International Litigation News

Newsletter of the International Bar Association Legal Practice Division

APRIL 2011

Relevant aspects of the Bill of Law for the new Brazilian Civil Procedure Code

Rafael Villar Gagliardi
Demarest e Almeida Advogados, Brazil
rgagliardi@demarest.com.br

Newton Coca Bastos Marzagão
Demarest & Almeida Advogados, Brazil
nmarzagao@demarest.com.br

This article points out the main modifications set out in the Bill of Law ('Bill'[1]) for the new Civil Procedure Code (CPC) which is under debate in Brazil and is expected to pass shortly. According to Brazil's legislative process, the Bill still needs to be approved by the lower house (Chamber of Deputies) and signed into law by the President. Therefore, the text of the Bill might still be modified. This article is based upon the text as approved by the Federal Senate on 15 December 2010.

Context

Since the 1990s Brazil's legislature[2] has been implementing a series of specific changes to the current CPC. The goals were to adapt the new constitutional rights[3] procedure, modernise procedural institutions, shape them to fit into a new social reality,[4] and to speed up proceedings.

These reforms profoundly changed Brazil's civil procedure. They allowed anticipatory measures (that would have an effect equivalent to final rulings on the merits) to be granted at the very beginning of the proceedings.[5] They simplified the enforcement of the final ruling, which became just a step of the original proceeding, as opposed to being a whole new proceeding.[6] Judicial seizure of the debtor's assets was made less bureaucratic – it became possible to do it online. Also, the precedents of superior courts became more valuable[7] and the rectification of procedural annulments was simplified.[8]

Although it became more effective, the CPC lost its systematic nature. The 64 regulations that 'reformed' it from 1 November 1973 (when it was passed) to 30 September 2009 (when the committee was set up to draft the Bill), ended up compromising the rigor and coherence of the CPC. The Bill seeks to rebuild this unity and coherence, without losing the effectiveness brought by the reforms. It is intended to become Brazil's new CPC.

The main modifications

The main changes are addressed in the paragraphs below.

International Cooperation

Unlike the CPC, the Bill regulates international cooperation by the Brazilian justice system on civil matters. According to Article 25, this cooperation will take place through international treaties, or in the absence thereof, 'based upon diplomatically established reciprocity'.

It also states that cooperation may be provided to other states or international agencies through judicial or administrative proceedings by one of the following means: (i) letters rogatory; (ii) confirmation of foreign final rulings;[9] and (iii) direct aid.[10]

Among these cooperative acts, the Bill cites urgent measures (including freezing and seizure of assets), procedural notices or summons and production of evidence. In short, the Brazilian justice system is authorised to engage in any 'form of international legal cooperation not prohibited by Brazilian law'[11] that does not violate national public policy.[12]

The Bill further sets forth the possibility of direct aid, based on a treaty or commitment to reciprocity,[13] to be rendered by Brazil's central authority (the Ministry of Justice[14]) to its foreign counterpart. If, under Brazilian law, the measure to be taken locally does not require the judiciary's involvement, then the central authority will take appropriate measures to carry out the requested cooperation.[15] If judicial measures are necessary, it will be incumbent on the local Federal Court to order the necessary measures, upon request by the Brazilian central authority.[16] On the other hand, direct aid will not be admitted if Brazilian law sets forth a specific procedure, as in the event of confirmation of foreign final rulings.

It is important to bear in mind that according to the Bill the use of evidence obtained through international cooperation requested by Brazil

must abide by the limits and conditions imposed by the supplying authority.[17]

Loosening the strictures of preclusion and modification of the appellate system

Another major change in the Bill concerns the preclusion system and the possibility of appealing against every interlocutory decision[18] rendered by the lower court in the course of proceedings.

Under the current CPC system, interlocutory decisions handed down by judges can be immediately challenged on appeal.[19] However, the flip side is that as a rule, whenever an appeal is not filed, preclusion – loss of the right to challenge the interlocutory decision – occurs, unless the decision deals with matters of public policy. Thus, currently, a party that feels aggrieved by a certain interlocutory decision may appeal so that review of the issue in question by the Appellate Court is allowed.

