Academic-Scientific Institutional Partnership

São Paulo Law School of Fundação Getulio Vargas (DIREITO GV)

Brazilian Arbitration Committee (CBAr)

2nd Stage of the Research on "Arbitration and the Judiciary"

Theme Report: Validity, Efficiency and Existence of the Arbitration Agreement[1]

TEAM

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1. Introduction

This empirical-jurisprudential research is aimed at continuing a survey initiated in 2007 by Sao Paulo Law School of Fundação Getulio Vargas (DIREITO GV) and the Brazilian Arbitration Committee (CBAr), which presumes that the arbitration institute cannot survive without due support and endorsement from the Courts, being essential

the existence of cooperation and a coordinated relationship between arbitrators and judges.

The questions that stirred up the development of this research were: how the Brazilian Judiciary has been implementing the Federal Act no. 9307/96? Has it been providing the arbitration institute with due support?

So as to answer such questions, it was established a partnership between Sao Paulo Law School of Fundação Getulio Vargas and the Brazilian Arbitration Committee to perform the mapping of the judgments on arbitration since the law above mentioned came into force, in 1996.

The research was carried out in two phases. The **first one**, conducted between August 2007 and March 2008, had the purpose of identifying and analyzing decisions held by the Brazilian Judiciary concerning six thematic fields straightforward related to the effectiveness of the arbitration in Brazil: (i) validity, efficiency and existence of the arbitration agreement; (ii) urgent interim measures and coercive remedies; (iii) invalidity of the arbitral award; (iv) enforcement and compliance with the arbitral award; (v) specific enforcement of the arbitration agreement – lawsuit provided by the article VII of the Arbitration Act; (vi) enforcement of foreign arbitration awards.[14]

The mapping of the decisions, which focused on the electronic jurisprudence databases of the Brazilian State Courts of Appeals (TJs), [15] Federal Regional Courts (TRFs) and Supreme Courts (STJ and STF), had as initial term the date on which the Arbitration Act came into force (November 11, 1996), and February of 2008 as its final term, excepting the Sao Paulo Court of Appeal, whose research database was updated up to December 2007.[16]

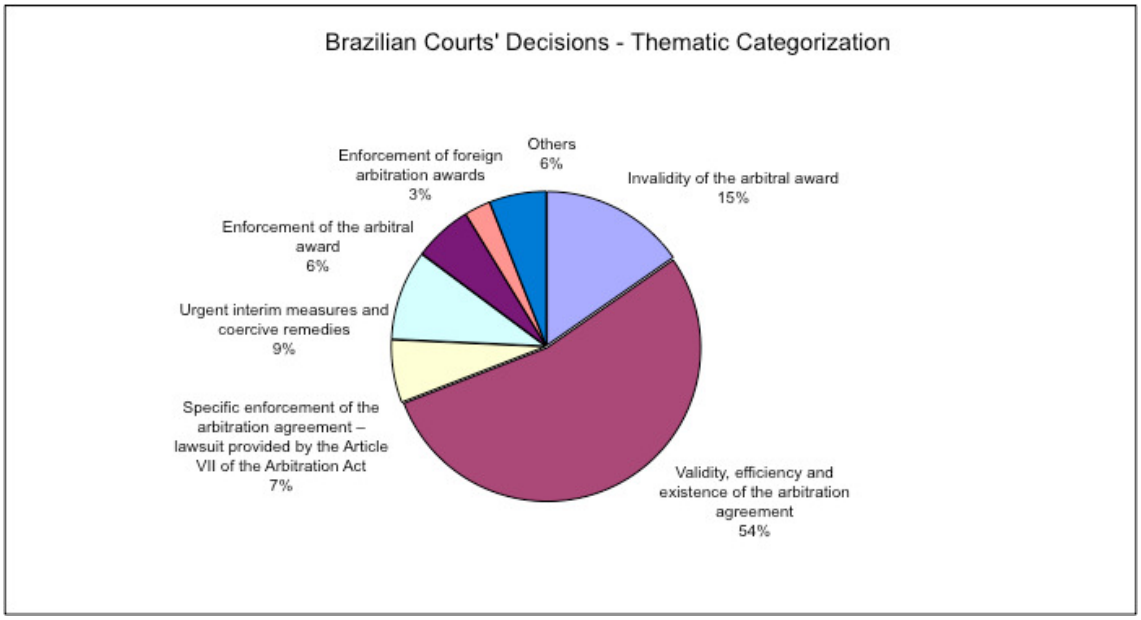
The labor Courts of Appeals were excluded, due to the large amount of sentences that exist within this context and whose gathering and analysis would jeopardize the schedule of the research. Likewise, the arbitration proceedings regulated by the articles 24, 25 and 26 of the Brazilian Federal Law no. 9099/95 (The Claim Courts) were not included in the research, as well as the cases involving surveys on the Brazilian Employee's Dismissal Fund (the so-called FGTS), found mainly in the Brazilian Superior Tribunal of Justice, as well as in the Regional Federal Courts.

As a result, **790 Brazilian court decisions** have been analyzed and tabulated within the research database, distributed as follows: 54% deal with issues concerning the validity, efficiency and the existence of the arbitration agreement; 15% with the invalidity of the arbitral award; 9% with the so-called urgent interim measures (*tutelas de urgência*); 7% cope with lawsuits of the Article VII of the Arbitration Law; 6% with the enforcement of the arbitral award; 3% with the enforcement of foreign arbitral awards; and 6% deal with other cases (remnant category from cases which did not conform to the prior thematic groupings).

[14] Report published in the *Revista Brasileira de Arbitragem (Brazilian Journal of Arbitration)*, year IV, no. 19, IOB, jul./ aug./sept. 2008, p. 07-23.

[15] With the exception only of Piauí Court of Appeal, which at the time of the research did not make available the content of its decisions on the Internet database.

[16] Most Courts have search tools that allow delimiting the period of the research in the electronic database. The ones that do not have that search tool had the temporal delimitation done later in the research.

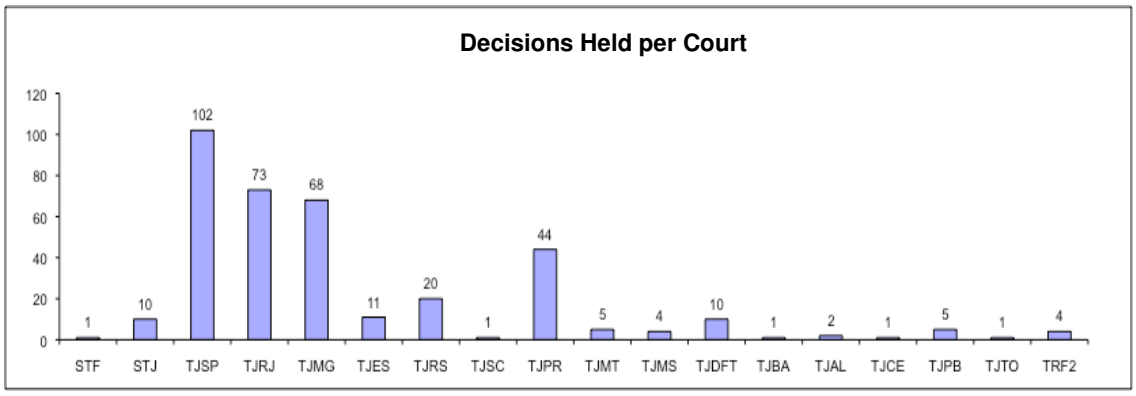


In the **second phase**, initiated in March 2008, the decisions started to be deeply studied, so as to verify how the arbitration law provisions have been implemented within each thematic group. The first group chosen was the nullity of the award, whose report was concluded in June 2009.[17]

The other themes were analyzed between August 2009 and January 2010. Among them is the one regarding the validity, efficiency and existence of the arbitration agreement, whose court decisions were deeply analyzed by the Team composed of the authors of this report.

From the 790 decisions considered by the research, 54% (i.e. 426 decisions) deal with the validity, efficiency and existence of the arbitration agreement. The decisions rendered by the Goiás Court of Appeal (TJGO) were excluded from this group, due to the differentiated arbitral proceeding used by this Court, as already detailed in the report of the first phase of the research, and the decisions held by the Pernambuco Court of Appeal (TJPE), were not available on the Court´s online search system during the accomplishment of the second phase of the research. With the withdrawal of the judgments from TJGO and TJPE, 363 decisions remained, distributed as follows:

[17] Report published in *Revista Brasileira de Arbitragem (Brazilian Journal of Arbitration)*, year V, no. 22, IOB, Apr. /May/Jun. 2009, p. 7-77.



As it is possible to notice in the chart above, the greatest amount of decisions on validity, effectiveness and existence of the arbitration agreement is concentrated on the courts from the Southeast region (TJSP, TJRJ and TJMG), drawing attention to the South area as well (TJPR and TJRS).

From these very decisions, there were also some exclusions – 31 court decisions were excluded in the gross, as justified below:

- Eleven decisions held by TJES were excluded, since only digests were available at the search gadget of the court at issue. Thus, the more detailed analysis required by this second phase of the research was made unfeasible, since it considered the entire content of the decisions.[18]

- For the same reasons pointed out above, nine decisions held by the courts from the Brazilian Northeast region were left out, in view of the impossibility of finding the entire content of the decisions through the search gadgets. The following were excluded: TJCE (one decision),[19] TJAL (two decisions),[20] TLBA (one decision),[21] and TJPB (five decisions).[22]

- Some judgments were inaccessible on the system, either because they were in camera proceedings, or due to technical problems in the search gadget. They are the following: TJRJ – AI 2002.002.08032 and Civil Appellate Review no. 200500142655; TJPR – Civil Appellate Review no. 92466-3; and TJMG – Civil Appellate Review no. 254.852-9.

- Lastly four judgments were excluded for thematic reasons, not being, thus, taken into account in the research. One of them dealt with labor litigation (TJMG - AI 2.0000.00.392013-8/000), while the others coped with arbitration in The Small Claim Courts (TJRS – Innominate Appeal no. 71000696021, Innominate Appeal no. 71000629659 and Innominate Appeal no. 71000519686).

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[18] Civil Appellate Review no. 024.05.901414-2; EDcl. 024.05.901414-2; AI 048.06.900075-9; EDcl. 048.06.900075-9; Civil Appellate Review no. 024.03.021830-9; Civil Appellate Review no. 027.98.900009-9; Civil Appellate Review no. 027.98.900010-7; Civil Appellate Review no. 027.98.900011-5; Civil Appellate Review no. 027.98.900012-3; Civil Appellate Review no. 024.03.900369-4; EDcl. 048.06.900128-6.

[19] AI 2006.0018.2930-0/0.

[20] AI 2005.000202-3 and Emb. Decl. 2005.000202-3/000.

[21] AI 2.217-1/00.

[22] Civil Appellate Review no. 20030140805, Civil Appellate Review no. 20030140830, Civil Appellate Review no. 20020079251, Civil Appellate Review no. 19980027553, Civil Appellate Review no. 20030063673.

- Finally, the following judgments were transferred to other thematic groups of the research, being left out of that group concerning validity, effectiveness and existence of the arbitration agreement.

TJRJ – Civil Appellate Review no. 2005.001.16199 – transferred to the "implementation of award" group.

TJRJ – Civil Appellate Review no. 200700102362 – transferred to the group named "others".

TJRJ – Civil Appellate Review no. 2002.001.02940 – transferred to the group labeled "actions of the article VII".

On the other hand, a judgment was included in this group, having been transferred from the thematic group called "others" to the group named "validity, effectiveness and existence of the arbitration agreement" – Federal Regional Court (TRF) second region, AI 2003.01.008906-5-1, Fifth Specialized Panel of Judges, judgment: September 14, 2005.

Thus, bearing in mind these deletions and additions (as well as the cases of connection, in which the same judgment would decide more than one appeal), the **330 court decisions** that were examined along this research about validity, effectiveness and existence of the arbitration agreement will be analyzed.[23]

The research was carried out with the purpose of obtaining a result close to the effective experience undergone by the cooperation between arbitrators and judges, fetching a detailed analysis of the judgments which deal with the arbitration agreement theme in Brazilian Courts.

Taking into account that the fundamental source of knowledge is the one provided by the knowledge generated by empirical experience,[24] this empirical survey was based on a concrete examination of the legal decisions which run upon the validity, effectiveness and existence of the arbitration agreement in a period of time greater than ten years, so as to assess the effectiveness of those regulatory principles of the Arbitration Law concerning the arbitration agreement.

Once established by the will of the parties – whether through pre-dispute arbitration clause or post-dispute submission to arbitration – that the dispute will be solved by means of arbitration, such an act has the ability to keep the Judiciary away from the appreciation of the matter, as a consequence of the binding effect of the arbitration agreement.

[23] There were also hypothesis in which a same case belonged to more than one thematic group of research. Such a fact occurred, in this Arbitration Agreement group, relative to the group concerning immediate remedy in the decisions of TJSP (AI 482.719-4/2-00**,** AI 460.034-4/5-00 and EDcl 460.034-4/5-01) and TJPR **(**AI 0145895-3, AI 0149555-0, MC Inominada 160213-7, MS 0161371-8, Civil Appellate Review no. 0170132-0, AI 0162874-8).

[24] REALE, Miguel. *Introdução à filosofia*. 4. ed. São Paulo: Saraiva, 2004, p. 73.

As a result, at the very moment in which the arbitration agreement is settled, the latter acquires the so-called negative effect, whereby the disputes that arose between the parties in that contractual relationship must be resolved exclusively by arbitration.

Bearing these premises in mind, the research that has been presently carried out is an efficient means to verify the controlling prerogative of the Judiciary and its important role of ensuring the effectiveness of the arbitration agreement.

In view of the negative effect of the arbitration agreement, once the parties rely on the Judiciary, they request – provided that such a norm is socially effective – the predominance of the mutual manifestation of assent expressed in contractual terms, capable of keeping the State jurisdiction away in order to decide the dispute that has arisen.

Something which could be verified by the research – anticipating the conclusion – is that the Arbitration Law unquestionably benefits from full effectiveness, because – disregarding the mishaps that are normal in the ripening process of a new law brought to the country – there is an undeniable communion between the legal order and the judicial decision, prevailing the virtuous circle between the judicial and arbitral fields, and an ethos of cooperation between arbitrators and judges.

2. Research Methodology

2.1. Development of Judicial Decision Reading Cards

A research group was formed to accomplish the analysis of these 330 decisions. The group had meetings fortnightly, between August 6 and December 7, 2009, so as to discuss the decisions from the reading card model designed to be filled in based on the entire content of court decisions. Each researcher filled in an average of 10 reading cards per meeting, bringing them to the collective debate of possible doubts and more complex cases during face-to-face meetings.

This reading card model – collectively designed by the group and enhanced over the meetings – brings in itself the criteria used to carry on a scrutiny of the cases judged by the Judiciary on validity, effectiveness and existence of the Arbitration agreement.

READING CARD OF THE ENTIRE CONTENT OF THE COURT DECISIONS

Researcher:

Court: **Panel of Judges:**

Parties:

2nd Instance

1st Instance

Proceeding Category:

Legal Proceeding no.:

Date of the Judgment:

Value of Matter in Dispute:

Institutional or ad hoc Arbitration?

Digest

Thematic subgroup

1. Brief summary of the case

2. Central themes of the decision (see illustrative list of themes attached)

3. How the issue was conducted and/or addressed by the Judiciary

a) **Was there an incidental action or claim for recognizing the invalidity, inefficacy or inexistence of the arbitration agreement?**

b) **Was the agreement ignored by the author – but raised in defense by the defendant – with a claim for dismissal without prejudice?**

4. Decision and Motivation

a) **Was there a dismissal without prejudice? On what basis?[25] Was it a request from the party or ex officio by the judge?**

b) **Were only procedural issues (procedural assumptions, for example) analyzed? Or were topics related to arbitration also addressed?**

c) **Technical implementation of the Arbitration Law:**

- **Was the arbitrators' jurisdiction for the analysis of the arbitration agreement validity respected?**
- **Were there any vices of consent of the parties detected by the Judiciary?**
- **Taking into consideration the case of the adhesion contract, were the rules due to the Arbitration Law respected (Article IV, Section 2)?**

d) **Was there any positioning change in relation to the decision held in first instance?**

e) **Which were the law articles mentioned?**

f) **Was there any claim for immediate remedy?**

5. Technical concepts used by the decision

a) **Difference between pre-dispute arbitration clause and post-dispute submission to arbitration.**

b) **Arbitration clauses with and without specifications to establish the arbitration.**

c) **Subjective and objective limits of the arbitration agreement.**

d) **Was it possible to identify in the demand if the case refers to pre-dispute arbitration clause or post-dispute submission to arbitration? In case of being a clause, has the latter provided the elements to institute the arbitration?**

6. Relationship between demands

Taking into account the reading of the whole content, is there the possibility of pointing out the existence of more than one decision in the same case, related to the same or other thematic fields (validity, effectiveness and existence of the arbitration agreement / nullity

[25] Here the response may be based on the article 267, VII of the Code of Civil Procedure, or even in the absence of conditions of action (right of action, case of action).

of the judgment / action of the article VII / immediate remedy / implementation of the award / homologation of foreign arbitration award).

7. Comments (free space devoted to the researcher and workgroup's comments).

The research group determined that the question inserted in item 3 of the reading card should contain only one positive response, apart from a few exceptions collectively defined:

a. 1st exception – cases of double negative response – dismissal without prejudice ex officio by the judge. This remark must be placed in question 4 (A).

b. 2nd exception – cases of double negative response – the defendant does not argue about the validity of the arbitration agreement, but claims the execution be suspended in the light of a prejudicial matter in arbitration. This remark must be placed in question 3 (B).

c. 3rd exception – cases of double negative response – neither the author's claim nor the defendant's defense give rise to the arbitration agreement, but the judge ex officio recognizes this existence and the impossibility of abatement of action considering the absence of any allegation from the parties.

d. 4th exception – cases of double negative response – there was a claim requesting the existence of the arbitration cause be recognized (not of its invalidity, inefficiency or inexistence), aiming at obtaining the declaration of avoidance of credit instrument promoted by the defendant, under the argument that the controversy should be solved through arbitration proceedings.

