

## COUNTRY DEVELOPMENTS

# International lis pendens: new perspectives for the Brazilian approach?

## BRAZIL

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**T**his brief article is intended to address the issue of international lis pendens from a Brazilian law perspective and its recent developments.

The Brazilian Civil Procedure Code (BCPC) provides that ‘the lawsuit brought before a foreign court does not imply lis pendens and does not prevent the Brazilian Judiciary Authority from processing the same lawsuit and [about the] ones related to it’.<sup>1</sup>

Brazilian law abides by a general principle of not recognising international lis pendens even if the lawsuits filed before the Brazilian and foreign courts are absolutely identical.

Such provision of the BCPC must be interpreted in the context of the jurisdiction granted to Brazilian courts. Sections 89 and 88 of the BCPC determine the cases in which Brazilian courts have jurisdiction to process and to decide lawsuits either in an exclusive way or not.

Section 89 provides that Brazilian courts shall have exclusive jurisdiction to process disputes over real estate located in Brazil and to preside over probate proceeding of assets situated in Brazil, even if the deceased is a foreign individual or had his or her domicile abroad.

Brazilian courts have non-exclusive jurisdiction in the following cases, listed in section 88 of the BCPC: (i) disputes in which the defendant, regardless of his or her nationality, is domiciled in Brazil – including multinational companies that have subsidiaries and/or branches in Brazil; (ii) disputes addressing matters related to obligations to be performed in Brazil; and (iii) disputes arising from facts or events that took place in Brazil.

Evidently, the fact that Brazilian law provides for exclusive jurisdiction of its national courts to decide on disputes regarding the matters listed in section 89, as mentioned above, does not mean that the dispute brought to a foreign court dealing

with one of such matters must be dismissed. This would constitute a clear violation of the sovereignty of the country before which the dispute was brought. Theoretically, the consequence would be that Brazilian courts would not ratify nor enforce a foreign decision made by said court. This is based on the fact that procedural law is a matter of public policy according to Brazilian legal tradition. Thus, the decision would not be granted exequatur or leave of enforcement by the Brazilian Superior Court of Justice, which is the judiciary body empowered to validate foreign judgments in Brazil.

On the other hand, the Brazilian Superior Court of Justice will, as a rule, grant exequatur or leave of enforcement to a foreign decision arising from a dispute dealing with matters that fall into the list of issues over which the BCPC grants Brazilian courts non-exclusive jurisdiction.

In this context, absent a general rule to prevent international lis pendens in Brazilian law, a dispute filed before Brazilian courts would not prevent the enforcement of a foreign judgment resulting from an identical dispute. In fact, if this is the case, the ongoing dispute filed before a Brazilian court should be immediately dismissed, since, once ratified in Brazil, the final decision on the matter entails *res judicata* in Brazil.

There are precedents in Brazilian case law of validation and enforcement of foreign judgments even if there is an ongoing lawsuit brought before a Brazilian court, between the same parties, dealing with the same facts and in which the same relief is sought, provided the dispute does not fall into the situations in which Brazilian law provides for exclusive jurisdiction of the Brazilian courts.<sup>2</sup>

By virtue of the wording of section 90 of the BCPC, the simple fact that identical disputes exist and develop before two different

jurisdictions, one of them being Brazil, does not authorise the dismissal of the dispute developing before the Brazilian court.

It should be emphasised that, as a general rule, Brazilian law does not encompass the principle of prohibition of forum-shopping and forum non conveniens. It means that a Brazilian court will not refuse to process a certain dispute even if the parties have been already litigating abroad and jurisdiction has not been challenged by the party that brings the new dispute before a Brazilian court.

Naturally, this system is unable to prevent undesirable situations, especially when one of the parties intends to engage in forum-shopping practices in any way possible. Nonetheless, despite the strict application of procedural law in the field of international lis pendens, Brazilian courts have shown they are aware of the problems arising out of the existence of simultaneous disputes brought by the same party before two (or more) different jurisdictions.

The Brazilian Superior Court of Justice has decided that a party that files identical lawsuits before different jurisdictions would violate the general duty of good faith and would, hence, be making undue use of its rights. That being the case, such party could suffer negative consequences arising therefrom, regardless of the lack of regulation on international lis pendens in Brazil.

The precedent arises from a Provisional Remedy filed before the mentioned Superior Court. The parties discussed the issue of jurisdiction due to the fact that different disputes were simultaneously taking place in Brazil and in the United Kingdom (Provisional Remedy 15398/RJ, decision on 23 April 2009).

Although the Brazilian Superior Court of Justice did not analyse the specific issue of international lis pendens or even the legitimacy of the behaviour of the plaintiff – that filed identical lawsuits before Brazilian and British courts – the rationale of the decision indicates a trend to consider forum-shopping to be a violation of the general duty of good faith and an abusive use of one's rights.

In this context, pursuant to Brazil's Civil Code, both violation of the duty of good faith and the abusive use of one's rights are considered to be unlawful acts and would entitle

the party that suffers any damage in connection with such behaviour to seek compensation.

Even though the decision did not go as far as preventing the Brazilian dispute to carry on, which would be the ultimate remedy to prevent forum-shopping, said decision appears to be an initial reaction by Brazilian courts to the lack of a vigorous response to bad faith or frivolous litigation behaviour. This is expected to be a long-awaited wind of change in terms of international lis pendens in Brazilian law.

While there is no legislative change to address this issue, an alternative solution might be found in Brazilian law, to avoid forum-shopping. This solution concerns the use of the fact that, according to the BCPC, a dispute may only be brought to a Brazilian court if there is a justifiable controversy. This rule entails that, in case the relief sought is considered not to be necessary for the plaintiff to achieve its ultimate purpose, the dispute should be dismissed without prejudice. The BCPC establishes that the justifiable controversy comprises the necessity and usefulness of the dispute.

Introducing such rule into the field of international lis pendens and forum-shopping, it is possible to infer that a party that asked for a certain relief before a foreign court does not need to litigate in Brazil in order to obtain such a relief. After all, it has recourse to the foreign court. Therefore, the case could be dismissed due to the lack of justifiable controversy, even if the foreign court denies the relief sought.

Summing up, although Brazilian law does not recognise international lis pendens, there has been a relevant evolution on the matter, especially when it comes to preventing forum-shopping. It is now time to expect this to be just the beginning of a growing trend that leads to a more contemporary approach to the problem of international lis pendens in Brazilian legislation.

#### Notes

- 1 BCPC, section 90.
- 2 Foreign Judgment Challenged No 3668/US, decision on 15 December 2010, Foreign Judgment Challenged No 2611/PL, decision on 15 December 2010 and Foreign Judgment Challenged No 911/GB, decision on 16 May 2007, Special Appeal No 251438/RJ, decision on 8 August 2000.