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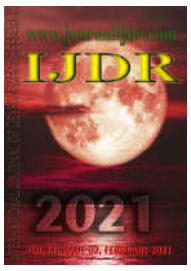

RESEARCH ARTICLE OPEN ACCESS

AN ANALYSIS OF RECENT DECISIONS ON ARBITRATION AND AGREEMENTSINTHE BRAZILIAN COURT OF ACCOUNTS

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ABSTRACT

Until recently, there has been a reluctance to apply arbitration and procedures agreements for lawsuits that might confront public interests. However, after the recent Brazilian arbitration law installment, this whole perspective seems to have changed. Hence, the use of arbitration forecasted in the legislative disposals has gained momentum due to the actual legislative proposals for further Brazilian public acquisitions – bidding law -, thus requiring higher competition from both national and foreign companies. However, apart from this opportunity, it remains uncertain whether this current rule has been fully applied, especially whenever nondelegable – irreducible – public interests might be involved. In an attempt to shed light on this issue, this study focuses on the Brazilian Court of Accounts' lawsuits to discover whether a gradual adoption of the new legislative permission has been used regarding alternative solutions methods for litigations. The methodology was exploratory research and critical analysis of Mato Grosso Cout of State Accounts' current procedures. The findings show gradual adoptions of Tags (Terms of Agreements for alternative Conducts) between the public sector and its respective contractors. As a result, the use of TAGs has been providing safeguards for public interests with higher guarantees and within a shorter time.

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INTRODUCTION

Several dichotomies between common law and civil law have long been demonstrated in doctrine from multiple different perspectives. Firstly, common law might not propose any public administration's favour it is magainst ordinary citizens in case of eventual litigation. Therefore, since the publication of the due process of law in the British legislative system, any privilege for public administration within lawsuits has been unadmitted. The central refusal for it came from the British parliament's commonly accepted idea that previous monarchic administration has been considered guilty of innumerable abuses over the U.K.'s population, such as several unilateral raises of taxes. As a result, after implementing democracy, the British public administration ought to litigate with the same criteria conceived for ordinary citizens. In France, the same suspicions about eventually unilateral abuses adopted by public administration resulted in the principle of immunity in administrative procedures – administrative lawsuits -. Additionally, as the previous deposed king had nominated most judges for the so posed judiciary power, France, thus, had adopted the archetype that people ought to be judged in administrative lawsuits by their peers, whose judges might not be nominated by the previous king, but instead, by the ordinary people and whose final decisions must not be modified by any other constitutional power. Consequently, the decisions made in the administration judgments usually had autonomy from any other governmental authorities. These two examples show that the suspicions of eventual abuse derived from the previous authoritarian monarchic public administration have resulted in two different archetypes within common law and civil law systems. Consequently, while the U.K.'s new government had refused to conceive any privilege for public administration concerning further litigation, civil law forecasts, such as those from France, Portugal, and Spain, have adopted the intangibility model of administrative judgments that the judiciary might not reform. As a result, any project of law that might undermine public impartiality and monopoly regarding administrative lawsuits that could lean towards private interests inducing losses of public benefits has, so far, no chance to transit into parliament, as previous aristocratic abuses have demonstrated the dangers of occasionally delegating the public monopoly to establish the final decision in its lawsuit.

However, the reluctance to admit other alternative conflict methods for public administration litigation has gradually lost strength as new flexible approaches have been increasingly incorporated into several European legal systems. For instance, recent laws researches show that while, in common law, the cost of a lawsuit might substantially increase mostly because part of the evidence has to be produced by litigants themselves, in civil law, the slowness of several cases had put some pressure on authorities to incorporate alternative ways to provide litigious solutions with faster and with lower cost results. Gradually, France and Italy have been incorporating alternative ways for further litigation into their particular legal system. Furthermore, European Union directives (which also have a deadline of two years to be incorporated into all E.U. members) have increasingly obligated E.U. members to adopt alternative conflict solution methods such as arbitration or mediation even in lawsuits which public administration poses as a part in the litigious.