2.2. Creation of Thematic Subgroups

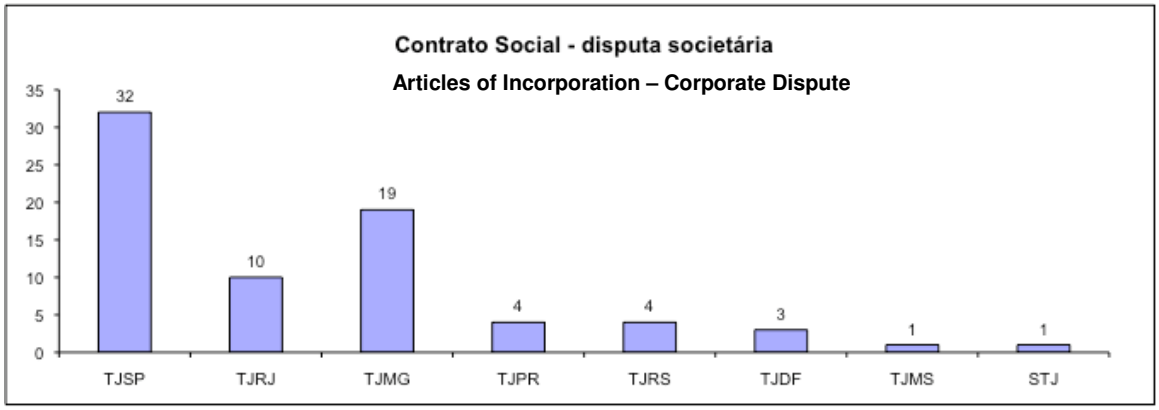
In order to handle a large amount of decisions, the research group decided to divide them into specific thematic subgroups, associated to the contractual theme of the decision, task which was carried out from the second face-to-face meeting on.

During each meeting, after reading the decisions and filling in the reading cards, the research group suggested new thematic subgroups be created. At last, 21 thematic subgroups were established, being one of them residual (called "Others").

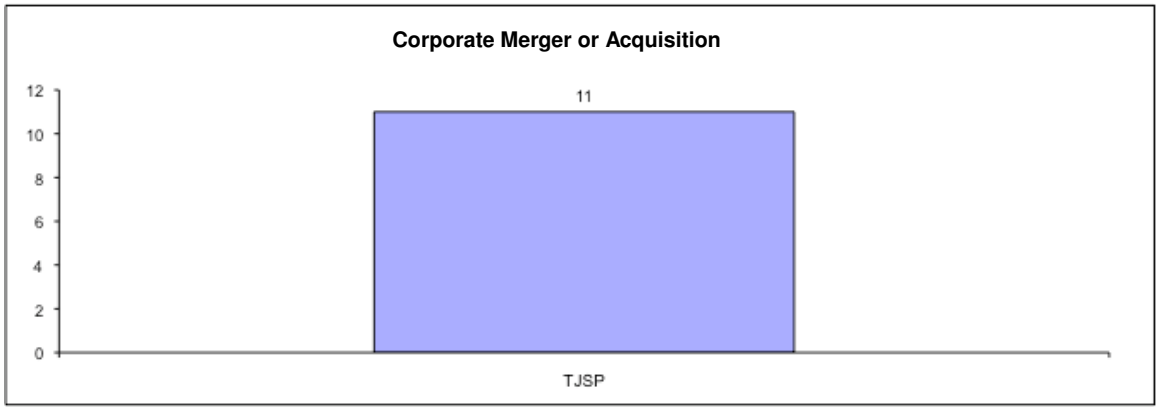
The subgroup "Others" was composed by all judgments in which the subject discussed appeared only once and was not erected to the level of an autonomous subgroup, as well as the judgments in which it was not possible to identify the subject and/or the matter in issue in the contract disputed between the parties involved, such as the judgments that deal only with procedural matters.

Thus, the decisions held by all the Courts examined by the research were distributed in the following thematic subgroups, graphically represented bellow. All the figures related to the appeals are detailed in the appendix 6.1 of this report.

2.2.1. Articles of Incorporation – Corporate Dispute

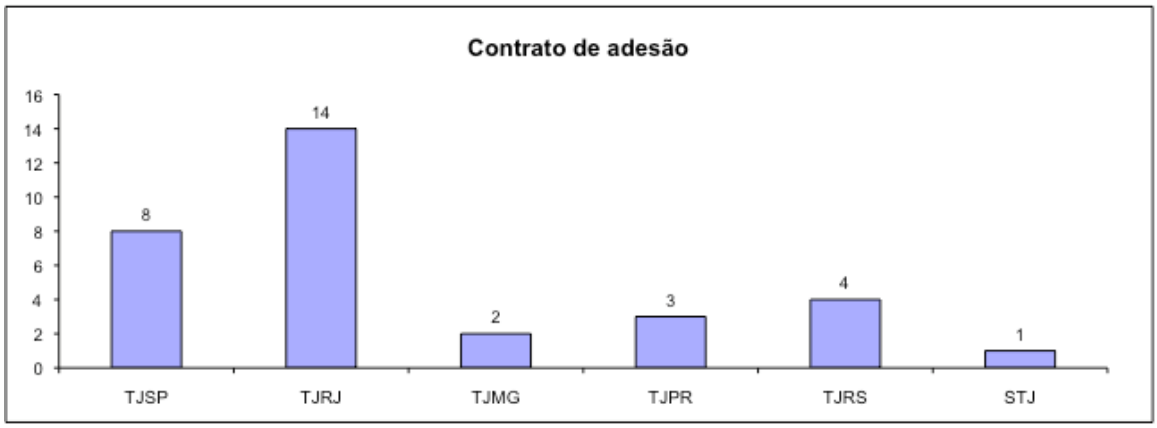


2.2.2. Corporate Merger or Acquisition

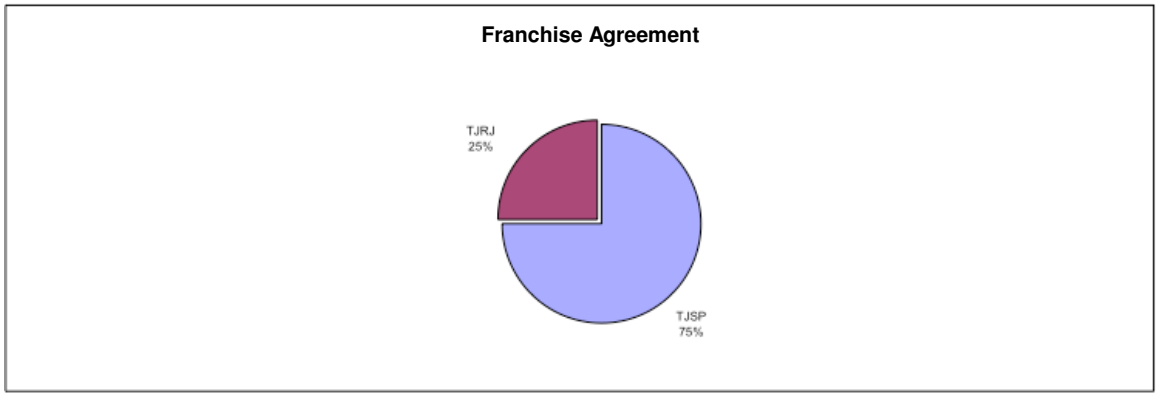


2.2.3. Adhesion Contract

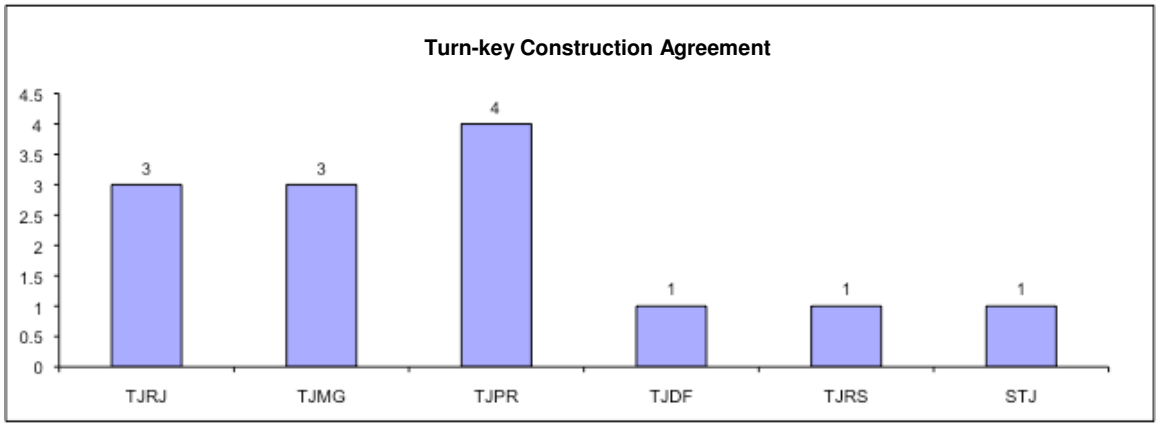
Adhesion Contract



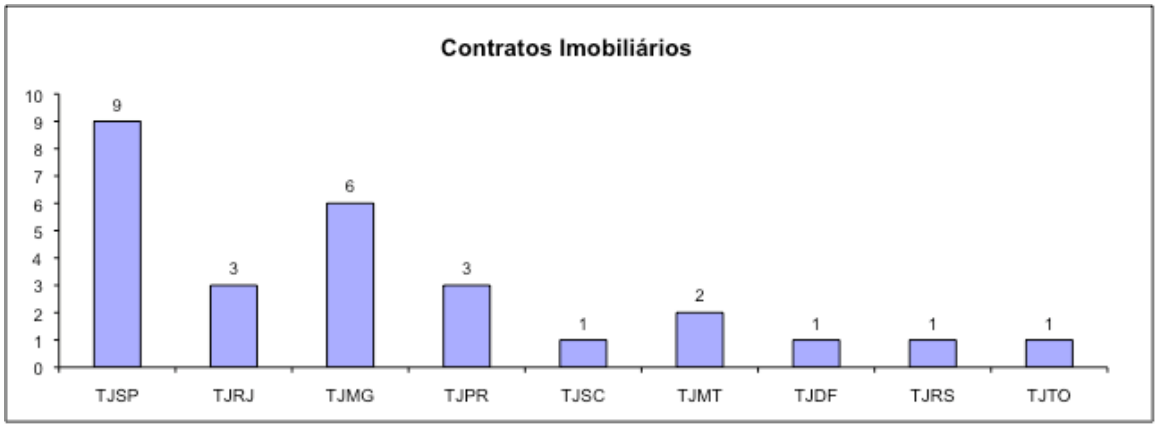
2.2.4. Franchise Agreement



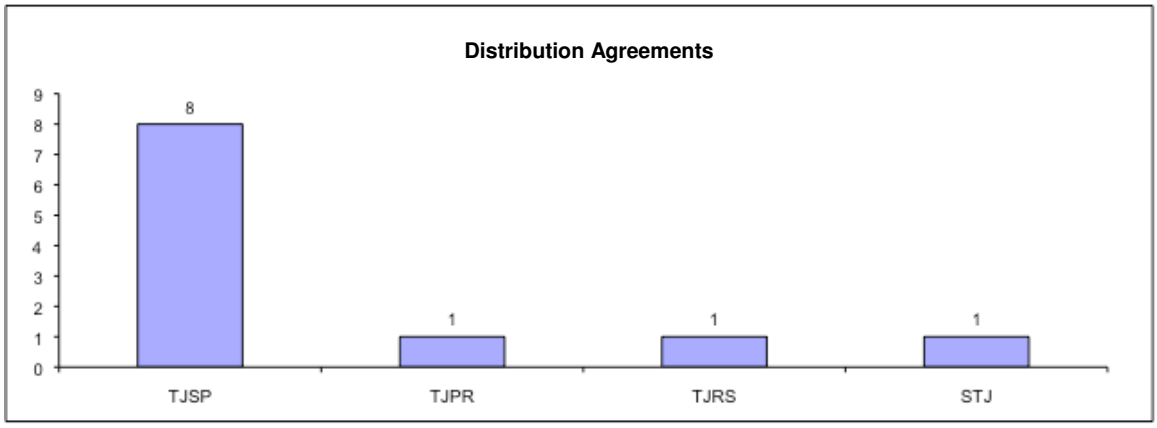
2.2.5. Turn-key Construction Agreement



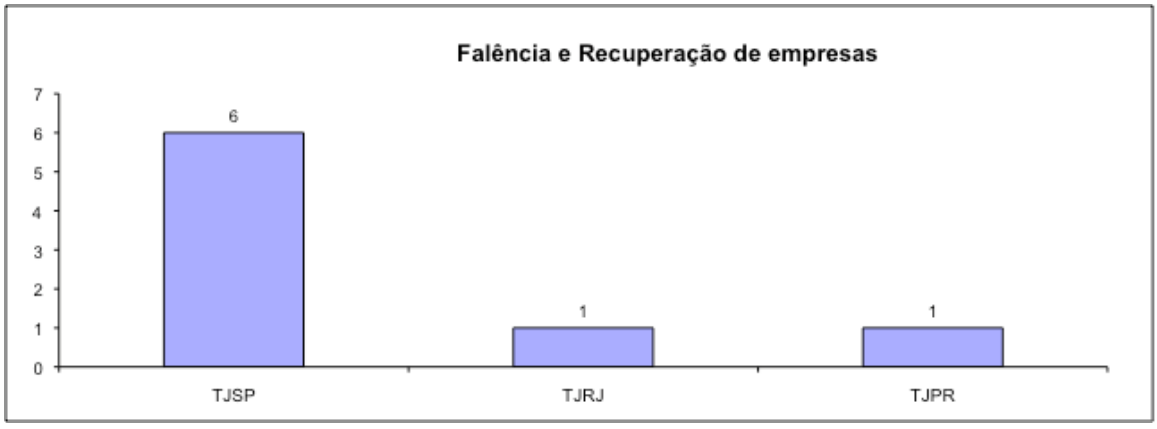
2.2.6. Real Estate Contracts



2.2.7. Distribution Agreements



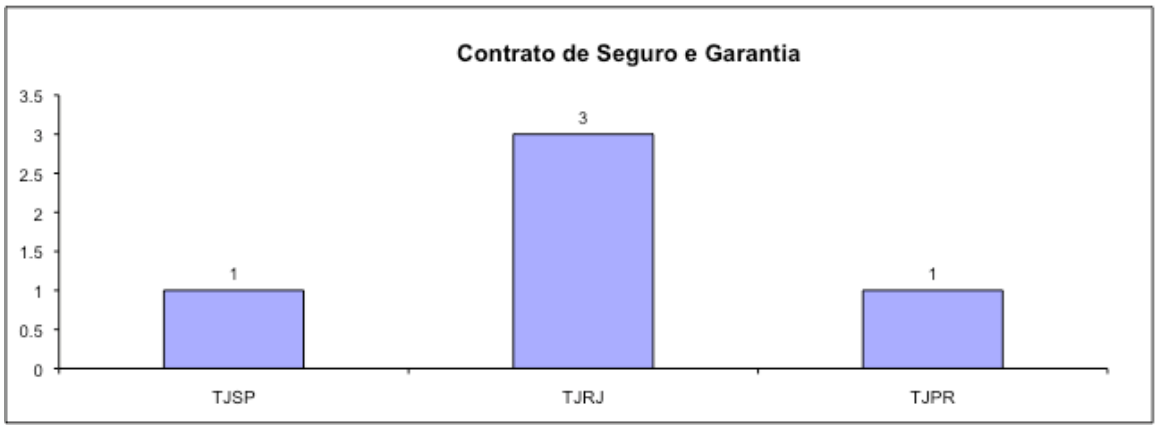
2.2.8. Bankruptcy and Recovery of Companies