The Bill is revolutionary because it loosens the rigid system of preclusions. It sets forth,[20] as a rule, that 'issues resolved during the development of the case' will not be precluded. In terms of compensation, it introduces a system of deferred appeals. In other words, a party will only be allowed to challenge an interlocutory decision along with the appeal lodged against the lower court ruling. The idea is to concentrate, whenever possible, all the matters into one single appeal. According to the Bill, only in those cases expressly set forth by law may the party request an immediate review of an interlocutory decision by the Appellate Court through an interlocutory appeal.[21]

This suggested change is controversial. On the one hand, the members of the Jurist Commission who drafted the Bill defend the limitation of interlocutory appeals, based on the valid argument that the CPC system, that freely allows the filing of such specific appeals, ends up overwhelming Appellate Courts and generating backlogs.[22] Critics, on the other hand, say that it is unthinkable to imagine a system that could foresee up front and unbendingly all the specific cases in which it would be desirable or even necessary to allow immediate interlocutory appeals.

Modification of the general rule of staying appeals: valuing lower court decisions

Another controversial modification consists of making lower court rulings immediately effective, allowing the winning party to commence enforcement of the ruling while the appeal by the defeated party is still pending.

The general rule in the CPC is that appeals stay all effects of lower court rulings. Hence, the suggestion proposed in the Bill implicates a fundamental change in the appellate system. It converts into the general rule what is currently the exception: appeals will no longer have the effect of stopping enforcement.

With this suggested change, the Commission sought[23] to provide greater effectiveness and speed to lawsuits by allowing the winner to immediately obtain[24] the results sought. This places more value on lower court rulings.[25] At the same time, it seeks to discourage the filing of purely procrastinating appeals against lower court rulings.

However, this is a delicate issue. The modification of the general rule will allow the prevailing party to initiate a provisional enforcement of the first instance award, seizing assets, selling them and even, in some cases, withdrawing money held in judicial escrow accounts.[26] In other words, even before the Court of Appeals' pronouncement, the prevailing party might have its right entirely fulfilled.

The Bill seeks to lessen the load on the judiciary by changing the appeals system. However, the causes of judges' overwhelming workload and backlog are, for the most part, more related to issues of managing the justice system than to an excess of appeals, either interlocutory or otherwise.

The Bill's ideological bent is undeniably correct: decisions handed down by lower court judges can (and should) be valued more highly. However, care must be taken to prevent excesses.

Broader powers for the judge when conducting proceedings

Following the trend of valuing lower court judges and their decisions, originally the proposal Bill would have granted (Article 105, item V) magistrates the authority to adapt the phases and procedural acts to the specific needs of the case, provided that due process was not violated. This rule would constitute a major innovation to the Brazilian system, which has historically been inflexible in procedural terms.

However, after a vote by the Senate, this provision (re-numbered to Article 118, item V) was altered and it now limits the judge's 'creative power' to allow extensions of procedural deadlines and to change the order of evidence production, depending on the specific needs of the case, to make the proceeding more adequate.

Valuing precedents: drawing upon the common law system

A highly lauded modification relates to the clear intention to value precedents set by superior courts.[27]

Continuing the irreversible trend[28] of drawing common law and civil law systems closer together, the Bill expands the set of cases operating as a precedent with binding effect,[29] endeavoring to increase judicial security at the same time lowering court costs, making case resolution faster, and consequently encouraging business activities.

Article 882 of the Bill orders the courts to seek 'standardisation and stability of jurisprudence', further stating that 'panels will follow the guidelines of the special panel or the higher body of the Court to which they belong' and that 'the undisputed case law of any appellate court should guide the decisions of all those related to it'.

Joining the technique of judging repetitive appeals[30] with the valuing of precedents, the Bill anticipates a salutary provision, as of Article 930, by regulating motions to resolve repetitive disputes.

According to the aforementioned provisions, a mechanism will be put in place if the dispute brought before the court in a certain lawsuit is found to have 'the potential to generate significant multiplication of cases based on an identical legal issue'.