Hence, in Europe, recent studies show gradual incorporation of several alternative solving problem mechanisms, apart from the traditional judicial process. As a result, all E.U. members may adopt a more unified and standardized jurisdiction system. Additionally, the E.U. seems to have been gradually unifying its alterative litigation methods. Moreover, Mercosul's actual forecast also predicts that mediation or arbitration, along with *ad hoc* Courts, may well be used to solve eventual conflicts among its members and enterprises and even for disputes that might involve the public administration. Apart from that, whereas alternative conflict solving methods have gradually gained strength in the private sector, not only in Europe but also in many other economic blocks such as Mercosul, their frequentuse in cases in which public interests might cause conflict with private ones remains, however, unclear. As recent studies demonstrate, there is still much skepticism of whether arbitration or mediation can be indistinctly used in litigations in which one of the defendants might possess undeniable public interests.

So, there is still not much unanimity on whether these alternative conflict solving methods might be fully applied to litigations in which public interests and private ones could confront. These eventual conflicts are precisely the focus of this particular study. Consequently, this study objective is to analyze the actual legislative disposals both in Brazilandin other countries regarding alternative conflict solving methods, explicitly emphasizing the arbitration process and its eventual conflicts with public interests that eventually arise. This research focuses on specific lawsuits: those that might occur within the Brazilian Court of Accounts. Thosearesome particular cases where the civil procedure code ought to have plenty of applicability and a point where public and private interests' conflicts might be accentuated. Thus, this research has been divided into four main parts. The first one shows the peculiarities of the suits that occur within the Brazil Court of Accounts compared to those in traditional judicial power. It also demonstrates what should be the legal definition of a terminative-definitive decision – a non-appealing one - made by the Court of account and its further legal consequences.

In the second part, the most recent studies among alternative ways of conflict problems methods, such as arbitration and transactions, are shown, emphasizing those that might conflict with further non-delegatable (inalienable) public interests. In this part, we shall point out what the jurisprudence has so far concluded about the full applicability of alternative conflict solving methods in the cases that they might confront public interests, as well as the most significant studies published about the same subject. In the final part, several cases from the actual Brazilian Court of Accounts are demonstrated and analyzed in order to answer whether it might be possible to use such alternative conflict solving methods for suits that inevitably confront inalienable collective rights. Finally, the conclusions extracted from both theoretical and empirical parts will then be demonstrated.

THE JUDICIAL LEGAL CONCEPT OF THE JUDGMENTS OF THE COURT OF ACCOUNTS: For an extended period, has either Brazilian doctrine and jurisprudence argued about what should be conceived as its Court of Accounts' decisions. After decades of intense debate, the Brazilian Supreme Court finally concluded that their terminal – non-appealing - decisions had to be conceived as extra-judiciary titles.

(MAIA and FERREIRA, 2013, pp. 5-56; FERNANDES, 2016, pp. 10-121; 2017, pp. 51-138).It still not very clear what an extra-judiciary title ought to be. Therefore, further explanations are required. From the perspective of a title, it can then be conceived as either a judicial or extrajudicial title. The first one is derived from a whole previous judicial process – a lawsuit – that might not just decide whether the author or the replicant might have a reason but shall also determine the amount to be paid and to whom. Consequently, whenever litigation might demand further efforts from judges or Courts to discover who might probably really have the requested right, then a whole judicial lawsuit is required, after which it will conceive a judiciary title so that the victorious part shall receive the amount he had already required. In those suits, proofs and testimonies are evaluated.

On the other hand, some titles might have some relative presumption of veracity. In such cases, the applicant is not called to presenta defense but instead to pay the author's bill. Therefore, the judge might only accept the applicants' justifications after the integral deposit of the amount discussed. This kind of title is what the Brazilian legal system calls extra judiciary titles, so they tend to have some relative honesty in favor of the author's requirements[1]. For instance, a non-paid duplicate is an example of this typical title with some presumption of integrity in favor of the author's allegations. (ASSIS, 2016, pp. 570-1426; CAMARA, 2020, pp. 221-432; DINAMARCO, 2019 pp.430-721.)