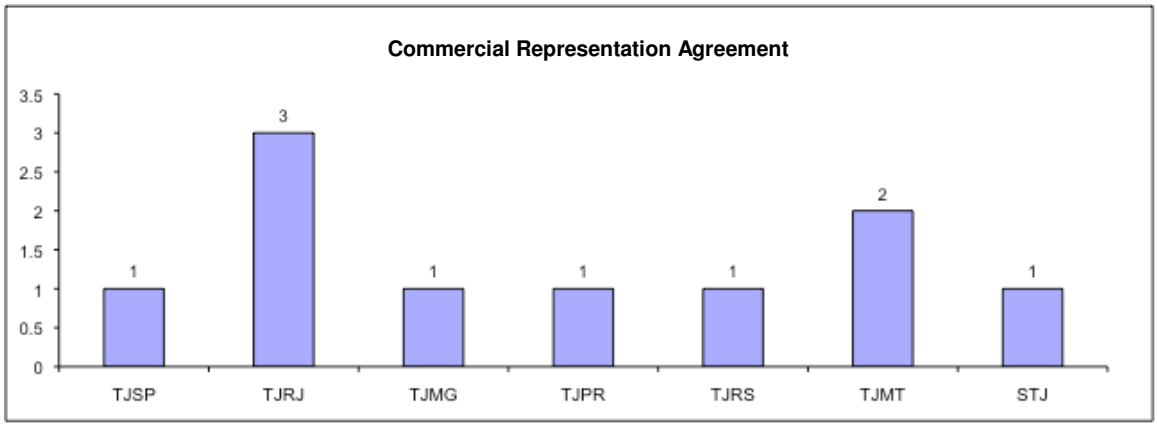
Bankruptcy and Recovery of Companies

2.2.9. Insurance Contract and Guarantee

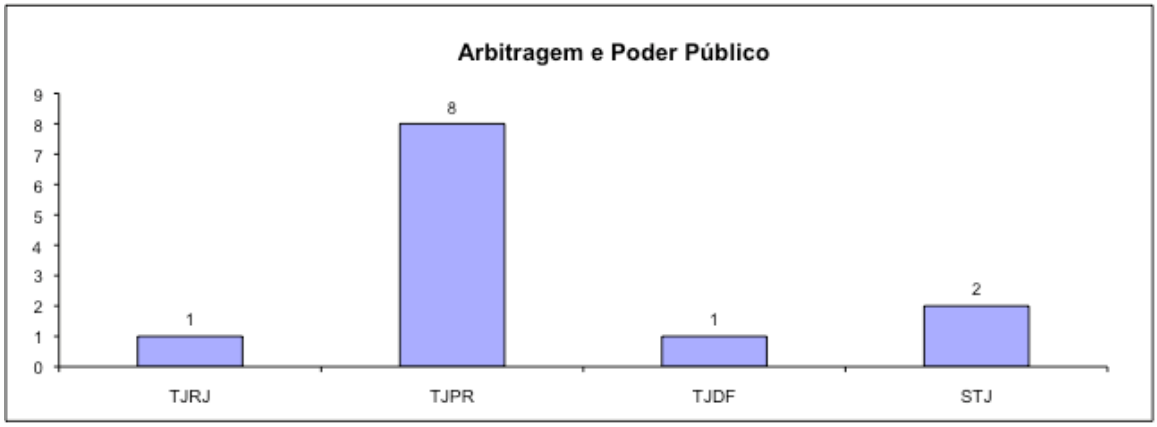
Insurance Contract and Guarantee



2.2.10. Commercial Representation Agreement



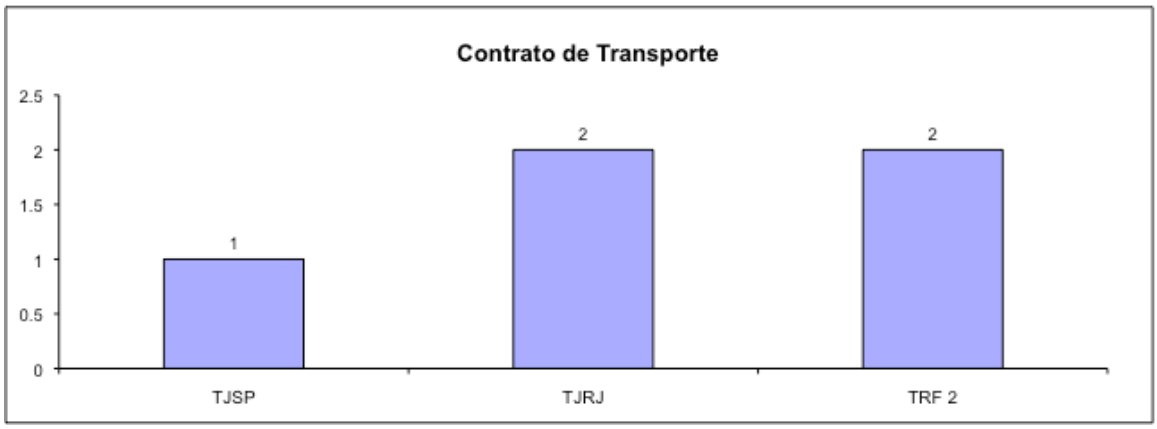
2.2.11. Arbitration and Public Power



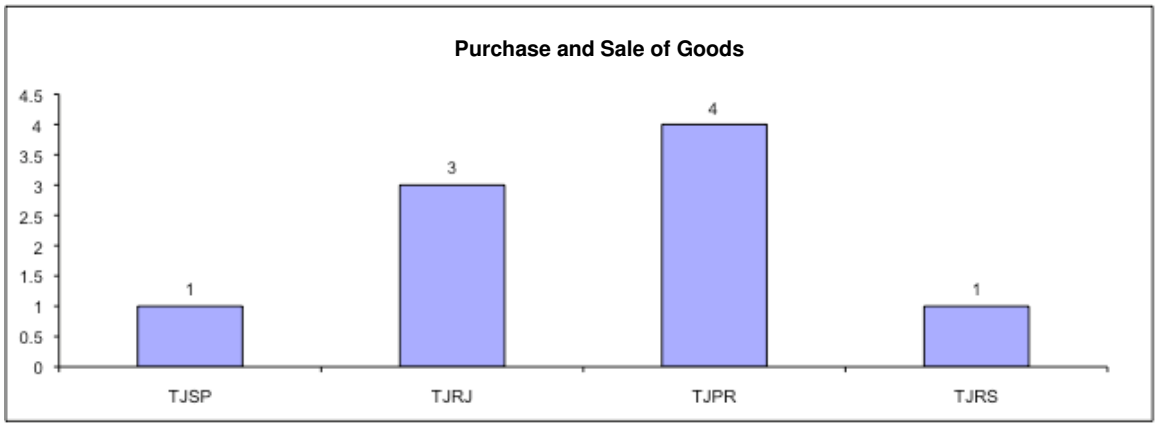
Arbitration and Public Power

2.2.12. Transport Contract

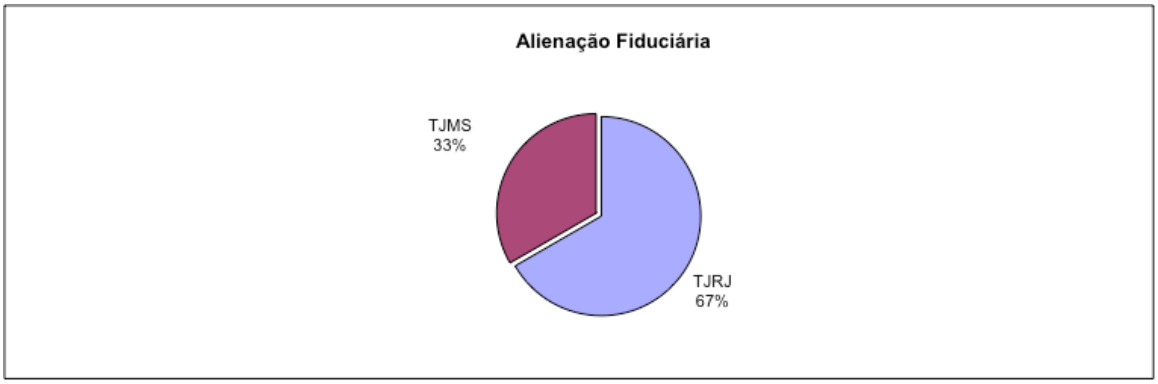
Transport Contract



2.2.13. Purchase and Sale of Goods



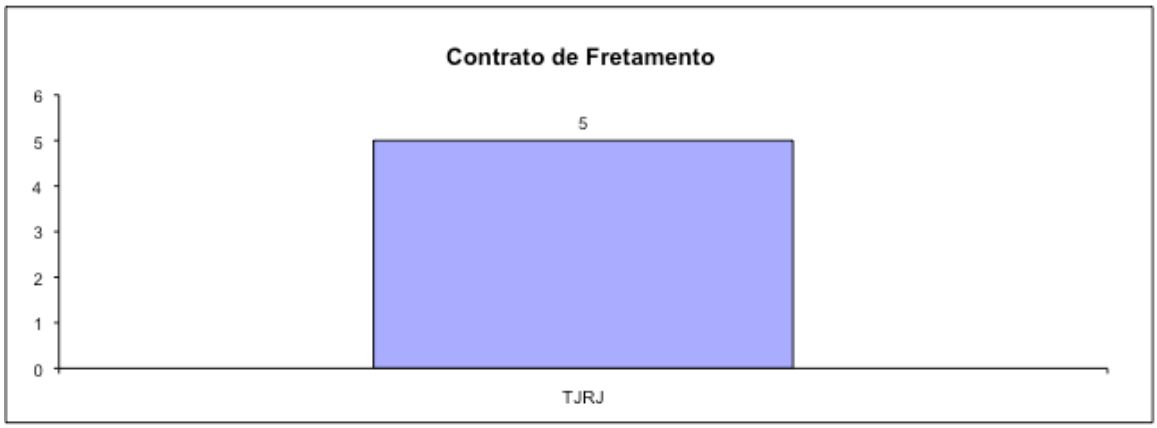
2.2.14. Chattel Mortgage



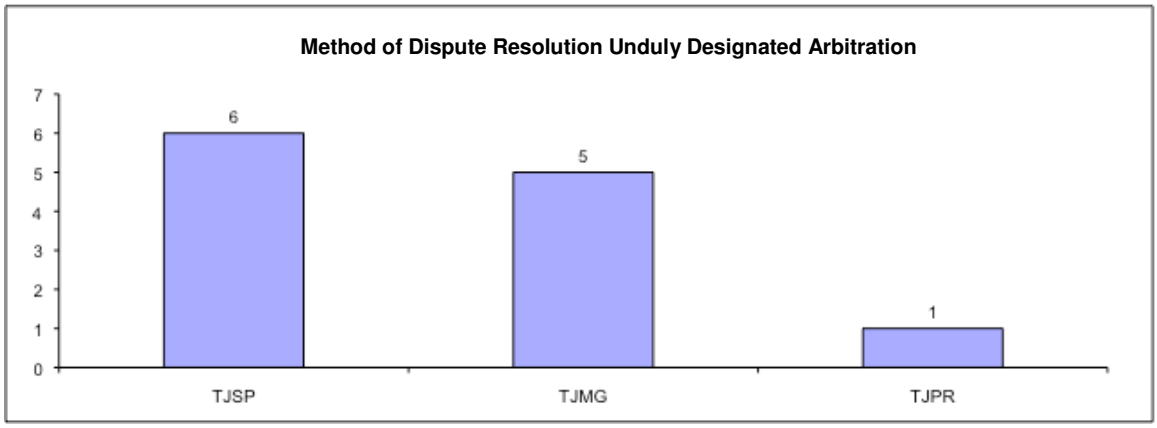
Chattel Mortgage

2.2.15. Charter Party

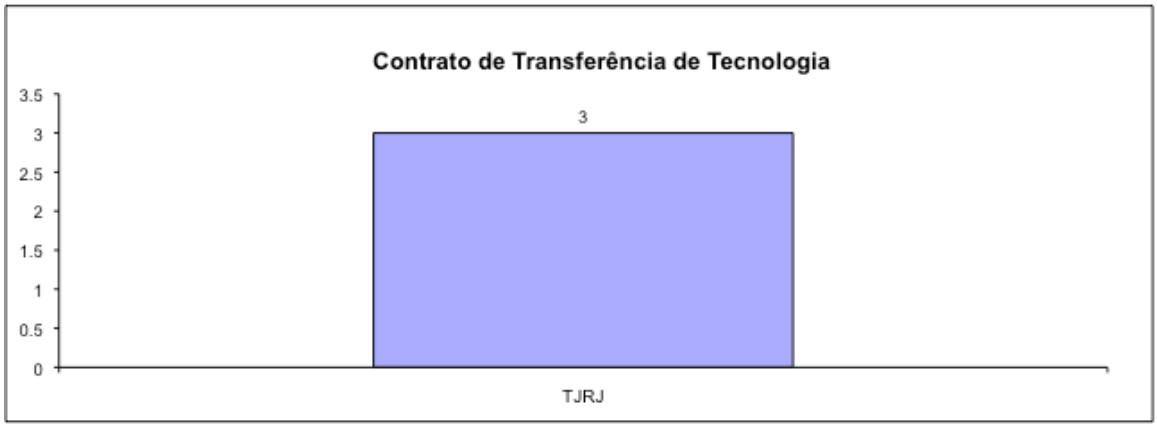
Charter Party



2.2.16. Method of Dispute Resolution Unduly Designated Arbitration

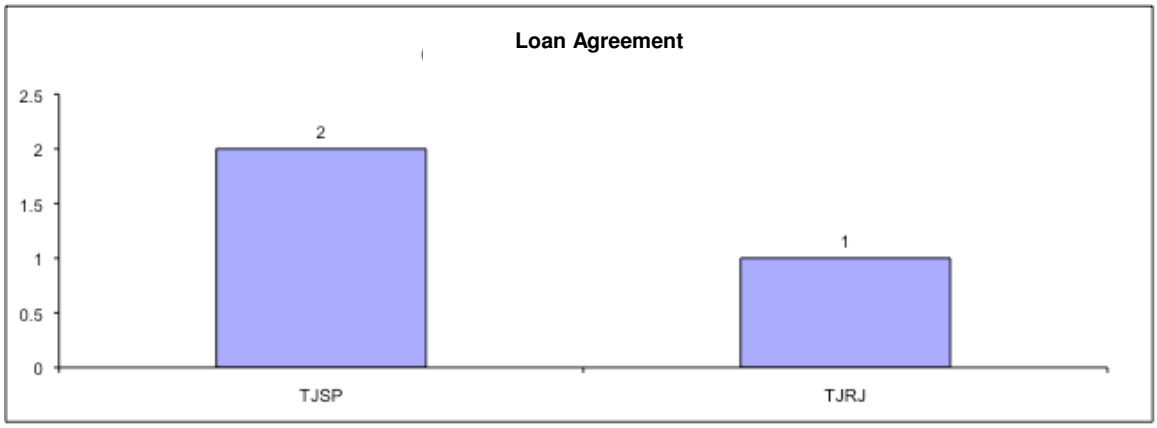


2.2.17. Technology Transfer Agreement

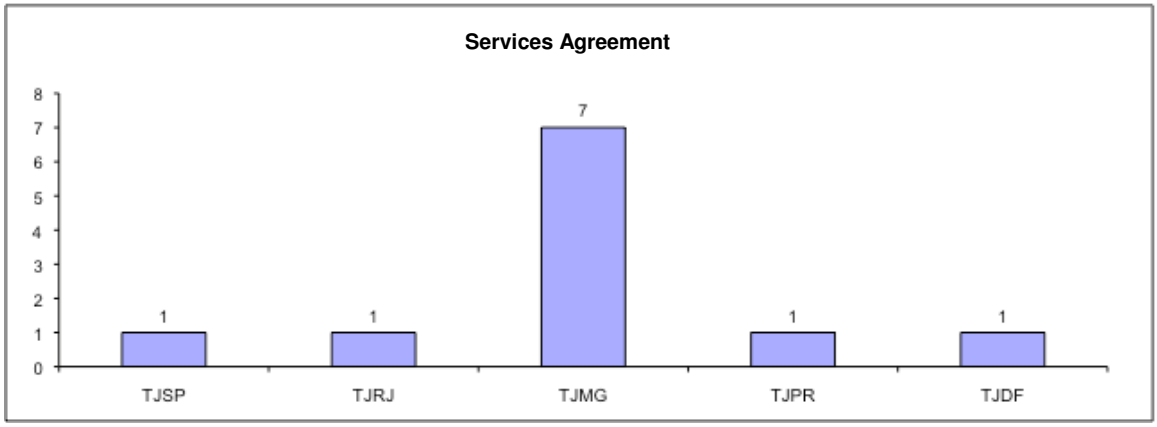


Technology Transfer Agreement

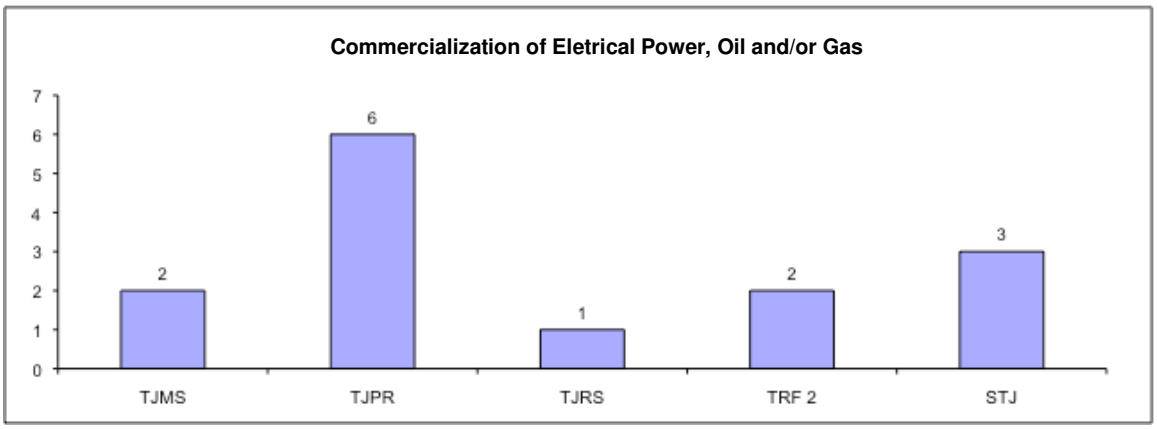
2.2.18. Loan Agreement


Loan Agreement
2.5
2
1.5
1
0.5
0
2
1
TJSP
TJRJ

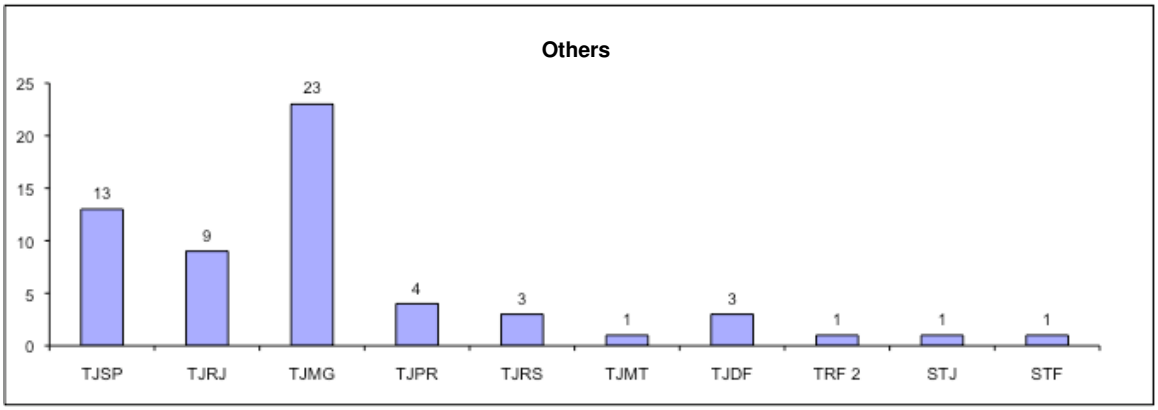
2.2.19. Services Agreement



2.2.20. Commercialization of Eletrical Power, Oil and/or Gas



2.2.21. Others



The subgroup 'Others', for instance, is composed by the following themes: arbitration and stock market, indemnity claims, arbitration and farmer's cooperative, atypical commercial contracts, indemnity for traffic accident, indemnity claim against the Board of Arbitration for irregularity, collection suit, assignment of radiophonic fees

agreement, arbitration clause inserted in Brazilian bank credit instrument, agricultural partnership agreement, consortium agreement, assignment of credit instrument, cotton purchase agreement in Commodities and Futures Exchange, forward supply contract, authorized agent agreement, among other themes of substantive and procedural law specified in the appendix 1 of this report.

