragraph 4. Should the general meeting decide not to institute proceedings, they may be instituted by shareholders representing at least five per cent of the capital.
Paragraph 5. Any damages recovered by proceedings instituted by a shareholder shall be transferred to the corporation, but the corporation shall reimburse him for all expenses incurred, including monetary adjustment and interest on his expenditure, up to the limit of such damages.
Paragraph 6. A judge may excuse the officer from liability, when convinced that he acted in good faith and in the interests of the corporation.
Paragraph 7. The action permitted under this article shall not preclude any action available to any shareholder or third party directly harmed by the acts of the officer.

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Also, the Brazilian Superior Court of Justice accepted JBS's argument that the minority shareholders only had extraordinary grounds to bring legal action claiming civil liability and damages against the controllers and managers, while the ordinary grounds to seek such measures belonged to the corporation:

> *"As a rule, the action for damages caused to the corporation by acts of managers and controllers should be initially filed by the directly harmed corporation, which is naturally the holder of the material right discussed.*
>
> Effectively, the so-called social action for civil liability of managers and/or controllers must be primarily initiated by the injured corporation itself (social action *ut universi*). In case of omission (inaction) by the company (to be accurately specified in each case), the law provides, subsidiarily, to the shareholders, as per the law, extraordinary grounds to bring forth the aforementioned action (social action *ut singuli*).
>
> Law No. 6,404/1976 sets forth in detail the accountability of managers in its article 159, which, according to specialized doctrine and this Court's jurisprudence, *allows for an extensive application to the accountability of controllers (provided for in article 246),* even though some moderation may be observed, considering its particularities and purposes.
>
> It is noted that the company's inaction constitutes, evidently, the basis for the minority shareholder's action in extraordinarily grounds to claim.
>
> When dealing with the claim for managers' civil liability, article 159 of the Law sets forth that the Corporation, *through a prior general meeting,* is entitled to take legal action for civil liability against the manager for damages caused to its assets. Paragraph 3 of article 159 authorizes *any shareholder* to initiate legal action if, after the authorization of the general meeting, the judicial measure is not filed within three (3) months from the date of the general meeting. Paragraph 4 of article 159 provides that even if the general meeting decided not to file the lawsuit, the claim can be filed by shareholders representing at least five per cent (5%) of the corporation's capital stock.
>
> (...)
>
> As previously mentioned, *specialized doctrine deems article 159 extensively applicable to the social action for civil liability of controllers,* which aims for the restoration of the corporation's assets (holder of the harmed right), considering the conciseness of the wording adopted by article 246 of Law No. 6,404/1976, which limited itself to establish the obligation of the controller to repair the damages caused to the corporation – from which arises the ordinary grounds of the injured corporation – and the grounds (extraordinary, evidently) of the shareholders representing five per cent (5%) of the capital stock, or any other shareholder, provided they post a bond to ensure payment of costs and fees in case of dismissal of the lawsuit; and establish a five per cent (5%) reward on behalf of the plaintiff in case of success.

Therefore, considering JBS filed the arbitration proceeding within three (3) months of the general meeting that decided legal action should be taken against the controllers, managers, and former managers, the Brazilian Superior Court of Justice concluded that only JBS had grounds to file a lawsuit requesting the civil liability and damages, since "*minority shareholders' social action, even though capable of being exercised individually (under the conditions established by law), may only occur if the corporation fails to initiate legal action for the controller's liability, in the exercise of its subsidiary extraordinary grounds to claim*."

It is essential to point out that on February 28, 2023, CVM ruled differently on an administrative probe, stating that minority shareholders have grounds to initiate their own claim for damages (as set forth on § 1st of article 246 of the Brazilian Corporation's Act) without previous deliberation by JBS in a general meeting[17], and the jurisdiction of the arbitration initiated by JBS after the general meeting would not prevail. Essentially, CVM did not apply the extensive application of accountability of managers and controllers provided for in article 246 of the Brazilian Corporation's act as the Brazilian Superior Court of Justice did:

> *"The point here is the following:* Even if someone argues that it would be economically more efficient to require a prior general meeting for the filing of the action under article 246, this alone is not sufficient to determine that this is the meaning of the current law, considering the inherent limitations therein. For the reasons stated above, it also seems perfectly legitimate to argue that there is a systematic interpretation indicating that prior deliberation by the general meeting is not necessary for the shareholders mentioned in paragraph 1 of article 246 to have the right to bring an action, on behalf of the company, against the controller." (our translation)

Thus, for the Superior Court of Justice to rule on the jurisdiction of a single arbitral tribunal, it was necessary for the court to review some of the arguments regarding the interpretation of article 246 of the Brazilian Corporation's Act (and the same was done by CVM).

We point out that CVM's decision does not overrule the Superior Court of Justice's ruling. In the words of CVM's Director, João Accioly[18]:

> "This Agency does not have legal competence to pronounce itself on some of the matters that constitute the grounds for the (Superior Court of Justice's) ruling, especially regarding strictly procedural and arbitral issues, such as the possibility of consolidating proceedings, the right to choose arbitrators, the regularity of the constitution of the arbitral tribunal, etc. To avoid misunderstandings, the

[17] CVM Administrative Proceeding No. 19957.007423/2021-12, Reg. Col. 2672/22, rapporteur: João Accioly (it was a consult presented for CVM to clarify if, as per article 246 of The Brazilian Corporation's Act, (1) there is no need for a previous general meeting to be held for a minority shareholder to have grounds to file a lawsuit for civil liability and damages against the controller; and (2) the corporation filed a lawsuit for the civil liability and damages against the controller after the minority shareholders, should the lawsuit filed by the minority shareholders be the immediately tossed out).

[18] CVM Administrative Proceeding No. 19957.007423/2021-12, Reg. Col. 2672/22, rapporteur: João Accioly.

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clarification above is provided so that this response to the Consult is not mistakenly considered an attempt to oppose the judgment of that Higher Court. The answers to the queries are not simple and, as we will demonstrate below (this introduction was written after the conclusion of the queries), although they are both affirmative, they do not imply the understanding that the conclusions of the Honorable Ruling are not supported by other grounds beyond corporate law and the stock market, the only sphere on which CVM has legal competence to render an opinion about." (our translation).

This difference of opinions only shows that the issue is controversial and demonstrates the importance of the consolidation of arbitral proceedings to be fully regulated by CAM and/or by domestic law.

Indeed, if such a rule existed on CAM's regulations, only the competent arbitral tribunal would be able to evaluate the merits of the issue, and conflicting decisions/interpretations on the issue could be avoided.

III. The Legislative and Arbitration Chambers' Response and Actions - Laws and Rules

After the recent Brazilian Superior Court of Justice's ruling, the Brazilian arbitral community started discussing what measures could be taken to avoid future issues such as the one object of Competence Conflict Proceeding No. 185.702/DF (*Conflito de Competência*), and to improve arbitral proceedings involving publicly listed corporations.

Initially, Centro de Arbitragem e Mediação Brasil- Canadá (CAM-CCBC), one of the most important arbitration chambers in South America, created a new set of rules to be applied solely to corporate disputes. Even though CAM-CCBC is not the competent chamber to rule on arbitrations involving publicly listed corporations participating in the New Market (*Novo Mercado*), Level 2 of Corporate Governance (*Nível 2 de Governança Corporativa*), Bovespa Plus (*Bovespa Mais*) or in the Bovespa Plus Level 2 (*Bovespa Mais Nível 2*), it is frequently chosen to decide on corporate disputes by other companies and its shareholders[19], and, for this reason, can face issues similar to those explained in the previous chapter.