It means that it is up to the Court of Accounts to analyze either author's and applicants' arguments and deliberate to provide the amount of the title and to whom it is about to be paid. Hence, it also means that the Court Account's final decisions must have three main characteristics: a) enforceability, b) liquidity (the amount of the charge), and c) validity (unquestionable title); otherwise, the full title might be considered null and therefore non-chargeable by the Supreme Court that might even reform the Court of Account's final decisions. Consequently, the judiciary power will only provide the means to the suit's victorious part to obtain the amount in question. Still, it shall not reanalyze the testimonies and proofs over which has the Court of Account already deliberated. Moreover, the lawsuits that occur within the Court of Accounts must have another demand. The State itself must take place as the author's requirements, which means that eventual damage to state properties must have occurred. So, the amount to be recharged shall be up to the Court of Account to determine which final decision shall then be conceived as an extra-judiciary title and then, in principle, not to be reformed by the judiciary power.

Besides, all the civil rights forecasted in the civil procedure code must be observed by eventual Court of Account's suits, such as contradictory principle, full broad defense, and the obligation to ensure that any people related to the lawsuit had the opportunity to offer their arguments. Apart from these particularities in the suits from the Court of Accounts, all civil procedures must be applied as a rule to be observed by all infra constitutional organisms from which the Court of Account is not an exemption. However, as demonstrated, the purpose of the Court of Accounts is to provide states financial safeguards. Consequently, there are still several doubts about whether the new alternative conflict solving methods forecasted within the actual Brazilian civil procedure code might be entirely applied to Public Administration and especially to the Court of Account's decisions, as they shall inevitably conflict with the principle of state-owned proprieties intangibility. So, the nonconventional methods for lawsuits like agreements from both parts that inevitably confront special public interests will be the next chapter's theme as it remains a gray zone to be highlighted.

THE PROCEDURAL AGREEMENT AMONG PARTS: RECENT STUDIES ON THE SUBJECT: As Wambier and Basilio (2016, pp. 140142) demonstrate, despite the actual articles n. 190 c/c art. 191in the recent Brazilian Civil Procedure Code, it has been forecasted that litigants might agree about several clauses regarding the procedure to be applied within the lawsuit in the debate. It means that despite the traditional methods, the legislator has foreseen an eventual possibility for litigants to relativize the imperative clauses. In other terms: apart from the standard conflict solving clauses, several clauses ought to be negotiated if both litigants agree with them. However, despite its predictions within the recent civil procedure code, recent studies have shown that this method has so far not been fully used. For instance, Pereira Júnior and Melo Santos's studies show that in Ceara State, in all the 39 justiciary Courts, not even one has so far used the legislative alternative, but rather remain using the ordinary time demanding judiciary way (PEREIRA Jr. and MELO SATOS, 2018, pp. 221-223). As a result, their applicability in providing a shorter deadline for lawsuits still not being used as forecast. As Omena Lima and Araujo Oliveira (2019, pp. 137-154) pose, the actual legislative code not only has predicted typical lawsuits agreements but has also allowed further atypical ones, which means that in principle, the parts should have freedom in establishing several clauses in the way that the procedure must be conducted. However, the legislator had put some limits on their libertyas a way to safeguard untouchable civil rights.

Consequently, apart from the permission conceived for litigants to freely negotiate clauses such as the burden of proof, the judiciary calendar, along with the forum – in which Court - the litigation might occur, the legislator has expressively demanded that these clauses shall only be applied over rights that admit self –composition. Further transactions among parts may also require the full capability to sign contracts putting aside any perspective for people under 18 years old or hypo-sufficient to sign eventual transactions. Apart from this legal forecast, Didier Jr (2016, pp. 1-27) demonstrates that there might not be any null ability for agreements among hypo-sufficient parts (such as people under 18 years old) as long as they shall be legally represented. He also indicates that in litigation, in that the public attorneymustpronounce, litigants will have no permission to put it asidein the lawsuit. Hence, it remains a mandatory clause to be observed. The agreements must then not diminish any constitutional guarantees or collective achievements rights. The authors also converge that the main rule is that litigants' procedural arrangements shall not require any further homologation (agreement)from judges unless had congress explicitly predicted it. The author also points out that unilateral agreements might occur - such as renouncing[2] – and bilateral[3]ones can be arranged.