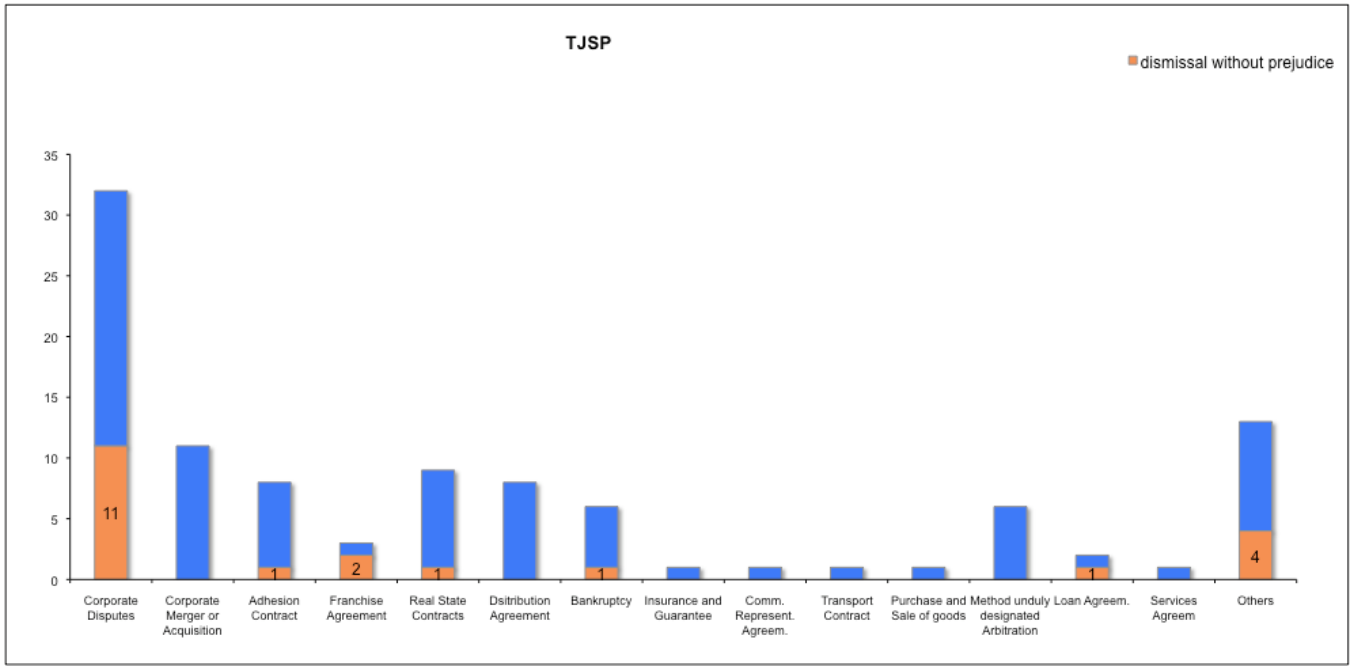
There are some cases of overlap between thematic subgroups, as could be noticed between the subgroups about adhesion contracts and real estate contracts, and between the subgroups about arbitration, public power and commercialization of electrical power. When there were blurred areas between these subgroups, the decisions were categorized in accordance with the predominant discussion identified throughout the reading of the entire content of the court decision.

3. Quantitative Analysis of the Decisions Held per Court

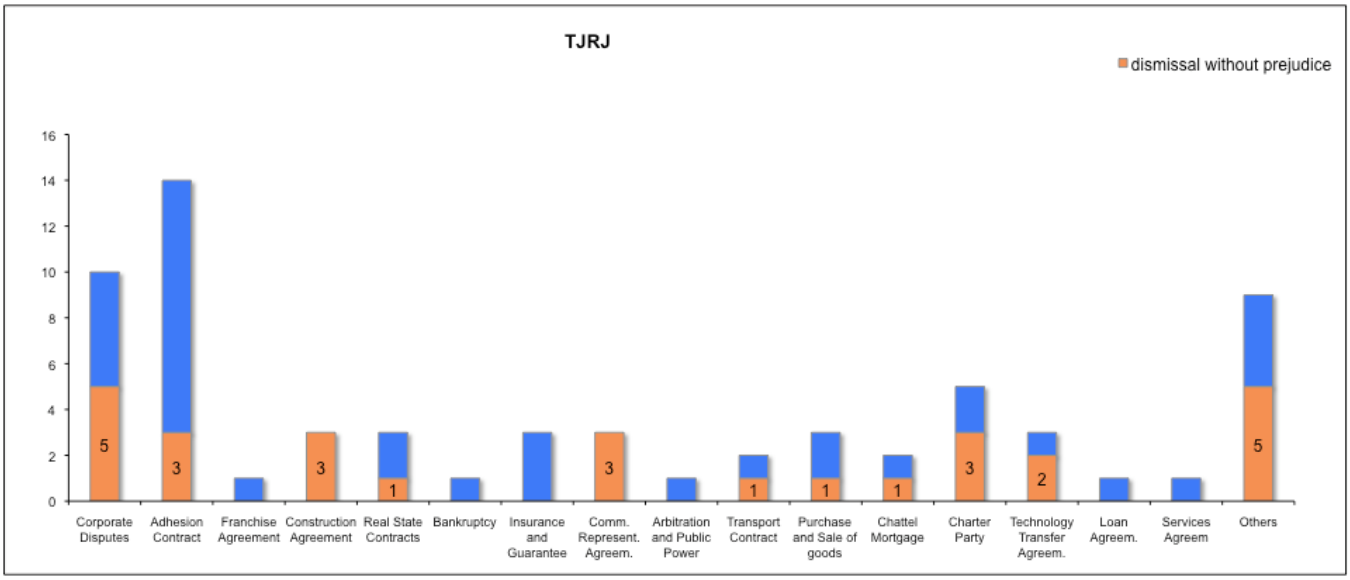
Below, the decisions of each subgroup will be arranged per Court, with the separation of those cases in which there was dismissal without prejudice in second instance, by means of the article 267, VII of the Code of Civil Procedure.

Having occurred the abatement of action in first instance and the reversal of judgment by the Court, this information was included in the reading card in the area devoted to *related themes*, such as *negative effect of the arbitration agreement*.

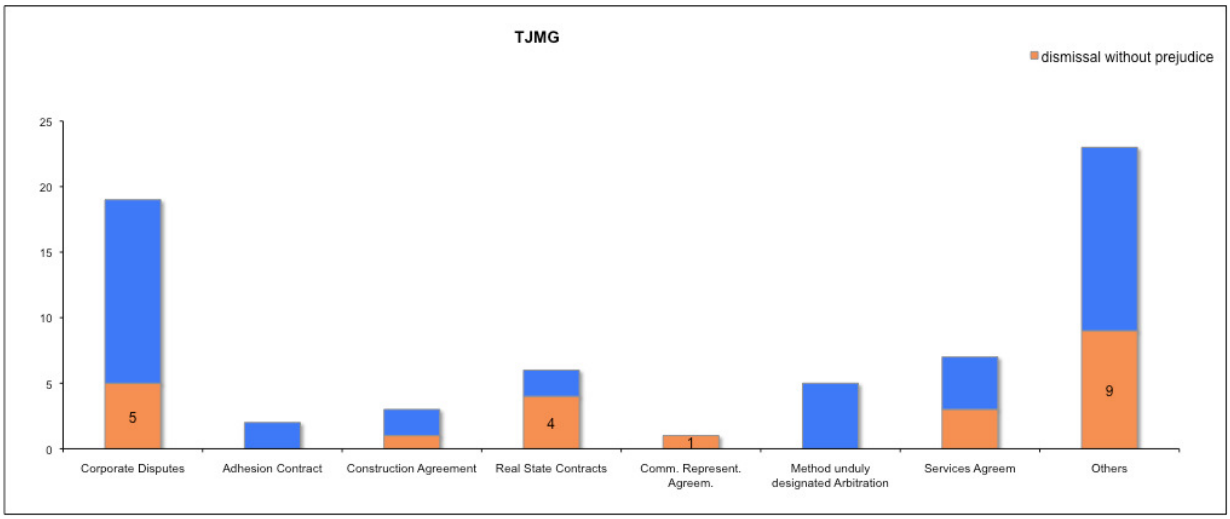
3.1 São Paulo Court of Appeal (TJSP)



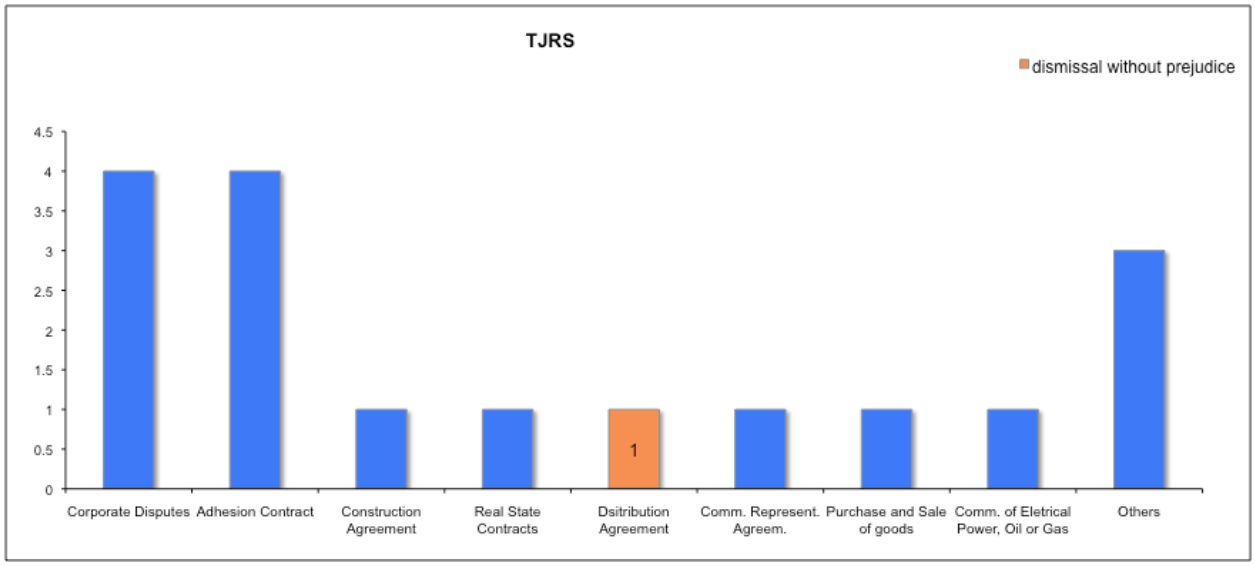
3.2 Rio de Janeiro Court of Appeal (TJRJ)



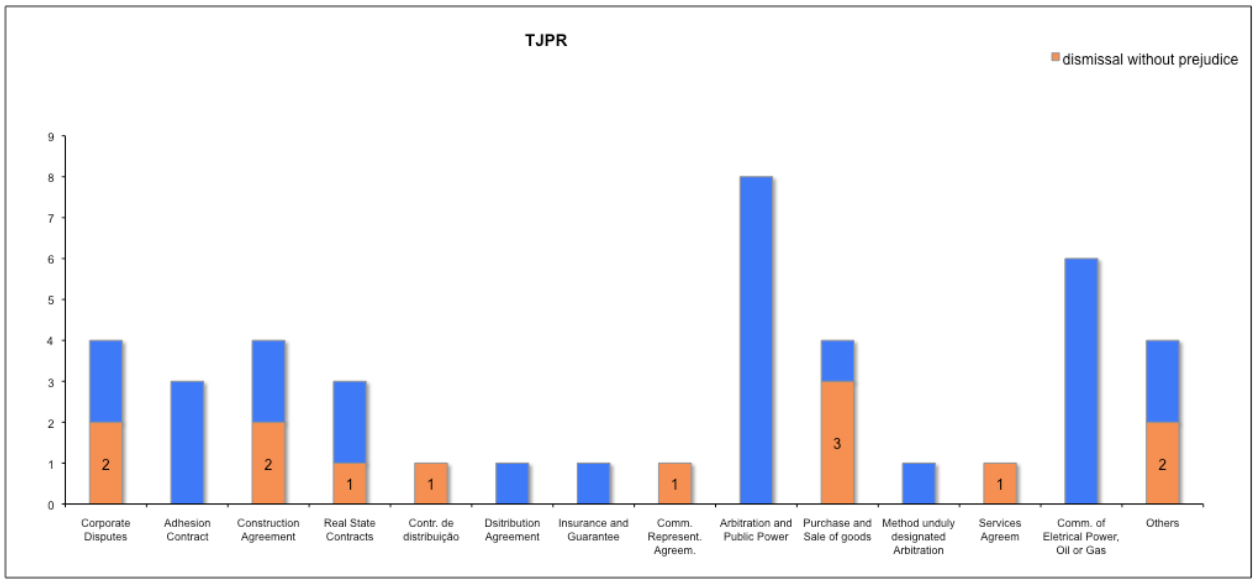
3.3 Minas Gerais Court of Appeal (TJMG)



3.4 Rio Grande do Sul Court of Appeal (TJRS)



3.5 Parana Court of Appeal (TJPR)

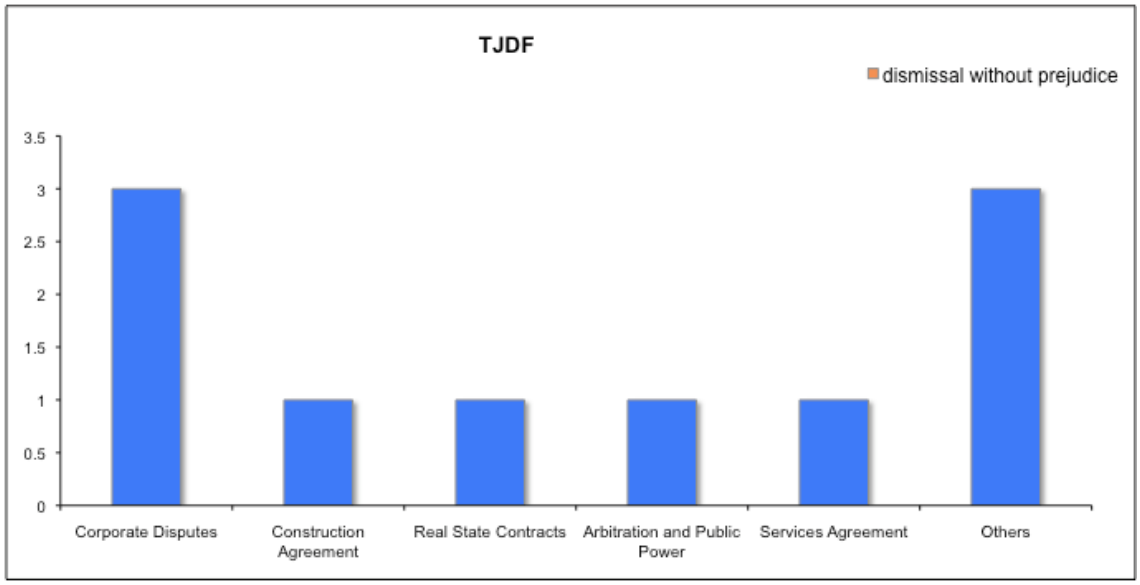


3.6. Santa Catarina Court of Appeal (TJSC)

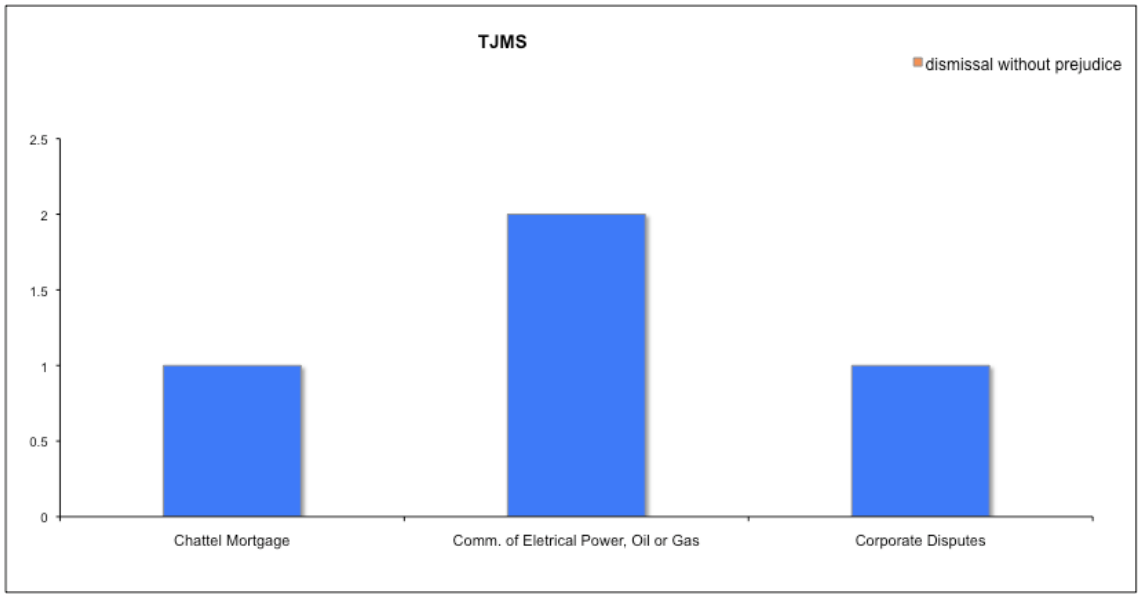
Only one judgment in the research database was related to the lease contract (Civil Appellation Review no. 2006.012949-4). The defendants requested the abatement of action in first instance, due to the existence of the arbitration clause, and on the grounds of action they refuted the plaintiff's allegations. The request for abatement of action was dismissed and the lawsuit was upheld. On the appeal the defendants reiterated the claim for abatement of action, which was acknowledged by the Court of Justice to accept the appeal, dismissing without prejudice, pursuant to article 267, VII of the Code of Civil Procedure.