The CAM-CCBC Corporate Arbitration Regulation sets forth important guidelines, especially regarding third parties, as per the definitions brought by article 1[20]:

> *"Article 1:* The provisions of these Corporate Arbitration Rules will be applied whenever all the following requirements are met:
>
> a) the arbitral award possibly affects not only the claimants of the arbitration or those who have been included as respondents in the Request for Arbitration, but also the legal level of a corporation, limited liability company or association ("Legal Entity") and, concurrently, partners, associates or shareholders holding securities of a class or type directly subject to the effects of the arbitration award, and/or the administrators also subject to it ("Affected Third Parties");
> b) the nature of the disputed legal relationship submitted to arbitration requires a uniform decision for all Affected Third Parties; and
> c) the bylaws or articles of incorporation of the Legal Entity contain a clause according to which the parties agree that the arbitration will be administered by the CAM-CCBC and governed by the CAM-CCBC Rules, pursuant to article 1 of the CAM-CCBC Arbitration Rules." (underlined by us)

Additionally, CAM-CCBC has created vital rules for third affected parties (such as minority shareholders) to participate in the proceeding, for the consolidation of multiple proceedings, and for the disclosure of arbitration proceedings involving publicly listed corporations:

> *"Article 4:* In the same opportunity or after requesting information from the parties on the Affected Third Parties, the CAM-CCBC Presidency will determine the notice of the latter ("Notice of the Affected Third Parties"). This Notice serves to invite them to partake in the arbitration proceedings should they desire to do so. All notified parties are bound by the outcomes of decisions rendered throughout the proceedings, irrespective of their active participation therein.
>
> (…)
>
> *Article 5:* In the case of publicly held companies that require the publishing of information on corporate legal actions, the Notices of the Affected Third Parties must be disclosed following the provisions of the Brazilian Securities and Exchange Commission (CVM). In the case of other Legal Entities, the Notices of the Affected Third Parties must be disclosed in accordance with the procedure for convening partners or associates to meetings, pursuant to the articles of incorporation or, if silent, to the Legal Entity's governing law.
>
> *Article 6:* The CAM-CCBC Presidency shall be responsible for analyzing and consolidating the arbitration with another possibly pre-existing one, after hearing the parties to both proceedings.
>
> *Sole Paragraph:* The provisions of article 19 of the CAM-CCBC Arbitration Rules are applicable in the event of a new arbitration filed by any Affected Third Party or Legal Entity to discuss a relief sought in the first arbitration. In this case, the

[19] It is the second arbitration chamber mostly elected by corporations' bylaws to rule on arbitration proceedings (3% of the corporations), and the International Chamber of Commerce – ICC has been the third arbitration chamber most elected by corporations' bylaws (2% of the corporations). PARGENDLER, Mariana; PRADO, Vivine M.; SANTOS, Ezequiel F. and VIOL, Dalila M. Cláusulas Arbitrais em Números no Mercado de Capitais Brasileiro (Arbitration Clauses in Number in the Brazilian Capital Market). Revista Brasileira de Arbitragem, n. 75, jul-set. 2022, São Paulo, p. 68.

[20] CAM-CCBC's Corporate Arbitration Rules: <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/supplementary-rules-02-2023/>. Access on November 21, 2023.

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jurisdiction of the previously constituted Arbitral Tribunal shall prevail.

Article 7: The Notice of the Affected Third Parties will fix a period of thirty (30) calendar days within which Affected Third Parties and, if applicable, the Legal Entity, can provide their response. Both may request their inclusion in the arbitration (i) supporting Claimants' demands, (ii) indicating that they intend to join the original Respondents, or (iii) merely following the course of the proceedings.

Sole Paragraph: After the period provided for in this article, the CAM-CCBC Secretariat will notify the Respondents, offering them the opportunity to present their Answers to the Request for Arbitration. (…)" (underlined by us)[21]

Unfortunately, CAM did not follow CAM-CCBC's example and has not created a similar set of rules, which would be essential and could solve most of the problems existing nowadays, as pointed out by the Brazilian Superior Court of Justice.

However, legislators in Brazil are currently discussing the creation of a new law that will change part of the Brazilian Corporation's Act, bringing more transparency to arbitration proceedings, new procedural rules, and more security for investors of the Brazilian stock market.

It is Law Bill No. 2925/2003[22], that has been presented to the Brazilian Chamber of Deputies and has been drafted by players from the arbitral community, by CVM, and by the Ministry of Finance of Brazil.