[1]In the recent reform the full deposit to accept the defendant´s arguments have been removed.

[2]Renouncing: occurs when one of the litigants poses an appeal but then gives up to it.

Moreover, the author points out that there is even a possibility for multilateral agreements such as those that might occur with the judge's prominent participation. In other words: judges can propose an alternative for litigation that parts have not thought of yet. Consequently, the actual legislators seem to have relativized the traditional judiciary perspective of Bülow (1964) that places judges in a position above all others within lawsuits. Bülow's view also imposes an obligation for the authors to demonstrate their arguments; otherwise, the judge shall provide the applicant the material right under discussion. However, this ancient perspective no longer seems compatible with this more collaborative view of lawsuits. Instead, the actual scenario demands higher and more proactive work from both judges and litigants to provide a solution that pleases both sides. Thus, it seems that Chiovenda's (1922) main idea, to whom the lawsuit might have some independence from the material right under discussion, appears to have recently gained even greater strength as it remains possible for both parts to make procedural agreements apart from the right under discussion, so they can freely negotiate the procedure terms and without any subordination to the material right under discussion.

As Nogueira (2016, pp. 247) points out, there are even explicit predictions for non-appealing clauses, which means that the parts are allowed to agree not to appeal. However, this particular disposal sounds unconstitutional in limiting a guarantee conceived to litigants to have their arguments revised, at least one time, by a higher Court (ABBOUD, 2011, pp. 62-119). Regarding the national jurisprudence, Medeiros Neto (2018, pp. 60-69) shows several cases in which alternative solutions to judiciary lawsuits have been used, such as appealing n. 2118535-58.2017.8.26.0000 from the 17thCivil Court of São Paulo, a case in which the Estate Court has recognized litigants' authority to negotiate procedures clauses even if they might not be explicit in the actual civil procedure code – atypical agreements -.In summary, the negotiation clauses related to the procedure are to be seen as widely as possible, so there must not be any constrictions apart from the ones explicitly predicted in the civil procedure code. However, as Vidal (2017, pp. 200) remembers, the agreement of procedures (just like any agreement in the whole legal system) must obey the conditions of validity, existence, and effectiveness predicted in the civil legislative code.

As a result, there shall not be any imposed agreement that might put some of the litigants in a position of either insubordination or vulnerability, which shall consequently be consideredasa non-registered clause. Moreover, this is not a particular prediction seen only in the Brazilian procedure code. Instead, as demonstrated in the introduction, Italian, German, as well as French procedural codes have forecasting procedure agreements either directly orthrough the incorporation of some of the European Union's primarydirectives. According to Klaus-Dieter Borchardt (Borchard, 2017, pp. 116-135), the European Union has three central legislative disposals: regulations, orders, and directives. Thus, whereas regulations are conceived as having plenty of applicability, directives do not. Therefore, while regulation norms are applicable just after subsequent publications, directive norms shall not be demandable until a particular E.U. member had incorporated it within its specific legal system.

[3]Bilateral: made by both sides.

After the deadline, however, the directive will automatically gain full applicability in each E.U. member. Consequently, as Renna and Giovanni show, Italy has already implemented the arbitration chambers for alternative litigation procedures in Milan in which several cases have already been judged (RENNA and Giovanni, 2010, pp. 291-311). Consequently, the use of arbitration chambers for alternative litigation procedures seems to be an irreversible tendency. As Caponi poses (CAPONI, 2008, pp. 99),the actual Italian procedure code has long abandoned the orthodox model policy to whom judges are posed in a situation above parts and towards a much more collaborative position for everyone related to the lawsuit. As shown, it is not only within the Italian legislative system that alternative conflict solving methods are found; the French legal system follows the same path (FRICERO, 2015, pp. 23). For instance, in the new French procedure code (*code de procedure civil Français*), several disposals resembling the Italian code are seen in articles n.1.442and in article n.1.527.