The decision is succinct and well-reasoned, and the rapporteur even quotes the decision held by the Supreme Court (STF) plenary sitting in the case of constitutionality of SE 5.206-7-Espanha, repelling any questioning on the constitutionality of the Arbitration Law.

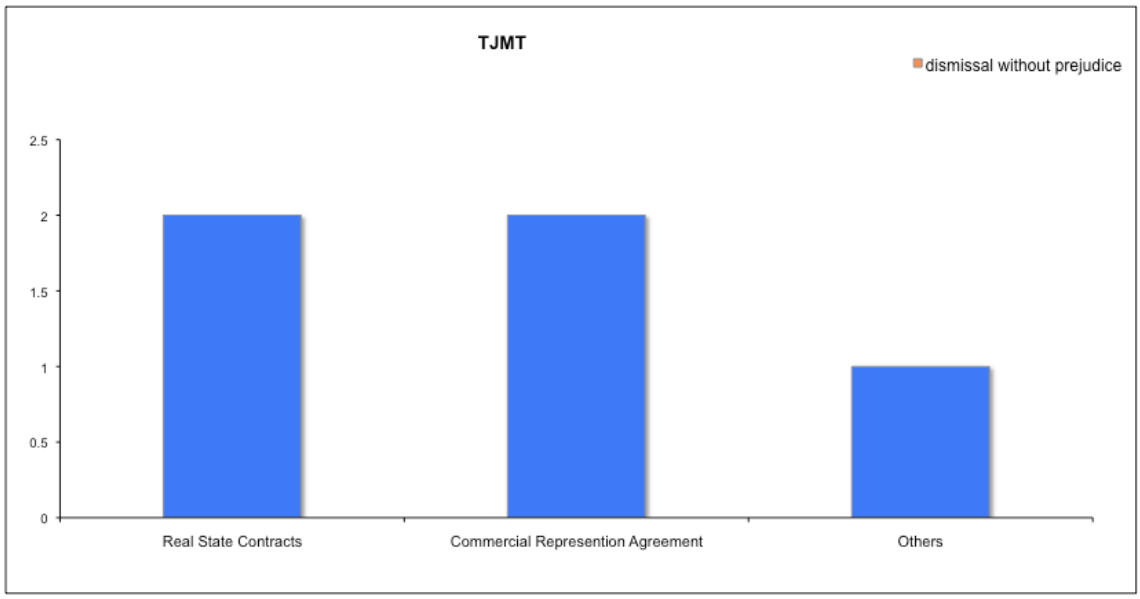
3.7. Distrito Federal Court of Appeal (TJDF)



3.8. Mato Grosso do Sul (TJMS)



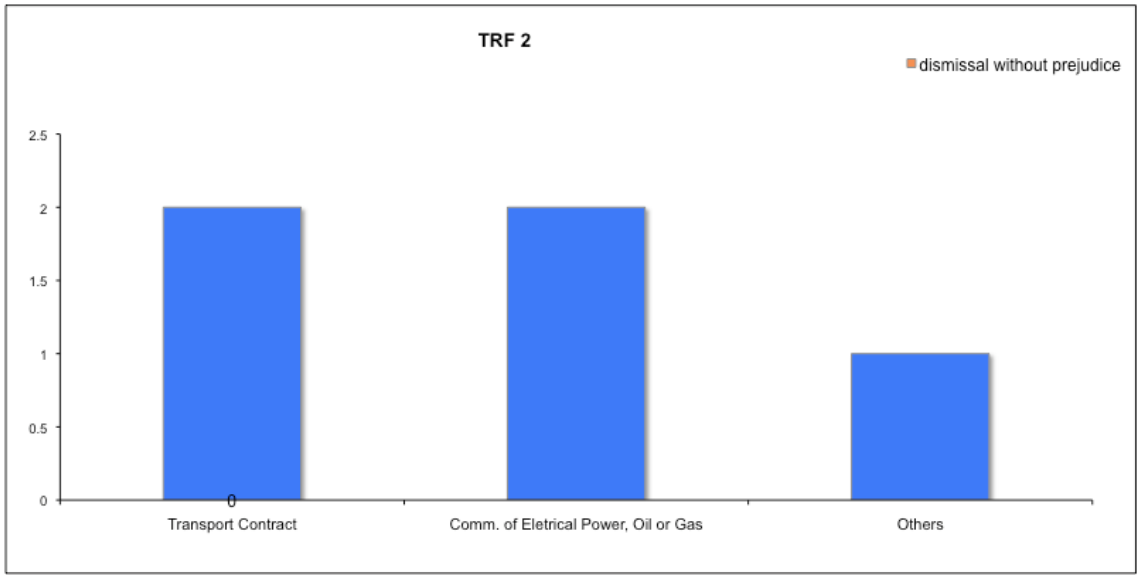
3.9 Mato Grosso Court of Appeal (TJMT)



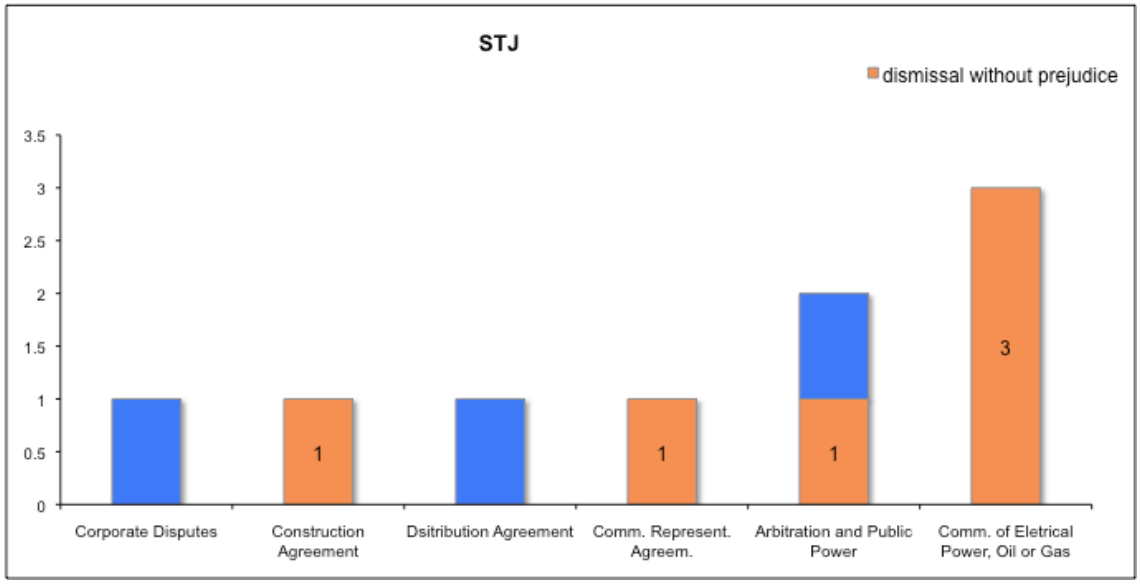
3.10 Tocantins Court of Appeal (TJTO)

There is only one judgment from this Court in the research database (Civil Appellation Review no. 5736), in which the parties included an arbitration clause in the lease contract. The Court considered that the existence of such a clause determines the imperativeness of resolution of the dispute via arbitration, and determined the dismissal without prejudice. In the face of the action, the Court also condemned the plaintiff to pay the prevailing party's legal fees and costs in the litigation, including attorney's fees, arbitrated in line with the legal parameters in the concrete case.

3.11. Federal Regional Court of Second Region (TRF 2)



3.12. Superior Justice Court (STJ)



3.13. Supreme Court (STF)

Only one case was found in the Brazilian Supreme Court (STF) concerning validity, efficiency and existence of the arbitration agreement (Provisional Remedy in Preliminary Injunction 212-5; First Panel of Judges; judgment: June 1st, 2004), in which

prevailed the analysis of procedural issues and in which it was not possible to identify the background theme solely through the contents of the judgment.[26]

As it is possible to perceive from the graphics above, the incidence of cases in which there was the dismissal without prejudice (the so-called negative effect of the arbitration agreement) varied greatly between the judgments issued by the examined Courts, and, within each of them, between the thematic subgroups to which the decisions were related.

Taking into account Sao Paulo and Rio de Janeiro Courts of Appeal (TJSP and TJRJ), the greatest percentage of dismissal without prejudice took place in the context of corporate disputes (34.37% at TJSP and 50% at TJRJ), being such courts the place where the broadest range of themes were discussed (15 thematic subgroups at TJSP and 16 thematic subgroups at TJRJ).

Minas Gerais Court of Appeal (TJMG), the third Court with the largest number of decisions on validity, effectiveness and existence of the arbitration agreement, has a considerably smaller amount of thematic subgroups, but in the subgroup labeled "Others" it is possible to notice a variety of themes brought before the State of Minas Gerais Judiciary, with emphasis on the vast majority of judgments that dismissed the lawsuit without prejudice in cases involving arbitration clauses in real estate contracts.

The Parana Court of Appeal (TJPR) in turn, which came right after TJMG as to the number of decisions concerning the arbitration agreement, also presents various thematic fields of decisions (13 thematic subgroups), especially cases of dismissal without prejudice in areas such as corporate dispute, turn-key construction, and purchase and sale of goods.

On the other hand, the State of Rio Grande do Sul and the Distrito Federal Courts of Appeal (TJRS and TJDF, respectively) were the courts in which the least cases of dismissal without prejudice were found, as shown in the graphs of the item above.

From the 10 court decisions delivered by TJDF regarding the theme studied throughout this research, only one abated the action on the basis of article 267, VII of the Code of Civil Procedure, and one other considered valid and effective the arbitration clause inserted in a construction and service delivery contract.

At last, with regard to the Brazilian Superior Tribunal of Justice, the dismissal without prejudice was maintained in more than 50% of the cases that reached such an instance.

[26] According to the Report, that the matter in issue is the fulfillment of the contractual clause that established the resolution of the conflict through arbitration. The lower level court dismissed the pre-motion regarding lack of jurisdiction in species, being the pronouncement confirmed by the second instance court. The court's opinion on the acceptance of the appeal applied the provisions of article 542, paragraph 3 of the Code of Civil Procedure, detaining the extraordinary appeal. Appeals requesting clarification of the decision were objected, being considered improvident. Whence the non-conformism revealed by means of interlocutory injunction, being alleged during a debate about the lack of jurisdiction that there is a need for having an immediate analysis of the appeal. The rapporteur then converted the interlocutory injunction into complaint, having accepted the injunction litigated, so that the extraordinary appeal could have due proceeding, i.e. hearing the appellee and having the lower level court decide on whether it accepts the appeal.

Subsequently, in the qualitative part of this report, the main issues concerning validity, effectiveness and existence of the arbitration agreement will be analyzed, bearing in mind the divergences encountered within each subgroup and among the courts scrutinized, always being careful not to make undue generalizations.

It is also important to emphasize the chronological limits of the research. The mapping of the legal decisions that generated the research database, taking as a basis the jurisprudence from State Courts of Appeal (TJs), Federal Regional Courts (TRFs) and Higher Courts (STJ and STF), had as its initial term the date on which the Arbitration Law came into force (November 23, 1996), and February 2008 as its final term, except for TJSP, whose research database was updated up to December 2007. This is a broad depiction of more than 10 years of court decisions on arbitration, although it does not comprise the most recent decisions on arbitration held in Brazilian courts.

4. Qualitative Analysis of the Decisions Held by Each Court

In addition to the individual analysis of the judgments for in-depth case study purposes, their grouping into the respective thematic subgroup and the filling out of the reading card detailed above, each researcher was in charge of drafting general comments (per Court) about the judgment of those decisions under analysis. Such a report sought a vertical examination of the thematic subgroups, remarks and issues that drew attention throughout the decision, reflecting Courts` trends, interesting cases, pathologies, among other issues deemed relevant by the researcher.

This qualitative analysis does not aim at applying a binary criterion that sorts the decisions into favorable and unfavorable to the arbitration, taking as a basis the Court`s positioning on the negative effect of the arbitration agreement – regardless of whether there is the dismissal without prejudice –, for there might be cases in which the abatement of action did not occur, but the Court proceeded in a technical way and in compliance with the arbitration law,[27] whereas the abatement of action might have been applied in other cases in a non-technical fashion.[28]

[27] In TJSP, for example, in the Civil Appellate Review no. 217,023-4/7 (and EDcl. 217.023-4/9-01), the Court decided the issue concerning the validity and liability of any echeloned arbitration clause contained in a Memorandum of Understandings that has never been actually implemented by the parties. The appellate judgment was dismissed without prejudice, due to the existence of the arbitration agreement, but the 10th Panel of Judges accepted the appeal in order to determine the return of the records of the lawsuit to the original court, so as to regularly proceed with the case. Apparently this decision would be unfavorable, but the positioning adopted by TJSP was notably based on fact that there is no exception in the Memorandum regarding the immediate application of the arbitration panel to the conflicts arisen in the pre-contractual phase, restricting its scope only to the forthcoming definitive agreement to be signed by the parties. That said, the Court considered that there would be no valid clause applicable to the Memorandum, having determined that the arbitration, though very often more rapid and flexible, depends on expressed written and unequivocal formalization to become mandatory. If we adopted a favorable binary criterion vs. an unfavorable one along the research, such a decision would be considered unfavorable, because there was no dismissal without prejudice. But the Court's caution in the case must be interpreted also bearing in mind the objective limits of the arbitration agreement.

[27] This occurred in a case of abatement of the plan proceeding by the Judiciary, when the parties sought some measure of coercion, which is a monopoly of the State Jurisdiction. An illustration of such a situation occurred in the Civil Appellate Review no. 1.0105.05.69591-1/001 (TJMG). Despite the due concern, in most of TJMG's examined cases, regarding the compliance with the jurisdiction of arbitrators and the negative effect of the arbitration clause, in this very appeal the access to the Judiciary had supposedly taken place in order to fetch coercion and execution (*coertio and executio*), which are jurisdiction elements which are absent in the arbitration. Moreover, the Court recognized the absolute

Bearing in mind the consolidation and systematization of the general comments, some considerations on the following items were drawn out:

4.1. Negative Effect of the Arbitration Agreement (Article 267, VII of the Code of Civil Procedure)

It is possible to notice that in TJSP the appreciation of the existence, validity and effectiveness of the arbitration clause took place mainly under the procedural and formalist bias, as can be noticed, for example, through the discussion on which is the most suitable procedural form to deliver the issue to the Judiciary: pre-plea motion, own lawsuit or plea for change of venue. In most cases the understanding adopted by the Court turned its attention exclusively to procedural issues, grounding the decisions primarily upon the Code of Civil Procedure and its established laws. [29]

In TJMG the existence of the arbitration agreement was also dealt through different procedural means, such as in pre-plea motion and plea for change of venue, with the purpose of requiring the process be dismissed without prejudice.[30]

In one of TJMG's cases, even though the compulsory nature of the arbitration clause was recognized, whereby the parties waive the right to appeal to the Judiciary, the Court decided that the access to State jurisdiction is allowed when towards provisional claims, as an exception to the parties abdication of the judicial proceedings. Thus, the judgment accepted the requests for staying protest of credit instruments and enforcement of the obligation of not protesting bills, while the controversy about their liability or non-liability was not solved by arbitration proceedings.[31]

Another interesting case held by TJMG – although this Court did not submit the matter to arbitration – is one in which the defendant appealed a decision which did not accept its plea for change of venue, due to the existence of an arbitration clause, even after having ceased to appoint an arbitrator when notified to do so during an arbitral proceeding initiated by the plaintiff, besides having alleged the illegality of the arbitration clause in the arbitral panel. The Court dismissed the plea, considering it "impertinent". The defendant was sentenced for malicious abuse of legal process due to the alleged plea for change of venue, for the unjustified resistance disturbed the suit. It

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negative effect of the arbitration clause, maintaining the dismissal without prejudice, based on an idea that, as can be inferred by the reading of the court decision, it was esteemed by the Court, for it addressed the implementation of the award.

[28] This occurred in a case of abatement of the plan proceeding by the Judiciary, when the parties sought some measure of coercion, which is a monopoly of the State Jurisdiction. An illustration of such a situation occurred in the Civil Appellate Review no. 1.0105.05.69591-1/001 (TJMG). Despite the due concern, in most TJMG's cases examined, regarding the compliance with the jurisdiction of arbitrators and the negative effect of the arbitration clause, in this very appeal the access to the Judiciary had supposedly taken place in order to fetch coercion and execution (*coertio and executio*), which are jurisdiction elements which are absents in the arbitration. Besides, the Court recognized the absolute negative effect of the arbitration clause, maintaining the dismissal without prejudice, based on an idea that, as it can be inferred by the reading of the court decision, it was esteemed by the Court, for it addressed the implementation of the award.

[29] See, to this effect: AI 373.070-4, AI 510.575-4/1-00, AI 7132996-7 and AI 463.379-4/0-00.

[30] See Civil Appellate Review no. 2.0000.00.402474-6/000.

[31] Civil Appellate Review no. 2.0000.00.393297-8/000

was clear that the Court was concerned in preventing the plaintiff from being continuously impaired by the delaying expedients adopted by the defendant, despite the fact that it could also have decreed the abatement of action, definitively declaring the competence of the arbitration panel.[32]

In an interlocutory injunction for making and inventory of partner's estate,[33] TJMG revised its understanding for the sake of pronouncing the competence of the arbitration panel. In a previous decision rendered in an interlocutory appeal[34] in the same process, the Court had argued that the arbitration provision established in the contract would not restrain access to the Judiciary in regard to article 5, XXXV of the Brazilian Federal Constitution, but the Court went back on its understanding, arguing that since the advent of the Brazilian Law no. 9307/96 the clause which elects arbitration as a means to solve conflicts between the contracting parties should be considered "valid and able to eliminate the decision-making power of the judicial authority".

