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Trends & Developments

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Trends and Developments

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Efficiency Through Administration of Justice – the Impact of COVID-19 on Brazil’s Judicial System

Introduction

According to *Justiça em Números*, the government report on Brazil’s judicial system – which comprises high, appellate and district courts at state and federal levels – there were 77.1 million lawsuits pending judgment in 2019. Despite that massive amount of cases before national courts, the official statistics indicate a decrease of 31.5% in the ongoing proceedings in comparison to previous years.

Undoubtedly, the relative success in containing mass litigation in Brazil can be attributed to the wide adoption of electronic records and platforms for digital filing with courts all around the country. In fact, as indicated in the *Justiça em Números* report, almost 90% of all legal actions commenced in 2019 are recorded and processed via electronic platforms.

Brazilian courts are also taking seriously the advantages and possibilities that artificial intelligence offers in case management and Q&A assistance. The São Paulo State Court of Appeals, considered the largest appellate court in the world, has pioneered the implementation of a robot assistant named Judi. As of now, Judi, a chatbot, provides information about costs and procedure in small claims courts and, in the near future, will even make available brief templates to potential plaintiffs.

Additionally, court specialisation has also become key to ensure efficiency in the judgment of complex cases, such as those related to consumer protection, environmental and bankruptcy law. Particularly for commercial and corporate litigation, the experience of São Paulo State Court of Appeals with dedicated business courts will be increasingly valuable to other Brazilian states.

Besides IT and managerial innovations, there has also been relevant legislative action by the Brazilian Congress to deal with repetitive lawsuits, providing statutory grounds for collective procedures and alternative dispute resolution, which has even allowed private parties to arbitrate claims against government agencies.

It is thus clear that Brazil has struggled to implement jurisdictional and administrative measures to effectively cope with a seemingly unbounded amount of litigation. While much has been made in recent years in respect to the aggregation of claims

and class action agreements, the pandemic crisis makes room for new developments on that front, including initiatives to fully digitalise the administration of justice.

As detailed below, the unprecedented isolation measures adopted to avoid the risk of COVID-19 infection of judges, attorneys and others have hastened those trends, which seem to be spearheaded by *Conselho Nacional de Justiça* (CNJ), the administrative body that oversees the functioning of the entire Brazilian judiciary.

Background – CNJ as a judicial administrative agency

The 45th Amendment to Brazil’s Constitution instituted the CNJ as an independent administrative body within the judiciary. It is designed by the Congress as a diverse council comprised of 15 members, including the Chief Justice of the Supreme Court and representative members from the judicial branches and public prosecutor’s offices at the federal and state levels, as well as representatives from the Bar Association.

According to the Constitution, the CNJ has powers not only to supervise and control the managerial and financial activities of courts, but also to ensure the legality of administrative action by the judiciary and to conduct and review disciplinary claims against judges and the judicial staff of district and appellate courts.

The CNJ is also entrusted with limited rule-making power to issue regulations, such as resolutions (*resoluções*), provisions (*provimentos*) and recommendations (*recomendações*), which are all meant to further the constitutional goals of transparency, accountability and, most importantly, efficiency in the administration of justice in Brazil.

The following sections of this article will illustrate how CNJ’s regulations have been enacted and applied amidst the pandemic, as a means to mitigate the massive litigation in Brazil that is expected to arise out of the COVID-19 sanitary and economic crises.

Towards the “digitalisation” of justice in Brazil – Juízo 100% Digital

At the outset, it is worth mentioning the recent enactment of Resolution No 345/2020 by the CNJ, allowing state and federal appellate courts to implement the “Juízo 100% Digital”

programme, intended as a non-mandatory framework for the development of a totally online and remote court proceeding.

According to CNJ, remote judicial proceedings are to be promoted and implemented across the country not only during the pandemic crisis, as a precautionary measure, but also after the sanitary restrictions applicable to the judiciary are foregone.

That said, the recourse to the standard, in-person judicial proceeding is considered a right under the due process clause of the Brazilian Constitution, but parties to a lawsuit could, if not renounce it, then at least contract around such constitutional right if both of them agree to make use of the Juízo 100% Digital platform.