The current draft of the law includes essential changes, such as the possibility of a class action lawsuit for damages to be filed by shareholders, but with the limitation that such shareholders represent an equal or greater percentage of 2 and 5 tenths percent of the shares (of the same type or class), or who possess an amount of shares equal to or greater than BRL 50 million (article 27-H)[23]. This bill also suggests that CVM can stablish procedural requirements for the arbitration chambers other than those established in the chamber's regulations, such as "*the need to specify in their regulations the procedure for consolidating arbitral proceedings in cases of connection and joinder*" (article 109, § 6).

The Brazilian Ministry of Finance has argued that the bill was discussed with a wide range of experts and representative entities of capital market institutions, starting from a study conducted by the Organization for Economic Cooperation and Development (OECD) in partnership with the Brazilian Ministry of Finance and CVM. The Ministry of Finance states that "*the study diagnosed the Brazilian model, comparing it with models from other jurisdictions, and indicated improvements in mechanisms for safeguarding the private rights of minority shareholders.*" [24]

The bill was presented in June/2023 and will still be reviewed by a commission formed by representatives of the Brazilian Chamber of Deputies under its constitutional and legal aspects (*Comissão de Constituição e Justiça*), and changes to the draft can be proposed.

Therefore, even if CAM does not create a specific set of rules for the consolidation of arbitrations involving different shareholders and the same subject and/or requests, the Brazilian Ministry of Finance and CVM are paving the way to create more legal certainty for investors and to bring more seriousness to the Brazilian securities market.

IV. Conclusion

This Article has demonstrated how arbitration proceedings involving publicly listed corporations are being processed, reviewing, specifically, the problem pointed out by the Brazilian Superior Court of Justice in Competence Conflict Proceeding No. 185.702/DF (*Conflito de Competência*) regarding the lack of guidelines in CAM's rules to consolidate arbitration proceedings initiated by different shareholders on the same issue and/or with the same requests, and to decide on which arbitral tribunal has jurisdiction to rule the cases.

It is our opinion that CAM should create its own set of rules for the issue, following CAM-CCBC's lead, since it is the sole competent arbitration chamber to rule on arbitration proceedings involving publicly listed corporations participating in the New Market (*Novo Mercado*), Level 2 of Corporate Governance (*Nível 2 de Governança Corporativa*), Bovespa Plus (*Bovespa Mais*) or in the Bovespa Plus Level 2 (*Bovespa Mais Nível 2*). This would allow arbitration chambers to maintain their independence to create its own set of procedural rules, thereby preserving the *kompetenz-kompetenz* principle and avoiding the judicialization of issues that would originally be subject to arbitration.

Even though CAM has not taken these measures until this date, it is our opinion that CVM and the Brazilian Ministry of Finance are taking the necessary legal manners to solve the problem and to bring (foreign and local) investors the needed legal certainty and security to continue investing in Brazilian publicly listed corporations and to sustain a stable (and maybe growing) stock market.

[21] CAM-CCBC's Corporate Arbitration Rules: <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/supplementary-rules-02-2023/>. Access on November 21, 2023.

[22] <https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2284015&filename=PL%202925/2023>. Access on November 21, 2023.

[23] We point out that this kind of procedural grounds limitation will probably cause legal discussions on the restriction to the constitutional right of action and to the legal rights minority shareholders already have under the Brazilian Corporation's Act.

[24] <https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2284015&filename=PL%202925/2023>. Access on November 21, 2023.

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Although we do not fully agree with the Brazilian Superior Court of Justice's conclusion that minority shareholders could not have taken legal action against JBS's managers and controllers to claim civil liability and damages in this particular case (we agree with CVM's opinion), we agree that a set of specific rules on the matter would avoid conflicting decisions/interpretations of the Brazilian Corporation's Act, and would allow the sole competent arbitral tribunal to rule on the procedural issues and on the merits of the case, it is our opinion CAM-CCBC has created a good set of rules on the main procedural issues that could arise in corporate arbitration proceedings with regards such as joinder, third party intervention and consolidation of proceedings.

We hope for the speedy approval of Law Bill No. 2925/2003 on this matter and reserve the right to publish a new article after its publication to reflect on the practical consequences and changes brought by a law change.

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