Therefore, in most judgments held by the Judiciary from the State of Minas Gerais the existence of the arbitration clause was appreciated in its terms and limits for an occasional dismissal without prejudice.[35]

In a declaratory plea for abatement of the arbitration clause and the arbitration proceeding itself, this very Court got to examine the arbitration proceeding rules and decided – by means of an interlocutory appeal presented against a decision that had granted the provisional remedy for stay of the arbitration proceeding – that even though the appealed decision alleged there had been a delay in the delivery of the arbitral award (which had been postponed three times), the postponements had been made in strict adherence to the rules of the International Chamber of Commerce, not justifying, thus, the stay of the arbitration proceeding.[36]

In the following sections of this paper, other themes related to the negative effect of the arbitration agreement will be analyzed, bearing in mind the Courts' understanding of each one of them: non - removal principle of jurisdiction; examination of the validity, effectiveness and existence of the arbitration agreement ex officio by the judge or through requesition of the parties; dismissal without prejudice by the second instance court and suppression of instances; and autonomy and effectiveness of the arbitration clause given the arbitration.

4.2. The principle of non-removal of the State Jurisdiction (Brazilian Federal Constitution, Article 5, Section XXXV) - constitutional approach

TJSP stated the constitutional principle of non-removal of jurisdiction to justify the most varied decisions, such as those on (i) non-retroactivity of the legal system of arbitration to the arbitration clause due in contract prior to the Law mentioned above (mere *pactum de contrahendo*); and (ii) the alleged lack of a binding force of the arbitration clause when there is no agreement subsequently established.[37]

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[32] Civil Appellate Review no. 1.0024.05.796559-2/001
[33] Civil Appellate Review no. 1.0400.05.016047-4/002
[34] AI 1.0400.05.016047-4/001
[35] Civil Appellate Review no. 445064-4, 471260-9 e 002681-2.
[36] AI 1.0024.06.206390-4/0001-1
[37] To the same effect, see Civil Appellate Review no. 083.125-4/2 e EDcl. 083.125-4/4-01, AI 089.522-4/8-00, AgRg 089.522-4/0-01, AI 090.709-4/4, Civil Appellate Review no. 262.324-4/5-00, , AI

To the same effect, it is important to point out the understanding of TJSP, based on the constitutional approach above mentioned, used to substantiate the possibility of bringing to the Judiciary matters not addressed in arbitration. The concrete case decided by TJSP involved an award which had dealt with the issue concerning the falsity of signatures disposed in a document examined by the parties. According to TJSP's allegation, as the claim for moral damages alleged by one of the parties had not been discussed in arbitration, such litigation could supposedly be directed to judicial proceedings.[38]

The examination of the judgments held by TJRS concerning the validity, effectiveness and existence of the arbitration clause, in turn, revealed a deeply refractory positioning relative to the removal of state jurisdiction, under the claim of violation of Article V, Section XXXV, of the Brazilian Federal Constitution.

In this regard, clearly against the direction followed by the other courts under analysis, several decisions held by TJRS considered that the parties cannot be deprived of free access to judgment, and the arbitration clause does not inhibit them to opt for the State jurisdiction, incurring the risk of not having constitutional guaranty of access to justice.[39]

TJRS understood that the Law no. 9307/96 granted the parties the possibility of solving their disputes by means of arbitration. Therefore, even though the contract contains an arbitration clause, the parties may appeal to the Judiciary, since the clause expresses mere liberality, not obligatoriness.

Such positioning gave rise to the revision of decisions held in first instance that were favorable to the abatement of action, due to the existence of the arbitration agreement, not being this negative effect recognized in the appellate review seat.[40]

The judgment delivered by TJMG, in an interlocutory appeal (AI 2.0000.00.356235-8/000), sought to conciliate the existence of the arbitration agreement and the purpose of the Article V, XXXV of the Brazilian Federal Constitution of 1988. Its abridgment determines that: "*Since the moment in which, within the context of a contract, it is agreed that the occasional litigation between the contracting parties in relation to the stipulated obligations will be settled by arbitrators, the extrajudicial proceeding will definitively be imposed as compulsory. The arbitration, in the future, when the litigation occasionally appears, cannot be discarded unilaterally. There no longer will be the possibility, in force in the previous system, of only one of the contracting parties to impose his veto to the extrajudicial proceedingrefusing to establish the 'agreement' of choice of the arbitrators and definition of the subject in dispute to be solved by them.*

197.978-4/0, AI 234.764-4/2-00, AI 618.314-00/3, AI 618.324-00/8, Civil Appellate Review no. 531.773-4/9-00.

[38] Civil Appellate Review no. 466.729.4/0: *"The access to the judiciary is a constitutional principle indistinctly guaranteed to all citizens, and the fact that there were hearing and award at the Court of Arbitration, which concluded that the plaintiff's signatures on the documents for obtaining loan were forged, does not dismiss the plaintiff's claim for court protection to the alleged moral damages suffered. Such a matter (moral damages) neither was nor could have been raised and discussed at that venue." (p. 2-3).*

[39] To the same effect, see AI 70004535662, AI 70008934861, AI 70009318106, AI 70009340274; Civil Appellate Review no. 70007909534, AI 70010662740, AI 70011081148, AI 70011513652.

[40] Civil Appellate Review no. 70009494923 and AI 70012340204.

The Article V, Section XXXV of the Brazilian Federal Constitution does not prevent the parties' waiver to submit the litigation to judicial appreciation, which is not excluded, however to manifest itself on the validity of the act. The Arbitration Panel is autonomous and its rules reconcile with the constitutional principle of free access to Justice. Its judgment has jurisdictional force, but it can be revised, despite of being judicially deprived. Thus, it cannot be said that its establishment and the submission of its interests and issues by the parties, exclusively for such a procedure, would infringe the principle of right of action or due process of law, in the light of the constitutional rights. The judicial proceeding management, disregarding the usage of the arbitration agreement established between the parties, leads to dismissal without prejudice (lack of right of action)".

TJMT, in a judgment delivered in 2006 involving lease contract, dismissed the arbitration clause agreed by the parties under the claim that it would infringe the constitutional principle of free access to judgment. Putting aside any discussion about the consent of the parties at the time of the clause contracting, the understanding of the Court followed this orientation: *"the mentioned clause which established the submission of contractual dispute resolution to arbitration cannot be taken as non-dismissible, because it infringes the constitutional principle that ensures parties the indisputable right of not being deprived of the free access to judgment."*[41]

4.3. Must the existence of an arbitration clause be argued by the party or may it be known ex officio by the judge? (301, section 4 of the Code of Civil Procedure)

This issue has been greatly discussed by Courts. In many cases in TJMG the suit was dismissed without prejudice ex officio by the judge, as occurred in the Civil Appellate Review no. 2.0000.00.425811-7/000 and Civil Appellate Review no.2.0000.00.394534-0/000, which took into account what was agreed by the parties through the arbitration agreement in order to consider the appellant lacking action, with the waiving of court protection and adhesion to arbitration.

On the other hand, TJMG decided differently in other cases, namely, on the need of arguing the existence of an arbitration clause by the party, for this matter could not be known ex officio by the judge.[42]

In TJRJ, the recognition ex officio of the arbitration clause was also matter of issue in debates. In the Civil Appellate Review no.2007.001.42265, the Court decided that although there is an arbitration clause validly agreed between the parties, there should not be the abatement of the ongoing action, once there was no provocation from the defendant regarding this matter. According to the Court's understanding, the terms of article 301, IX, of the Code of Civil Procedure supposedly made impossible the recognition ex officio of such a clause.[43]

In TJDF, in a case where the conflict between arbitration clause and choice of venue clause was discussed, by means of a Contract for Provision of Pre-operational Technical

[41] AI 67125/2006
[42] Civil Appellate Review no. 1.0702.04.169908-4/001.
[43] To the same effect, Civil Appellate Review no. 2007.007.48344.

Services and Hotel Venture Management and Other Agreements, the knowledge *ex officio* of the arbitration clause was likewise addressed, having the Court decided on its impossibility. The Court considered that the clause was not capable of preventing access to the Judiciary, and that another provision inserted into the contract established the Distrito Federal Court as competent to solve disagreements, aside from deciding that the knowledge ex officio of the matter is not allowed, in compliance with article 301, paragraph 4 of the Code of Civil Procedure.[44]

4.4 Dismissal without prejudice in second instance. Suppression of instance?

In some cases the Courts considered that as the existence of an arbitration clause in cases brought to discussion in the Judiciary had not been appreciated by the first instance, they could not be examined by the Court, due to the possibility of incurring suppression of instance.

This took place in TJMG[45], where in one of the lawsuits the Court considered (AI 2.0000.00.353467-8/000) the existence of an arbitration clause essential for the continuation of the action, for if it had been accepted, it would mean dismissal of the suit without prejudice, cancelling the pleaded decision and determining that the judge analyze this pre-trial motion and deliver a new curative decision.

To the same effect, the AI 2.0000.00.321974-1/000, whereby the Court stated that while there is a decision in first instance regarding the arbitration matter, its appreciation by would not be feasible by the *ad quem* body, since the matter would not be included among those which are susceptible to be known ex officio and by any jurisdiction. The Court pointed out that there is rather a comparative than an absolute incompetence; that is the reason why the unfeasibility is addressed without the previous pronouncement of the lower stage of appeal.

In TJSP, some decisions also took into account the principle of the double degree of jurisdiction as an element to supposedly prevent the Court fromappreciating the validity, effectiveness and existence of the arbitration agreement.[46]

In three cases held by TJDFT, the Court decided not to analyze the possibility of abatement of action based on the arbitration agreement, since thefirst instance judge had not delivered a decision about the matter.

In the first case, still in 1999 (i.e. before the Arbitration Law was declared constitutional by the Brazilian Supreme Court), in spite of the fact that the TJDF had accepted the interlocutory appeal to declare the validity and effectiveness of the arbitration clause, it did not make a statement about the abatement of action for fear of suppressing a court instance.[47]

In the second case, although implicitly, the Court refused to consider the argument of incompetence of the Judiciary due to the existence of the arbitration clause, in a seat of

[44] Civil Appellate Review no. 2005.01.1.038212-9
[45] AI 2.0000.00.383059-5/000, AI 2.0000.00.416193-5/000, AI 2.0000.00.505414-4/000(1), AI 2.0000.00.337082-5/000(1), AI 2.0000.00.353467-8/000, AI 2.0000.00.321974-1/000.
[46] AI 206.960-4/4 and EDcl. 206.960-4/6
[47] AI 1999.00.2.001609-5

interlocutory appeal, in view of the non-pronouncement of the court *a quo* on the matter, alleging that the tort should deal only with the requirements consisting of the article 273 of the Code of Civil Procedure. The appealed decision had granted a provisional remedy for depositing the rentals related to properties belonging to the society in an account entailed in the lawsuit, while the action for corporate liquidation dissolution was pending, and the Appellants/Defendants alleged in the interlocutory appeal the existence of an arbitration clause in the corporate articles of incorporation. The Court then considered that such an allegation should be analyzed in a pre-plea motion, in accordance with the article 301 of the Code of Civil Procedure, so that it was prevented from examining the matter concerning the effectiveness of the arbitration clause in the review seat without the pronouncement of the court *a quo* on the matter.[48]

In the third case, the court decision was delivered in an Internal Interlocutory Appeal, lodged in view of the decision of the interlocutory appeal, determined the return of the lawsuit to the first instance court, so that the defendant's allegation about the court's self-disqualification to examine the matter could be appreciated in plea, due to the existence of an arbitration clause in the company's articles of incorporation in a lawsuit concerning a corporate dispute.[49]

In TJMS, there was likewise a case in which the Court did not accept the allegation of existence of the post-dispute arbitration, given the absence of manifestation from the court *a quo* on this issue, incurring the risk of suppressing an instance, refusing the plea in abatement.[50]

4.5. Pre-dispute Arbitration Clause vs. Post-dispute submission to Arbitration: autonomy of the arbitration clause

Although the difference between pre-dispute arbitration clause and post-dispute arbitration has already been established in the doctrinal field, there are still some debates on the effectiveness and independence of the arbitration clause in the jurisprudence, with cases in which the Court argues that the arbitration clause itself would not be enough to institute the arbitration, being necessary to set up the commitment so as to give rise to absolute effectiveness.

In TJSP, the main argument used to justify such positioning was the supposed qualification of the arbitration clause as a mere promise to constitute the arbitration, but it is worth having in mind that this understandment adopted by the Court appeared more frequently until 2001/2002, decreasing somewhat since then.[51]

As for TJMG, in only one of the cases under analysis did the court dismiss the effectiveness of the arbitration clause, on the grounds that it would not be effective by itself, being the post-dispute submission to arbitration necessary for parties to be effectively bound to arbitration.[52]

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[48] AI 2004.00.2 010026-3
[49] Ag.Reg. in AI 2007.00.2.000240-8
[50] AI 2006.009393-1/0000-00
[51] AI 197.978-4/0, AI 234.764-4/2-00, AI 618.314-00/3 e AI 618.324-00/8, AI 089.522-4/8-00 e AgRg 089.522-4/0-01) e AI 090.709-4/4, EDcl. . 090.709-4/6-01, AI 149.021-4/8, Civil Appellate Review no. 383.455-4/5-00, Civil Appellate Review no. 1107917-0/1.
[52] AI no. 2.0000.00.452321-5/000.

As regards TJPR, in a decision involving two companies (Inepar vs. Etiquira), on the Court declared the need of a post-dispute submission to arbitration. The case was related to the dispute arisen between the parties on the action for annulment of the arbitration award. In this specific situation, in spite of (I) the existence of an arbitration clause with specifications for establishing the arbitration , (ii) the regular constitution of the court of arbitration, (iii) the regular formalization of the Terms of Reference and (iv) the fact that the invalidity of the arbitration clause in the course of the procedure has never been taken into account, TJPR understood that the native legislator's supposed intention would be one that always requires the post-dispute submission to arbitration, even considering the circumstances described above. Based on this understanding, the Court determined the annulment of the arbitration award delivered. It is important to point out that such a decision was not unanimous, with an opinion supporting the sufficiency of the pre-dispute arbitration clause with specifications for establishing the arbitral procedure.[53]

Taking into account TJRS, one of its decisions also placed itself in the same way, demanding not only the contractual establishment of arbitration for making the clause effective, but also the post-dispute submission to arbitration whereby the parties set up the conditions under which the arbitration would be carried out. That is the Interlocutory Appeal no. 70005680558, which has as its matter in issue the representation and sales agreement involving party domiciled abroad. The agreement establishes arbitration abroad under foreign law. TJRS understood that in order to institute the arbitration proceedings, it would be necessary to set up the post-dispute submission to arbitration, for the arbitration would not be possible without it.

4.6. Autonomy of Will

The liberty afforded to the parties to demonstrate their willingness to accept the arbitration agreement is highly respected by the Judiciary branch. That is the way courts have been judging, posture which attests to the relevance of validity, effectiveness and existence of the arbitration agreement established.

TJSP has been taking into account the private-based concept regarding the legal transaction when appreciating the validity, effectiveness and existence of the established clause. The arguments alleged are essentially related to article 104 of the Brazilian Civil Code (legal transaction requirements) or to the vices of consent (legal transactions defects).

In this Court, the autonomy of will also appeared as a background to: (i) dismiss arbitration clause that does not fulfill the requirements as established in the legal system; (ii) not extend the clause to matters which are not expressly contained in the drafting of the clause; (iii) justify the Judiciarys' intervention only in case of arbitration clause without specifications to establish the arbitration; or (iv) to solve specific and urgent issues, either because the arbitral court has not been formed yet, or because the action to set up the commitment has not been brought to court yet.[54]

[53] AI no. 428.067-1. To the same effect, see AI 370561-5, AI 428.067-1, and AI 439.800-3.
[54] See, to this effect, Civil Appellate Review no. 980.401-0 e AI 1.111.650-0.

To the same effect, TJRJ presents a tendency to examine the issue regarding validity, effectiveness and existence of the arbitration clause under the same perspective seen in the autonomy of will. So as to appreciate the theme, this Court relies on concepts from civil law, as well as on the consumerist legislation (in the specific cases of adhesion contracts) rather than on constitutional or public-order related provisions.

As an example of issues that were addressed by TJRJ under the predominantly private-based perspective, the following detached:

(i) Appreciation of specific powers to establish a commitment.[55]
(ii) Demonstration of unequivocal and conscious will of the parties involved so that they bind to the arbitration.[56]
(iii) Vices of consent at the time of establishing a clause.[57]
(iv) Demonstration of unequivocal and conscious will of the parties involved so as to waive the validly agreed clause.[58] And
(v) Strict compliance with the form requirements necessary to the establishment of arbitration clauses in adhesion contracts.[59]

4.7. Competence-Competence Principle (Article VIII, Single Section of the Brazilian Federal Law no. 9307/96)

The concept in which the arbitrators have the prerogative to decide on their own jurisdiction on validity, effectiveness and existence of the arbitration agreement is well-established, according to the single paragraph of article VIII of the Arbitration Law.