However, it remains undeniable that Italian doctrine has highly influenced Brazil's law procedures due to the unnumbered Italian authors that have offered classes among the most prestigious Brazilian Universities. Therefore, Madrioli Caratta (CARRATTA, 2016, pp. 405) demonstrates that even in the execution procedure[4]or even in lawsuits related to labor, the Italian procedure code has forecasted arbitration or mediation methods as an alternative way to solve problems for eventual contract break in a shorter time regarding the tradition slow judiciary path. Consequently, equal disposals have been written in the actual Brazilian procedural document.

Thus, this amplification in alternative solving methods is not a mere coincidence, but rather an obligation derived from the directive 1.852/2017 of the European Union. So, both Italian and French civil procedural codes have already incorporated mediation and arbitration as alternative conflict-solving procedures apart from traditional litigious paths.[5] However, the recent Brazilian administrative bidding law project has directly forecasted competition among national and international enterprises to provide the best goods to Brazilian administrative organs. Consequently, these legislative disposals have emphasized arbitration as a prior way for further litigation to offer safeguards to international investors with a more impartial decision to be made. The theme shall be better analyzed in the next chapter.

ARBITRAGE IN PUBLIC SERVICES: Mediation is an alternative to traditional litigations that can be applied in a broader range of possibilities. It only requires the capability for litigants to negotiate as well as the capacity to celebrate self-composition agreements. Therefore, apart from limited cases such as agreements made by people under 18 years old, their uses are generally accepted in the whole legislative system. On the other hand, arbitration tends to be much more restrictive than mediation or even transaction. It demands the ability to sign contracts, and it is only applicable to agreements that regulate disposable rights (rights that can be either sold or donated). Consequently, the idea of disposable rights is much more restrictive; this affirmation tends to be even more stringent for the public sector, which regulates activities such

[4]Execution procedure: a procedure that provide ways to restrain goods so to provide author or defendant a way to fully satisfy its credit.

[5]https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32017L1852&from=EN.

as tax power or police power that can be neither negotiable nor transferred. For instance, parents' duties towards their children are considered to be right that might allow self-composition (disposable right) -as litigants might negotiate about when and where the child support payments shall be made -instead, it is conceived as anon-disposable right under the perspective that monthly payments shall not be dismissed so to not to harm the child's rights. There has been, consequently, a severe discussion on the use of arbitration in public contracts. Firstly, the majority doctrine has only admitted its applicability in disposable rights clauses. Apart from the doctrine divergence, the recent reform in the Brazilian public bidding laws has explicitly forecasted the use of arbitration chambers for the public sector as a way to provide international investments to Brazil's infrastructure, especially regarding that arbitration chambers tend to give a more impartial decision and within ashorter time for an eventual contract break, hence, providing higher safety to investors' capital.

According to the actual Brazilian legal disposals, arbitral chambers' uses are allowed; however, the specific sections that might conduct an eventual lawsuit related to public contract breaks must already have previously been selected by the public administration through an impartial bidding procedure which is known as an adherent clause for further public providers to attach. Nonetheless, the arbitration chambers' final decisions shall have total autonomy, not being subordinated to the public administration that had previously contracted it to conduct eventual litigious procedures regarding public contracts breaks (CASSESE, pp. 604-607).To better explain: the arbitration chambers are hired by public administration but are not subordinated to it. Furthermore, all chamber decisions must be accepted by either author or replicants, public administration, or public providers. Their final decision is then mandatory to everyone related to the contract break. The chamber shall then deliberate and decide who might have the reason and the right in the case analyzed and whose final decisions will be unnegotiable. Hence, the actual Brazilian legislative laws have even predicted the use of arbitration chambers in several public services attached to disposable rights such as public-private partnerships (ANDRADE and Oliveira, 2013, pp. 71-106; PAULSSON, 2014, p. 45-56) or public bidding procedures.