Pursuant to Resolution No 345/2020, all court sessions, including any hearings and even trials, will be held through videoconferencing or other means of instant communication based on data transmission over the internet.

Despite CNJ's initiative to implement the Juízo 100% Digital platform, appellate courts at all federation levels will be responsible for detailing and adapting the provisions of Resolution No 345/2020. However, the basic framework established by CNJ will have to be observed:

- the procedural switch to an entirely remote proceeding should be consensual and voluntary by the parties to the lawsuit;
- the parties should be allowed to retract their choice for the remote judicial proceeding until a final judgment is rendered;
- the right to switch back to an in-person judicial proceeding could be exerted by the parties only once in the course of the same lawsuit; and
- the retraction from Juízo 100% Digital must not entail the parties' escape from the court's jurisdiction or a modification in the case's original venue.

Finally, Resolution No 345/2020, despite not displacing the in-person proceedings as the standard avenue for litigation before Brazilian courts, creates a presumption of consensus about the remote proceeding, as long as it is explicitly proposed by the plaintiff when filing their claim.

To that end, CNJ's regulation states that the defendant's silence regarding the Juízo 100% Digital platform, up until his or her defence submission is filed, should be considered an acceptance of a proceeding fully based and dependent on video remote technology.

Scientific co-operation and expert knowledge in the cloud – the e-NATJus Nacional platform

Another administrative tool that has become particularly useful during the pandemic crisis is e-NATJus Nacional, an electronic platform for scientific advice that provides courts all over the country with authoritative expert opinion, as a way to rationalise and expedite the judgments of cases involving technical knowledge.

The e-NATJus Nacional platform was established by the CNJ under Provision No 84/19, and implemented through a co-operation agreement with the federal government's Ministry of Health, with the support of two of the most reputable hospitals in Brazil: Hospital Sírio Libanês and Hospital Albert Einstein.

In March 2020, Technical Opinion (*Parecer Técnico*) No 123 was made available via e-NATJus Nacional to inform judges and other judicial staff about the scientific evidence of drugs based on hydroxychloroquine components, as prevention and treatment to COVID-19.

The controversy surrounding the prescription of hydroxychloroquine in the wake of the COVID-19 pandemic is well known, despite – or, perhaps, because of – its public endorsement by leaders such as the USA's President Trump and the Brazilian President, Mr Bolsonaro. Accordingly, the CNJ was prudent to anticipate that the amount of new health law cases would soar, and that such medicine would become a disputed issue not only in the political arena, but also in courts of law.

The scientific and medical effectiveness of hydroxychloroquine would be a decisive fact, particularly in collective litigation seeking injunctive relief against the Brazilian government, to assure the distribution of that drug to all citizens through the public health system. This was the case in the Ação Civil Pública No 1015707-53.2020.4.01.4000, a collective proceeding brought by the Brazilian Federal Attorney's Office (MPF) against the city of Teresina, the state of Piauí and the Union. Actually, the federal district court for Teresina, when ruling to deny the MPF's motion for preliminary injunction, relied inter alia on e-NATJus Nacional and on the scientific findings about hydroxychloroquine, or the lack thereof, as provided by Technical Opinion No 123.

The technical opinions made available to courts via e-NATJus Nacional, under request of the CNJ, are not binding and can never be a surrogate for expert evidence adduced by the parties in a trial. Nevertheless, such ready-made knowledge about disputed scientific facts, when shared with courts across the country, facilitates the control and greater uniformity of court rulings in socially relevant, albeit repetitive, litigation, such as

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that related to the right to healthcare and the access to hydroxy-chloroquine during the current pandemic crisis.

Facing bankruptcy and reorganisation proceedings during and after the pandemic

The CNJ has also issued Recommendation No 63/2020, a non-mandatory regulation offering guidelines to the state judges that, during the pandemic crisis, preside and conduct judicial reorganisations and bankruptcy proceedings throughout the country.