TJSP, in the Interclínicas case, which had a great repercussion in the country, showed maturity when interpreting the arbitration clause involving a company under out-of-court settlement. It is possible to observe the full recognition of basic principles already spread by the (Brazilian and international) arbitration community, such as the exemption of agreement signature before arbitration clause with specifications to set up the arbitration, and the arbitrator's jurisdiction-jurisdiction as a judge of a first instance court.[60]

The compliance with the principle of jurisdiction-jurisdiction also appeared in decisions of other Courts, like TJPR, which proved to be rigorous in its application. Before the agreed arbitration clause, this court acknowledged that it was a matter of negative right of action generating the abatement of action, with no need for more appreciations about the original jurisdiction of the matter. In order to substantiate such reasoning, TJPR made use of many concepts brought by the arbitration law, such as (i) compulsory nature of the agreed clause, (ii) binding effect, etc.[61]

[55] Civil Appellate Review no. 2006.001.14601
[56] Civil Appellate Review no. 2005.001.42032
[57] Civil Appellate Review no. 2005.001.31186
[58] Civil Appellate Review no. 24.825/2007 e 25.140/2007
[59] Civil Appellate Review no. 2006.001.59128
[60] AI 460.034-4/5-00 and respective EDcl 460.034-4/5-01
[61] Civil Appellate Review no. 316.842-1, Civil Appellate Review no. 245.792-9, Civil Appellate Review no. 372.439-6, Civil Appellate Review no. 414.532-4, Civil Appellate Review no. 220697-3 and EDcl. 220697-301

However, some courts tend to make this principle relative, as in TJRJ. The Court shouldered the original jurisdiction so as to analyze the effectiveness/ineffectiveness of arbitration clauses inserted in adhesion contract, relativizing the principle of jurisdiction-jurisdiction provided in article 8 of the Arbitration Law.[62]

On the other hand, the tendency adopted by TJRJ in relation to the assumptions alien to adhesion contract to recognize the negative effect of the clause, bringing the parties to arbitration without further discussions about it. As far as this aspect is concerned, a case that deserves some consideration is the litigation involving the National Company of Cement Portland, which, among other issues, explicitly deals with such a theme, considering the existence of an arbitration clause one of the negative rights of action that determines de dismissal without prejudice.[63]

The relativization of the jurisdiction-jurisdiction principle and the negative effect of the arbitration clause also occurred at TJMG. In some cases, the State of Minas Gerais Judiciary shouldered the appreciation of the arbitration clause, in its terms and limits, as a precondition to an occasional dismissal without prejudice.[64]

Those hypotheses in which TJMG totally disregarded the arbitration clause were rare, even when raised by the party.[65] In an interesting case, the Court decided, in an interlocutory appeal, that the arbitration clause would not prevent the access to the Judiciary; however, on a latter trial on the same controversy, it changed its understanding, recognizing that the establishment of an arbitration clause dismisses the jurisdiction for such a case.[66]

4.8. Subjective and Objective Limits of the Arbitration Agreement

The discussion about the objective limits of the arbitration agreement emerged at TJSP, mainly with regard to corporate matters, related both to the entry and exclusion of partners. Generally speaking, it is possible to notice TJSP's tendency to consider that more specific disputes arisen between partners are not included at the core of the arbitration clause generally agreed in the articles of incorporation.[67]

The concern shown by TJSP seems to center around the avoidance of debates about the supposed impediment of judicial proceeding to all members. Additionally, the theme is also related to the collection of demurrage. TJSP considered that such an obligation is not subject to the arbitration agreement, for it deals with a stipulation autonomous in relation to the sea freight contract.[68]

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[62] AIs 2001.002.09325 and 2003.002.04580, AIs 2006.002.5765 e 2006.002.14140.
[63] Portland Contentious: AI 2006.002.05255, Civil Appellate Review no. 2007.001.24833 and 2007.001.24798 and Civil Appellate Review no. 24.825/2007 and 25.140/2007). To this effect, see also: AI 2006.002.12221, Civil Appellate Review no. 2005.001.44039, Civil Appellate Review no. 2007.001.25140 and Civil Appellate Review no.. 2007.001.24825, Civil Appellate Review no. 2007.001.27446.
[64] Civil Appellate Review no. 445064-4, 471260-9 e 002681-2
[65] EDcl. 376034-7 and AI 2.0000.00.379421-2/000.
[66] AI 1.0400.05.016047-4/001 e Civil Appellate Review no. 1.0400.05.016047-4/002
[67] Civil Appellate Review no. 442.037-4/7-0 and AI 491.325-4/5-00.
[68] Civil Appellate Review no. 7086044-7.

As regards to the subjective limits of the arbitration clause, TJSP addressed the issue in the Onodera case, when decided that franchisee association could not intend to avoid the binding force of the arbitration clause to which its members individually submitted.[69]

In TJRJ, it is also possible to perceive that the issue concerning the subjective and objective limits of the arbitration agreement arose quite a few times. There were cases in which once the configuration of the necessary joinder of parties was recognized, the Court understood that it would be unreasonable to apply the arbitration clause and its effects to only one of the contractors, despite the fact that one of them did not allege its existence in a pre-plea motion.[70]

Bearing in mind the objective scope, the court's tendency seemed to be the strict compliance with limits instituted in the clause, with no extensions beyond what was agreed, in line with the same private-based positioning adopted previously.[71]

Similarly, TJPR denotes some rigor when defining the objective scope of the agreed clause. The concern of the Court seems to be the strict compliance with the limits agreed between the parties when establishing the clause.[72]

Another judgment that approaches the theme is related to a corporate dispute in which TJPR faced a discussion concerning the binding of the parties to arbitration when one of the parties had already left the corporation. In this context, the Court considered that as the plaintiff had already left the corporation, registering even the corporate change before the competent Board of Trade, the arbitration clause provided in the articles of incorporation would not have the power to bind the parties to arbitration.[73]

The objective limits of the arbitration clause were also appreciated by TJDF, which reversed a judgment delivered by the first instance court dismissing without prejudice, based on article 267, VII, and article 301, IX of Code of Civil Procedure. The background of the discussion was an action for dissolution of the corporation. The reverse was provided because the Court had judged the merits of the action along with the merit of another action for annulment of the amendment of the articles of incorporation which had been attached to the previous lawsuit. The Court considered that the jurisdiction of the arbitral proceedings would be limited to the assessment of remaining credits, as ruled the arbitration clause in the articles of incorporation, transcribed in the judgment. [74]

4.9. Arbitration in Linked and Accessory Contracts

The issue of contractual coalition and extension of the effects of the arbitration clause always gives raise to debates.

TJRJ, under a perspective restrained and loyal to the idea of autonomy of will, considered in some cases that the arbitration clause inserted in only one of the

[69] Civil Appellate Review no. 7127102-2.
[70] Civil Appellate Review no. 2007.001.21338 and Emb. Decl. 2007.001.21338
[71] Civil Appellate Review no. 2006.001.21111and MC 2006.014.00053
[72] Civil Appellate Review no. 288.492-8
[73] Civil Appellate Review no. 144019-9
[74] Civil Appellate Review no. 2001.01.1.080685-9

instruments could not be applied to another, incurring the risk of violating what was originally agreed by the parties. Despite the existence of arguments such as the indivisible nature of contracts and the accessory character among them, TJRJ as a rule decided to dismiss any possibility of extending the limits of the clause.[75]

The possibility of extension of the arbitration clause contained in the main contract to the accessory contract was discussed before TJRS. The Court examined the contracts implemented between the parties to conclude that the arbitration clause set up in the turn-key construction agreement could not be extended to the subcontracting agreement, amending the judgment which had dismissed without prejudice.[76]
At the Superior Tribunal of Justice in turn, in the decision regarding the Chaval Navegação Ltda. case,[77] the rapporteur did not recognize the appeal to the Superior Court of Justice concerning the allegation of inexistence of contract, and as a consequence nor the arbitration clause between the parties, for she adduced that there was no omission on the part of TJRJ in relation to the matter. The understanding of TJRJ was thatthe (non)existence of a direct relation between the parties would be irrelevant, since the contracts supposedly were completely interconnected and must be, thus, interpreted jointly, being the arbitration clauses of both contracts valid and effective between both parties to the action. Additionally, considered that the Arbitration Law could be immediately applied to the case, because "*no matter concerning vested rights and perfect and complete juristic act, or inexistence of law by the time of the agreement was discussed in the court records*." The judgment considered that the Brazilian Federal Law no. 9307/96 would be applied to those contracts made before its validity, in case there is an arbitration clause previously ruled by the former Brazilian Civil Code of 1916 and the Code of Civil Procedure.

4.10 Adhesion Contracts (Article IV, Section 2 of the Brazilian Federal Law no, 9307/96). Arbitration and Consumer Relation.

In the cases in which TJSP considered that there was an adhesion contract agreed between the parties, the adopted positioning predominantly aimed at declaring the

[75] Civil Appellate Review no. 2007.001.17081, Civil Appellate Review no. 2007.001.22946
[76] Civil Appellate Review no. 70016974636. *"The E.T.E. – Engineering and Telecommunications and Electricity S.A. signed a turn-key construction agreement with Brasil Telecom which stipulated that any disputes would be solved by means of arbitration proceedings. On the other hand, the defendant signed a subcontracting agreement with Cosate Conege Consortium, incorporating the turn-key construction agreement in its clause 1.2, and establishing in its clause 2.1 that all the provisions set up in the turn-key construction agreement would be applied to that subcontracting agreement, except for the conflicting provisions. The parties to the subcontracting agreement elected the District Court of Santa Maria to resolve any disputes arising from that agreement. The Cosate Conege Consortium commence, on the basis of the clause for election of court for the subcontracting agreement, filed an action for damages against E.T.E – Engineering and Telecommunications and Electricity S.A., which was dismissed without prejudice on the ground of article 267, subsection VII of Code of Civil Procedure. The first instance court accepted the defendant's argument, who had alleged that the turn-key construction agreement was applicable in a subsidiary way, and that the arbitration clause had been extended to the subcontracting agreement. The plaintiff appealed, claiming that the clause for election of court, contained in the subcontracting agreement, should have been applied. The defendant appealed, claiming augment of fees and value of the action. The 10th Civil Court denied appeal to the defendant's appeal, and accepted the plaintiff's appeal. According to its interpretation, the parties had not opted for submitting their disputes to arbitration proceedings, and the clause of an agreement signed by one of the parties with a third party could not be applied in this case."*
[77] STJ, REsp no. 653.733; 3rd Panel of Judges; judgment: August 3,2006.

inefficiency of the agreed arbitration clause, for the requirements concerning form, required by article VI, section 2 of the Brazilian Federal Law no. 9307/9678, were not fulfilled – notably the drafting of the clause at issue. The caution taken by the Court, particularly because it deals with the vulnerability that usually affects one of the parties to adhesion contracts, cannot be seen as a negative aspect of this Court's trend.

To the same effect, TJRJ demands the literal fulfillment of the determinations set up in the Arbitration Law (articles IV, section 2). This understanding is clearly exposed, for instance, in a litigation involving Brascan Imobiliária Incorporações S.A. (a real state office). In former contracts, Brascan disregarded those requirements prescribed in the Arbitration Law, being that the reason why the Court did not recognize the validity of the arbitration clause. In latest contracts, the same company began to draft the arbitration clause following the legal precepts, focusing mainly on the clause within the contract, atitude which made the Court start recognizing the validity of the arbitration clause, dismissing the action without prejudice.[79]

In another case, however, even before a contract to supply surveillance services concluded between the companies, TJRJ adopted the rule established at article IV, section 2 of the Arbitration Law, since it deemed that, in species, it was an adhesion contract subject to the requirements of such a provision.[80]

Still taking into account arbitration in view of the Code of Consumer's Defense, it is worthy pointing out that TJMG dismissed the arbitration clause in a court decision, because it considered that enforcing the arbitration proceedings to be carried out by the International Chamber of Commerce, located in Paris, would difficult the weakest party's defense in the relation, and, based on the consumerist law, annulled the clause accepted the controversy.[81]

TJPR presented a less literal interpretation of the law as regards to the adhesion contracts. Even so, it was possible to verify both trends. On one hand, there is a positioning which defends the validity and effectiveness of the agreed clause, independently of occasional inconveniences or losses to the adherent, provided that the requirements of form prescribed by the Arbitration Law are observed (considered public order requirements).[82] On the other hand, an argument inclined to dismiss the effectiveness of the arbitration clause agreed in adhesion contract was found, in view of low sufficiency inherent to one of the parties.[83] In an interesting case, TJPR acknowledged that the form contract executed in the context of a legal transaction for the international trade of grains should not be considered as an adhesion contract for the purposes of article 4, section 2 of the Arbitration Law.[84] In another hypothesis, TJPR interpreted the requirements of the provision above as cumulative, not alternative.[85]

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[78] Civil Appellate Review no. 638682-00/9, AI 373.141.4/4-00, EDcl. 373.141.4/6-01, AI 458.679-4/8-00

[79] See, to this effect, AI 2001.002.09325, Civil Appellate Review no. 2003.001.16786, AI 2003.002.04580, AI 2004.002.23288, AI 2005.002.06761, Civil Appellate Review no. 2005.001.37220, AI 2005.002.02814, Civil Appellate Review no. 2006.001.08408, Civil Appellate Review no. 2006.001.24005, AI 2006.002.12221

[80] Civil Appellate Review no. 3708/00. To this effect, the decision delivered by TJSP in the Civil Appellate Review no. 987677-0/7.

[81] Civil Appellate Review no. 2.0000.00.448536-7/000

[82] Civil Appellate Review no. 227.963-0; Civil Appellate Review no. 298.297-6

[83] Civil Appellate Review no. 395.862-3

[84] AI 321.822-2

[85] Civil Appellate Review no. 385.486-0

On the other hand, decisions dismissing arbitration proceedings in cases involving consumer relations were found in TJRS.[86] In one of the judgments, the arbitration was dismissed for involving an adhesion contract and because of the difficulties caused to the other party so as to take part in arbitration proceedings carried out in another country, resulting in an expensive choice to the adherent, something which would have hindered the access to justice.[87]

As far as TJMT is concerned, this court decided the dispute involving a commercial representation agreement signed between two important and renowned Brazilian companies. Despite the apparent sophistication of the parties involved in that legal transaction, the Court decided to dismiss the pre-plea for change of arbitration venue, for it understood that the contract into which the arbitration clause was inserted was an adhesion contract. The judgment, however, not even discussed or appreciated whether the requirements prescribed in article 4, section 2 of the Brazilian Federal Law no. 9307/96 had been observed.[88]

4.11. Arbitration and Public Power

Not only court decisions involving State parties were included in this group, but also those which contained an analysis on Arbitration and Public Power

Although TJRJ has positioned itself favorably to the admissibility of the arbitration due to what is established in the Brazilian Federal Laws no. 8987/95 and 9478/97, the court declared in a specific case that there was some illegality in the agreed contract, particularly regarding the arbitration clause inserted in it, to the extent that the clause at issue would supposedly conflict with the constitutional principles applicable to the public administration, such as that of advertising, for example.[89]

Considering TJMG, the court dismissed the implementation of arbitration proceedings in the case of non-disposable rights, in a litigation involving the State.[90] In appeals requesting clarification of the decision,[91] it announced that the validity of the contract

[86] To this effect, see AI 70016605073
[87] AI 70002330983
[88] EDcl. 36321/2001
[89] AI 2003.002.07839
[90] Civil Appellate Review no. 1.0000.00.199781-6/000
[91] The court records deal with an action for annulment, with a request for anticipated judicial protection brought by the State of Minas Gerais against the appellant, aiming at the annulment of shareholders' agreement before its illegality. Such an action was upheld by the court *a quo* and confirmed by the Court. Reluctant, the appellant filed appeals requesting clarification of the decision, claiming, in short, for the need of recognizing the defective pleading, as well as the omission in relation to necessary joinder of parties and transgression to articles I, IV and VIII of the Brazilian Law no. 9307/96. The appellant argued that the suspended judgment complied with the non-implementation of the arbitration proceeding to those legal relations addressed in the court records, due to the alleged unavailability of the rights under dispute; however, according to its reasoning, such an understanding directly infringes articles I, IV and VIII of the Brazilian Law no. 9307/96, which dismisses the possibility of the arbitration clause being affected by the nullity of a contract in which it is inserted. According to the rapporteur's view, "*being null the shareholders' agreement, there is no possibility of claiming for its clause*". As a result, adduces that the validity of the contract cannot be submitted to arbitration. Thus, it dismissed the suspensions, arguing that the shareholders' agreement was dismissed for affronting the principle of legality, an issue carefully scrutinized in the suspended judgment. – EDcl. 1.0000.00.199781-6/001. See also AgRg in AI 481,023

could not be submitted to arbitration. Therefore, being null a shareholders' agreement, there was no possibility of alleging a resulting arbitration clause.

The strict understanding about the principle of jurisdiction-jurisdiction on arbitration clause set up in contracts with the Public Power was voted at TJPR. This was the positioning found, for example, in the cases concerning UEG vs. Copel and Rio Pedrinho vs. Copel.[92]

Perhaps the most prominent theme found in TJPR is the arbitration of conflicts involving the public power, particularly private and public joint stock company. In view of the conflict involving contract for commercialization of electrical energy, signed with a public entity from the State of Paraná, TJPR considered that there would be no impediment for COPEL private and public joint stock company, with a corporate veil of private law, to carry out a transaction or resolve its disputes through arbitration agreement, since the specific interest in the arbitration proceedings would be merely economic, not a non-public one. Based on the differentiation of the activities of the private and public joint stock company, in accordance with the public or private interest involved, the COPEL case had some impact on Brazil, becoming one of the first Brazilian precedents on the matter.[93] Still regarding private and public joint stock company, a similar positioning was adopted in another important precedent of TJPR, now involving two companies: Compagas vs. Passarelli.[94]

TJDF pronounced a decision favorable to an arbitration involving the public power. It is the writ of *mandamus* requested by SERVENG – CIVILSAN S/A, and another one before the Audit Court from Distrito Federal[95], which aimed at annulling the administrative decision from that body, determining that Brasilia's Water and Sewage Company– CEBS refrain from appealing to the Court of Arbitration to resolve its disputes, inspite the fact that the contract originated from a public bid has an arbitration clause established. The Court granted the security and determined the disputes be solved by arbitration proceedings, since (I) article 45 of the Executive Law no. 2300/86, which regulated the public bids at that time, although prevented that divergences from contracts with companies and individuals domiciled abroad be solved by arbitration, did not bring the same impediment in relation to individuals or legal entities domiciled in Brazil; (ii) the subject-matter of the contract, which is the adaptation and expansion of Sewage Treatment System from Brasilia, is liable to have its dissents resolved by means of arbitration; (iii) according to article 54 of the Brazilian Law no. 8666/93, the principles of the general theory of contracts and the private rights norms can be supplementarily applied to those rules of public law; (iv) the Public Administration must observe what is set up in the notice with invitation to bid, in compliance with article 41 of the Brazilian Law 8666/93, which establishes the arbitration in this case; and (v) the Audit Court's decision has no imperative power, because it is not a matter of sentences, "*but opinions and deliberations subject to the Judiciary' appreciation*."