There are still some doubts about the concept of disposable rights regarding main public activities in which Rocha's (2017, pp. 1-27) studies have engaged. According to the author, disposable public rights are closely related to public administration's empire power. Consequently, whenever the public administration stands in a privileged situation concerning ordinary citizens, the arbitration procedure (as well as arbitration chambers) might not be allowed, such as taxation or misappropriation cases. Apart from the discussion posed, the public Brazilian bidding project law has forecasted arbitration in article 151.[6] The primary idea is that delegable rights are inevitably involved in every public bidding procedure that consequently allows for the use of either arbitration or arbitration chambers in the case of eventual contract breaks. As arbitration is pointed to be a faster method for further litigation solving problems, this new scenario seems to be a unique opportunity for Brazil to attract international investors, especially regarding the fact that E.U. has already predicted it within several directives that have already been incorporated into multiple E.U. members such as France, Germanor Italy as previously demonstrated. Moreover, arbitration tends to be seen by international investors as a more independent way to provide impersonal justice and within a shorter deadline. It is also essential to demonstrate that the use of arbitration can occur in two main ways: a) after the contract break– an arbitral commitment that is optional – orb) through a specific item previously forecasted in the public contract that anticipates the competence to judge eventual contract breaks (arbitral clause) to whom public providers must adhere. In this specific point, the central doctrine seems to admit arbitration chambers only in public contracts, as seen in the second hypothesis. It means that both litigants already know who might judge an eventual lack of commitment; in this case: the arbitration chamber shall then oversee it. In contrast, apart from all the alternative legislative disposals forecasted and all the previous theoretical studies demonstrated, little empirical research has engaged with the topic, which will be the next chapter's theme.

THE USE OF ALTERNATIVE CONFLICT SOLVING METHODS FOR THE COURT OF ACCOUNT OF MATO GROSSO

Among all kinds of diverse alternative litigation solving methods, The Mato Grosso Court of Account has been using mostly TAGs[7]. These agreements have the advantage that further default from either part will automatically transform it into an extrajudicial title that will authorize its immediate execution. For instance, regarding the World Cup, the contractors' default to accomplish their goals established into Tags has resulted in several fines and direct execution and constrictions of assets to fully satisfy the creditors (the municipalities, in case).[8]On the other hand, after several defaults in Cuiabá's educational department, another Tag has been signed. However, at this time, several beneficial results have been found as the mayor of Cuiaba and his secretaries have entirely fulfilled the entirely signed terms.[9]

Regarding the transparency in municipalities contracts, the recent Term of Agreements n. 36/2016 has also been fully applied by public managers from several cities to provide higher transparency in public contracts. These are just a few examples from several current alternative conflict solving methods apart that have already been used by public administration and apart from the judiciary traditional way. As shown, Tags have been primarily adopted by the Court of Mato Grosso State's account, which resulted in a faster and more effective way to satisfy public primary undisposableinterests that have already been mentioned.

Conclusion

This study demonstrates that apart from some reluctance from the jurisprudence to adopt alternative conflict solving methods in public administrative contacts, their uses, mostly in Tags

[6]Available in: www.12.senado.leg.br/noticias/materias/2020/12/09/nova-lei-das-licitacoes-esta-na-pauta-do-senado-desta-quinta-feira.

[7]TAGs: Agreement Terms of Conduct.

[8] Retrieved from: https://www.tce.mt.gov.br/conteudo/show/sid/73/cid/42644/t/Governo+n%E3o+cumpre+cronograma+definido+em+TAGs+para+retomada+das+obras+da+Copa

[9] Retrieved from: https://www.tce.mt.gov.br/conteudo/show/sid/73/cid/44192/t/TCE+julga+que+TAG+com+a+Secretaria+de+Educa%E7%E3o+de+Cuiab%E1+alcan%E7ou+resultados.

cases, have proved to provide a more effective and expedient time as to guarantee public interests. As previous examples have shown, alternative conflict solving methods have proved to be a useful alternative to the traditional congested judiciary litigation methods. That is the reason that had led the Court of Account of Mato Grosso to increase their applicability. These examples have also demonstrated that additional procedural agreements might not provide the best solution for the case, but rather the decisions that bring general resolutions for both litigants and some feasible alternative.

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