According to CNJ's recommendation, Brazilian bankruptcy courts are advised to:

- prioritise the analysis of creditor or debtor claims related to the access of funds or assets already collected and restrained by judicial order;
- suspend in-person general meetings of creditors, allowing virtual meetings;
- authorise the extension of the automatic stay provided in Article 6 of the Brazilian Bankruptcy Law if the general meeting of creditors is needed to be delayed, and until the first court ruling on whether the plan submitted by the debtor will be approved or not;
- permit amendments to the reorganisation plan, as long as supported by evidence of correlation between the pandemic crisis and the debtor's incapacity to carry out its obligations, and only if the ongoing recuperation plan is being duly fulfilled;
- determine that trustees in judicial reorganisations keep performing their duties to the court, overseeing debtors in a virtual or remote manner, and presenting the monthly activity reports via online platforms on the internet; and
- evaluate, with special caution, emergency motions for interim injunctions, eviction orders, and seizure measures in claims against debtors in default during the state of public calamity, as recognised by the Congress through Legislative Decree No 6/2020.

Indeed, those recommendations have been observed and applied by most courts with jurisdiction to rule on judicial reorganisation and bankruptcy proceedings since 1 April 2020, the date on which Recommendation No 63/2020 came into effect.

Among the said recommendations, the possibility to hold general meetings of creditors remotely could be identified as the most important guideline of Recommendation No 63/2020 to ongoing judicial reorganisations and bankruptcies proceedings – it encourages judges to freely authorise virtual meetings, benefiting creditors and debtors alike, by reducing transaction costs, increasing the effectiveness of those meetings, and provid-

ing celerity for the creditors' payment under the reorganisation plan.

Additionally, it is worth mentioning the CNJ's approval of the Normative Act (*Ato Normativo*) No 0005479-03.2020.2.00.0000, on 2 July 2020, recommending to courts at all federation levels the creation of judicial centres for alternative dispute resolution specialised in business and commercial law.

According to CNJ deliberations, as formalised in that Normative Act, many of the expected bankruptcy and reorganisation proceedings following the pandemic crisis could be resolved with conciliation and mediation endorsed by the judiciary.

In particular, commercial mediation is considered both a healthy business practice and a means to avoid the increasing number of lawsuits related to the pandemic, which is desirable in a scenario of widespread insolvency leading to massive litigation by creditors that challenge the extension of their claims under the reorganisation plan. In fact, business mediation has been recently and successfully employed to solve several conflicts in connection with the judicial reorganisation of Oi S/A, the telecommunications company.

Conclusion

The challenges posed to the judicial system in the wake of the pandemic crisis are, unfortunately, not new in nature and only reinforce the need for an efficient administration of justice to tackle, at a national level, mass and repetitive litigation in Brazil.

The recourse to the limited regulatory tools available to CNJ, often non-binding even to lower courts, is certainly a second-best option, in view of the limited rule-making power and authority provided by the Constitution. Nonetheless, while the definitive and mandatory adoption of entirely remote judicial proceedings could only be achieved via legislative action by the Congress, the CNJ regulations, if not effective, reveal at least a sensible policy design.

Indeed, to the extent that urgent solutions to unanticipated problems, such as the COVID-19 pandemic, are required also in the administration of justice, litigation in time of crisis have to be dealt with by thorough planning, thinking rationally and, inevitably, employing technology on a large scale.

SABZ Advogados was founded in 2006. The firm has always focused on understanding its clients' daily needs, creating solid links with legal departments and corporate executives. Its team of 50 professionals is trained in a multidisciplinary fashion, an approach that is responsible for a unique way of working based on offering intelligent and business-oriented legal solutions, including in litigation. It is committed to making a difference

to its clients' businesses. SABZ is hired by the top players in the relevant economic sectors (agribusiness, chemical industry, infrastructure, financial market, real estate market and insurance). Middle-market clients also request SABZ's expertise in sensitive cases. The arbitration and litigation team handles commercial disputes involving all business-related issues as well as domestic and international arbitrations.

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