By allowing a mechanism to be initiated by the plenary – the highest body of appellate courts – cases that involve the same legal matter and are being heard at a lower court or at the appellate level will have their respective progress immediately halted.[31]

Whatever legal theory the appellate court uses in the ruling of such a motion it will be applied to all proceedings that involve the same legal matter, binding later decisions of the lower courts.[32]

Ongoing repetitive appeals in higher courts (Superior Court of Appeals[33] and the Federal Supreme Court[34]) will have a similar treatment to that given to resolve repetitive lawsuits and are established in Articles 990 through 995 of the Bill.

The Bill has sought to grant identical treatment to all of those subject to the same jurisdiction, attempting to avoid the so-called jurisprudence lottery or forum shopping.

Changes to the rule of distribution of the burden of proof

Another important modification concerns the possibility of shifting the burden of proof under specific circumstances.

The Bill shatters another paradigm, granting the judge authority to shift the burden of proof in a manner other than legally established as the general rule,[35] given the peculiar circumstances of a case and the underlying facts to be proven by the parties.

The static, traditional rule according to which the plaintiff must prove the facts that constitute their right and the defendant, on the other side, must prove the facts that prevent, modify, or extinguish the plaintiff's right, may be rebutted through a reasoned interlocutory decision by the lower court.

To avoid surprises, it is highly advisable that the parties be alerted of the lower court's intention or inclination to shift the burden of proof for a certain fact, thus giving them a chance to present possible arguments in favour or against such a measure. Once arguments are made, the lower court will be in a better position to alter the general rule contained in Article 358, without violating due process of law.

According to Article 358, the lower court will place the burden of proof on the party who is best capable of producing the given evidence. This possibility is similar to the rule of reversing the burden of proof applicable to consumer relationships (Article 6, item VIII, of the CDC).[36]

A chance that is being wasted: validity of the clause to select a foreign venue

In the CPC, Brazilian case law has settled on the understanding that if there is any element connecting a case to Brazil, then a clause choosing a foreign venue would not be valid. If, for example, a Brazilian dealer of products manufactured by a foreign company executes a distribution agreement with a clause choosing New York as the only venue having jurisdiction to hear cases involving the agreement, that clause would not prevent a suit from being filed in Brazil. Brazil does not recognise international *lis pendens*.

This is the result of outdated legislation established at a time when Brazil did not play a relevant role on the international scene.

Article 88 of the Bill, as originally drafted, expressly upholds the validity of a clause choosing a foreign venue, setting forth that if the plaintiff selected a foreign jurisdiction and the suit is still filed in Brazil, the case can be

dismissed owing to the Brazilian magistrate's lack of jurisdiction.

However, the said provision was struck from the text during discussions of the Bill in the Senate. If it is not reinstated during deliberations in the Chamber of Deputies, Brazil will have missed a unique chance to bring its procedural legislation into the modern era.

Conclusion

Given the current stage of the Bill, there is a very good chance that at some point in 2011 Brazil will have a new Civil Procedure Code. The main changes to date have been pointed out in this article. On the one hand, the Bill could have gone further on issues such as the choice of a foreign venue and the powers of the court to adapt proceedings to the specific needs of the case. On the other hand, it has taken on controversial matters that innovate the Brazilian system, such as international legal cooperation and placing value on precedents, in a clear approximation with the common law system.

Notes

1 Bill of Law 166/2010.
2 More precisely, this happened on 13 December 1994, when Law 8952 was passed and introduced the possibility of a party obtaining advanced protection prior to the opposing party's response.
3 The Brazilian Constitution, dated 5 October 1988 (15 years after the CPC), instituted various procedural guarantees, creating what scholars have referred to as the 'constitutionalisation' of Brazilian Civil Procedure.
4 'New social reality' refers to profound transformation through economic growth, globalisation, mass consumer relations, and the growing trend of bringing disputes to the court system, as a result of the raising awareness of rights promoted by the Constitution and the Consumer Defense Code (Federal Law 8078/90).
5 Thus reversing marginal damages resulting from a delay in rendering judicial protection.
6 Prior to the reform, to enforce a final ruling, a creditor had to file a new suit (enforcement action), paying new court costs, asking for another service of process of the debtor (who often managed to dodge it). Furthermore, the debtor had another opportunity for defense. These factors contributed for delaying achievement of the final and actual outcome of the case, with satisfaction of the winning party.
7 Anticipating, for example, the institution of a brief to block appeals (Article 518, §1 of the CPC) and systematisation of repetitive appeals to both the Superior Court of Appeals and the Federal Supreme Court (Articles 543-C and 543-B, respectively, both in the CPC).
8 Article 515, §4 of the CPC.
9 Article 40, sole paragraph. The expression 'foreign final rulings' in this paragraph must be understood as final judicial decisions or arbitral awards which are not subject to appeals in the foreign state.
10 Articles 26 and 27.
11 Article 28.
12 Article 32.
13 Article 34.
14 Article 30, §1.
15 Article 36.
16 Article 37.
17 Article 29.
18 The expression 'interlocutory decisions' (in Portuguese, *decisões interlocutórias*) defines the lower court resolutions that do not decide the case in such level of jurisdiction, either on the merits or dismissing it without prejudice. The decisions by the lower court that do decide the case in that level, either on the merits or dismissing it without prejudice (in Portuguese, *sentenças*) are herein referred to as 'rulings'. When there is *res judicata*, the rulings are referred to as 'final rulings'.
19 Such appeal can be referred to as 'interlocutory appeal' (in Portuguese, *agravo de instrumento*).
20 Article 963, sole paragraph of the Bill.
21 According to Article 969, an immediate interlocutory appeal is only possible when the interlocutory decision (i) involves urgent protection or advanced protection based upon evidence; (ii) concerns the merit of the dispute; (iii) is filed during the enforcement of the final ruling; and (iv) is under other cases expressly set forth by law.
22 Today, more interlocutory appeals are judged than appeals.
23 Along with a new modification: the imposition of additional legal fees on an appellant who is unsuccessful in their appeal (according to the Bill's system, the party who loses in a lower-court and first court of appeals will be doubly penalised, which doesn't happen today).
24 Even if only precariously.
25 Which has been slowly introduced into the Brazilian civil procedure by the legislature. In one of the recent reforms, for example, the Judge ended up being authorised to immediate dismiss a claim (even before the defendant received service of process) in which the plaintiff is deemed to have no grounds, because the lower-court acknowledges that rulings for the defendant have been consistently handed down in identical cases (article 285-A, of the CPC).
26 Although the creditor has the legal obligation to post a bond before withdrawing any amount deposited by the debtor in an judicial escrow account (or the value resulting from the judicial sale of a property seized), the harm to which the debtor is subject is evident: having the seized property definitively sold to a third party (in a judicial auction) before having a final ruling.
27 The term 'precedent' is used herein in its broadest sense as a 'decision by the court' (therefore, excluding the original/English meaning of the term as a decision with binding authority).
28 Such trend was valid and pointed out by the Italian professor Michele Taruffo in Rodolfo de Camargo Mancuso, *Divergência Jurisprudencial e Súmula Vinculante* 4th ed, (São Paulo: Editora Revista DOS Tribunais, 2010).
29 In the current system, only the superior courts (Superior Court of Appeals and the Federal Supreme Court), in restricted and express circumstances can hand down binding decisions.
30 'Repetitive appeals' began to be used in the Supreme Court in 2006 (Federal Law 11418) and extended to the Superior Court of Appeals in 2008 (Federal Law 11672), in light of the number of appeals with identical legal issues, thus demanding standardised decisions.
31 Article 934.
32 Articles 933, §2º and 938.
33 The Superior Court of Appeals has national jurisdiction, with the main job of standardising interpretation of Federal Law.
34 The highest court, whose main function is to defend the correct application and interpretation of the Brazilian Constitution.
35 Article 358 of the Bill.
36 'Article 6 : The following are basic consumer rights: VIII – facilitating the defense of their rights, including the reversal of the burden of proof in their favor in a civil suit, when, at the judge's discretion, the consumer's allegation is likely or when the consumer is disadvantaged, based upon ordinary rules of experience.'