In a dispute arisen before the TRF (2nd region), in a contract to supply energy to the National Interconnected System (SIN)[96], having the Brazilian Commercialization Agency for Emergency Electrical Power (CBEE) stipulated the submission of disputes

[92] MC 160213-7 e AI 174.874-9
[93] AI 174.874-9.
[94] Civil Appellate Review no. 247646-0.
[95] MS 1998.00. 2.003066-9
[96] Internal Interlocutory Appeal no. 116.300

originated from the contract to arbitration proceedings, determined such stipulation be in the contract draft attached to the notice of convocation. Bearing in mind that CBEE rescinded that contract unilaterally, Proteus established arbitration proceedings aiming to be compensated for both the investments carried out and damages supposedly suffered. In order to stay the arbitration proceeding before FGV Chamber of Conciliation and Arbitration, CBEE filed a provisional remedy, whose injunction was dismissed at the first instance court. Reluctant, CBEE lodged an interlocutory appeal with a request for anticipated judicial protection, which was dismissed. Against such a dismissal, CBEE lodged an internal interlocutory appeal, which was accepted. Subsequently, the interlocutory appeal was also accepted.[97]

The Superior Tribunal of Justice, in turn, considered that when the contracts signed by a State company run upon economic activities, the rights and obligations there provided would be available and transactional, being that the reason why they could be submitted to arbitration. Conversely, when the activities of the State Company resulted from the public administration's power of empire, being related to the primary public interest, the rights involved would be unavailable and, therefore, could not be submitted to arbitration. In one of the appeals, there was a dismissal without prejudice on the grounds of such an argument, by means of article 267, VII of the Code of Civil Procedure.[98]

Still regarding this topic, another judgment held by STJ considered that only public rights of contractual or private nature can be submitted to arbitration, deriving from mere private acts. It also adduces that the (primary) public interests are unavailable, but not the administration interests (secondary). There are no restrictions as to the possibility of private and public joint stock company to establish arbitration agreements. "*Avoiding the stipulation of the arbitration clause in an administrative contract signed between commercial parties is to restrict where the law has not done it*." This decision also mentions the jurisdiction-jurisdiction principle and establishes that "*the arbitration does not subtract the natural judge constitutional guarantee; on the contrary, it implies its implementation,* inasmuch as *it is appropriate only by mutual concession between the parties, inapplicable, thus, by coercive means, as both parties assume the 'risk' of being defeated during arbitration proceedings*."[99]

4.12. Method of Dispute Resolution Unduly Designated as Arbitration

A peculiar situation is related to the inappropriate use of the arbitration expression in some specific ways of dispute resolution that do not have such a characteristic.

As far as TJSP is concerned, it was possible to verify through the research the so-called "Unimed Litigation", which consisted of numerous decisions involving cooperating companies from Unimed, in which the validity of the alleged arbitration clause contained in a document for establishing the cooperative was discussed. As it was a method of dispute resolution that cannot be confused with arbitration, despite the name

[97] AI 2003.01.008906-5-1
[98] REsp. 612.439 and REsp. 606.345, judge by the 2nd Panel of Judges.
[99] MS no. 11.308 and AgRg MS no. 11.308, judge by the 1st Section

erroneously given by the parties, it is necessary to recognize the Court's correct decision on dismissing the allegations that the clauses had to be recognized as such.[100]

TJRJ also dealt with issues involving mechanisms unduly named as arbitration. The assumption of greater frequency was the one related to an irregular performance of the supposed arbitration entity. Hence, situations were found in which the supposed arbitration panel, acting as if it had jurisdictional powers, *notified* the parties to submit their *dispute*, incurring the risk of *default*, mostly without the support of some arbitration agreement.[101] In these hypotheses, the plaintiff mostly sought to invalidate both the arbitration clause agreed and the arbitration sentence itself, which was irregularly pronounced.

Another circumstance perceived was the confusion created by the parties and non-rectified by the Judiciary about the misuse of *arbitration*, when the intention was to refer to *arbitrament*, as occurred at TJMG.[102]

A peculiar discussion also seemed to have taken place at TJMG, [103] having the Court considered that the following clause set up in the Statute of the Evangelical Community "Palavra Viva" constituted a legitimate arbitration clause: "*In case of divergence between the minister and the Community (Church), both parties may request the intervention of a Special Commission, composed of ministers and members of the Ormiban – Order of the Ministers of the National Baptist Convention, being the parties committed to comply with its decision.*" This lead to the dismissal of the appeal at issue and the removal of the case appreciation by the Judiciary.

The 15th Civil Panel of Judges of TJRS[104] denied appeal to the internal interlocutory injunction, for it deemed, among other arguments, that the clause perceived by the appellant as an arbitration clause did not mention arbitration, but rather conciliation by an International Chamber of Commerce. Thus, it would not be an arbitration clause pursuant to the Brazilian Law no. 9307/96. However, taking into account the description of the clause within the entire content of the court decision, it is not possible to determine whether it really was an arbitration clause.

4.13. Inclusion of the Chamber of Arbitration in the Pole subject to Judicial Proceedings

The development and consolidation of arbitration in Brazil brought a relevant problem, which was the emergence of non-competent Chambers of arbitrations to the purpose that they supposedly should serve. Therefore, legal proceedings against these institutions started to be filed.

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[100] Civil Appellate Review no. 188.533-4/0-00, [100] Civil Appellate Review no. 244.313.4/3-00, [100] Civil Appellate Review no. 254.456.4/3-00 and [100] Civil Appellate Review no. 273.925-4/3-00. Also addressing the method unduly designated as arbitration: AR 714706-00/0

[101] Civil Appellate Review no. 2007.001.18271, Civil Appellate Review no. 2006.001.14601 and AI 2005.001.16852

[102] To this effect, see Civil Appellate Review no. 2.0000.00.309.299-9/000

[103] AI 2.0000.00.379304-6/000

[104] Internal Interlocutory Appeal no. 70016959397

In this respect, a decision delivered at TJRJ is illustrative. In the unique situation found, what was possible to notice was that the claim of the party about a supposed instigation to error in the formation of the commitment. Although the judgment did not last in the analysis of this issue, it is important to highlight that the passive legitimacy *ad causam* of the chamber in such a hypothesis was explicitly stated by the Court.[105]

Aware of the hypothesis of inclusion of the chamber of arbitration in the passive pole, for the purpose of making the institution liable for any damages caused to the parties, it is important to highlight, though, those cases filed against such institutions, for technical ignorance about the Arbitration Law on the part of the plaintiff, or even as a strategy of the parties to try to avoid arbitral jurisdiction.

In this matter, it is interesting to point out that there is a decision at TJSP[106] in which it is possible to verify the inclusion of the chamber of arbitration in the passive pole of the lawsuit, questioning the validity of the regulation of Brazil-Canada Chamber of Commerce (CCBC). In the case at issue, TJSP dismissed the plaintiff's allegation of invalidity, on the grounds that the parties freely signed a contract which contained an arbitration clause with specifications to establish the arbitration, having the parties chosen CCBC and assumed the obligation to accept the rules imposed, all of them preexistent and totally known by the parties.

The article V of the Brazilian Law no. 9307/96 was thus applied, establishing that "*as long as the parties refer to the rules of some institutional arbitration body or specialized entity in the arbitration clause, the arbitration proceedings will be instituted and processed accordingly to such rules, being the parties also allowed to establish in the clause or in another document the agreed manner to institute the arbitration.*"

4.14. Intertemporal Law – implementation of the Brazilian Federal Law no. 9307/96 to contracts prior to legal effect

TJRJ highlights the tendency to admit the application of the Federal Law no. 9307/96 to contracts prior to its legal effect. This Court has been supporting by suffrage the understanding that, having the contracting parties pledged themselves to submit any litigation arisen between them to the arbitral proceedings, and being the latter a juristic act perfectly based on available rights, there would be no reason to dismiss the enforcement of arbitration law, which has immediate applicability.

As for TJRJ, the fact that the contract in which the arbitration clause was inserted had been signed before 1996 would not lead to any reduction in the effectiveness of the agreed clause.[107] It is important to emphasize that the current understanding of TJRJ has notably been adopted since 2000, and there are sparse decisions in opposite direction prior to this year.[108]

[105] Civil Appellate Review no. 2005.001.31186
[106] Civil Appellate Review no.296.036-4
[107] AI 2003.002.00841, Civil Appellate Review no. 2007.001.22946, AI 2006.002.05255 and Civil Appellate Review no. 2007.001.24833, Civil Appellate Review no. 2007.001.24798, Civil Appellate Review no. 2005.001.42032.
[108] Civil Appellate Review no. 1997.001.00191, judged on March 28, 1997; AIs 1997.002.03415 and 1997.002.03422), judged on March 10, 1998, Civil Appellate Review no. 1999.001.18330, AI 3.744/96 and AI 3.747/96, judgment: October 15, 1996.

The Superior Tribunal of Justice in turn considered that the Arbitration Law can be applied immediately to the case, i.e. the Brazilian Law no. 9307/96 can be applied to contracts made before its legal effect in case there is an arbitration clause previously regulated by the former Brazilian Civil Code of 1916, and by the Code of Civil Procedure.[109]

5. Conclusion

Aiming to investigate in an empirical fashion the enforcement of the Arbitration Law by the Brazilian Courts with respect to validity, effectiveness and existence of the arbitration agreement, the outcomes of this research proved to be positive, because they allowed a comprehensive diagnosis of the judicial decisions on this matter.

However, the necessary conclusion is that obtaining the endorsement of the Judiciary Branch for the enforcement of the Arbitration Law has not been gratuitous, nor free of criticism. And the journey to create and consolidate an arbitration culture in Brazil was somewhat revealed by this research, which examined decisions since the promulgation of the law in 1996, which can be considered as modern for its time and in connection with the international concepts which have mirrored up to 2008, a period of time superior than ten years in which there were advances, oppositions, errors and successes, which added up clearly symbolize the reception of the Arbitration Law by the Brazilian Courts.

Gradually, the concepts of the Arbitration Law started being assimilated and their use was made in a technical and appropriate fashion by the jurisprudence, drawing attention in this interregnum the Brazilian Supreme Court's decision on the constitutionality of the Arbitration Law in 2001. The research demonstrated a growing development in the cooperation relationship between the Judiciary Power and Arbitration.

Emphasized that the courts understandings towards arbitration are not uniform, varying the number of decisions and issues addressed by the courts searched, which can be a reflection of marked regional differences existent in Brazil.

It is important to point out, though, that the Courts' understanding on issues related to arbitration is not homogeneous, with the number of decisions and themes addressed varying per court analyzed, something which may be regarded as the result of marked regional differences that take place all over Brazil.

The mishaps are also due to the natural process of assimilation and consolidation that exists in the interpretation of any law, even more when such an ultimately important theme like the access to justice is debated. Moreover, this discussion inevitably ends up comprehending tangential topics as important as the primary ones, such as the autonomy of the parties' will. By contractually choosing arbitration as a means of resolving disputes arisen from a contract, these parties exclude, by virtue of the negative effect of the arbitration agreement, the Judiciary's jurisdiction to judge the matter.

[109] STJ, REsp 653.733, 3rd Panel of Judges; judgment: August 3, 2006.

In a nutshell, the goal of this empirical mapping, held in Brazilian Courts of Appeal (TJs), Federal Regional Courts (TRFs) and Higher Courts (STJ and STF), was to systematize the judgments about validity, effectiveness and existence of the arbitration agreement, in order to ponder over – through the very knowledge on these data – the way the Arbitration Law has been applied in Brazil, connecting the academic discussions to the underlying empirical reality, from the courts' perspective.

There are decisions that deal with polemic themes and continue being discussed among legal scholars and within the Judiciary itself, and, therefore, deserve emphasis in this report.

To sum up, it was possible to verify over time a clear evolution in the interpretation and enforcement of the Arbitration Law by the Courts. Furthermore, a particularly noticeable reality is the increasing acquaintance of the Judiciary with its technical concepts and the development of a virtuous circle between Judiciary and Arbitration, marked by the cooperation between judges and arbitrators, and by judicial control when it is necessary, so as to ensure that the arbitration is being treated as a legitimate and efficient means of dispute resolution, whose effects should be recognized when the parties voluntarily and validly opt for their use.

6. Appendix

6.1. List of Court Decisions Organized into Thematic Subgroups

1. Articles of Incorporation – Corporate Dispute

TJSP (32)
4420374700
414364000
108.182-4/1
131.845-4/1
140.276-4/5
234.764-4/2-00
258.442-4/9
158.328.4/04 – dismissal without prejudice
158.329.4/4 – dismissal without prejudice
463.379-4/0-00 – dismissal without prejudice
519.416-4/2-00
296.036-4
AI 82.862.4/8
82.862.4/0-01 – Internal Interlocutory Appeal related to the previous AI
82.862.4/1-02 – Appeal requesting clarification of the previous court decision
128.411.4/4 and 128.410.4/4 – same court decision, same date – related demands
262.324-4/5-00
455.763-4/0-00 – dismissal without prejudice
468.304-4/6-00 – dismissal without prejudice
511.015-4/4-00 – dismissal without prejudice for lack of prosecution
491.325-4/5-00
442.037-4/7-0
414.636-4/0-00 – dismissal without prejudice

531.773-4/9-00
122.809-4/77
482.719-4/2-00
473.999-4/8-00 – dismissal without prejudice
257.416.4/3 – dismissal without prejudice
210.128-4/5-00 – dismissal without prejudice
242.841-4/8-00 – dismissal without prejudice
244.960-4/5-00
392.763-4/1-00

TJRJ (10)
Civil Appellate Review no. 200700124798 and 200700124833 – dismissal without prejudice – same court decision, same date – related demands
AI 200600205255
Civil Appellate Review no. 2006.001.35895
2007.001.25140 – dismissal without prejudice
2005.001.16852
2006.001.14601
2007.001.24825 - dismissal without prejudice
2007.001.24825 – Appeal requesting clarification of the previous court decision – dismissal without prejudice
2007.007.48344
2004.001.25315 – dismissal without prejudice

TJMG (19)
2.0000.00.383059-5/000
2.0000.00.416193-5/000
2.0000.00.505414-4/000(1)
2.0000.00.376034-7/001(1)
2.0000.00.309299-9000
2.0000.00.336299-6/000
1.0016.04.040289-9/002 – dismissal without prejudice
1.0000.00.199781-6
2.0000.00.361731-8
1.0024.05.581902-3/001 (1) – dismissal without prejudice
1.0400.05.016047-4/002 – dismissal without prejudice
2.0000.00.321974-1/000
2.0000.00.321974-1/002
2.0000.00.470277-0/00
2.0000.00.465974-1
1.0000.00.199781-6/0001
2.0000.00.471292-1 – dismissal without prejudice
2.0000.00.472088-1 – dismissal without prejudice (bound to AI 2.0000.00.471292-1)
1.0400.05.016047-4

TJMS (1)
2004.004249-3/0000-00

TJRS (4)
70009318106
70009340274

70012340204
70016543662

TJPR (4)
220.697-3 – dismissal without prejudice
220.697-3/01 – Appeal requesting clarification of the previous court decision – dismissal without prejudice
410.403-2
144.019-9

TJDF (3)
2004.00.2.010026-3
2007.00.2.000240-8
2001.01.1.080685-9
STJ (1)
AgRg in AI 481.023

2. Corporate Merger or Acquisition

TJSP (11)
76.615-4/2
492.325-4/2-00
454.967-4/3-00
491.347.4/5
491347-4/7-01 – Appeal requesting clarification of the previous court decision
217.023-4/7
217.023-4/9-01 – Appeal requesting clarification of the previous court decision
129.131-4/3
123.567-4/9
7.118.935-2
7.118.935-2/01 – Appeal requesting clarification of the previous court decision

3. Adhesion Contract

TJSP (8)
7.124.027-2
7.124.027-2/01 – Appeal requesting clarification of the previous court decision
987.677-0/7 – services agreement
516.531.4/5-00 – contract of purchase and sale of property – dismissal without prejudice
638.682-00/9 – commercial leasing agreement (shopping mall)
373.141.4/4-00 – adhesion to Bovespa statute
373.141.4/6-01 – adhesion to Bovespa statute
458.679-4/8-00 – real estate contracts

TJRJ (6)
Civil Appellate Review no. 2006.001.59128 (consumer relation – real estate contract)
Civil Appellate Review no. 2006.001.61675 (consumer relation – real estate contract)
AI 2006.002.14140 (real estate contract)
AI 200600225765 (real estate contract)
2004.002.22349 – services agreement

200000103708 – services agreement

Cases concerning Brascan Real Estate Office (adhesion contract – real estate contract)

TJRJ (8)

AI 2001.002.09325
Civil Appellate Review no. 2003.001.16786 – dismissal without prejudice
AI 2003.002.04580
AI 2004.002.23288 (consumer relation)
Civil Appellate Review no. 2005.001.37220 (consumer relation)
AI 2005.002.02814
Civil Appellate Review no. 2006.001.24005 – dismissal without prejudice
AI 2006.002.12221 – dismissal without prejudice

TJMG (2)
2.0000.00.448536-7/000 (consumer relation)
2.0000.00.394548-4/000 (medical services)

TJRS (4)
70009494923 – distribution agreement
70016605073 – distribution agreement
70016959397– distribution agreement
70002330983 – distribution agreement

TJPR (3)
227.963-0 – commercial representation
395.862-3 – construction
385.486-0 – property management agreement

4. Franchise Agreement

TJSP (3)
7.107.252-1 - dismissal without prejudice
7.127.102-2 – dismissal without prejudice
7.117.217-5

TJRJ (1)
2007.001.142265

5. Turn-key Construction Agreement

TJRJ (3)
AI 2000.002.14895 – dismissal without prejudice
EDcl 2000.002.14895 – appeal requesting clarification of the previous court decision
2007.001.27446 – dismissal without prejudice

STJ (1)
Resp no. 653.733 – dismissal without prejudice – same TJRJ case above mentioned

TJMG (3)
2.0000.00.379421-2/000
2.0000.00.410097-4/000 (1)
2.0000.00.356235-8 – dismissal without prejudice

TJPR (4)
245.792-9 – dismissal without prejudice
280.038-2
316.842-1 – dismissal without prejudice
428.067-1 – turn-key construction agreement (Inepar vs. Itiquira)

TJDF (1)
2006.01.1.062056-4

TJRS (1)
70016974636

6. Real Estate Contracts

TJSP (9)
769.043-00/8
373.070-4/0-00
618.314-00/3 – agricultural land lease agreement
618.324-00/8 – agricultural land lease agreement
355.478.4/0 – lease and management agreement
366.882-4/9-00 – dismissal without prejudice
1.107.917-0/1
7132996-7
1003370-00/7

TJRJ (3)
Civil Appellate Review no. 2007.001.22946
Civil Appellate Review no. 2005.001.00773 – commercial leasing contract
200700226966 – dismissal without prejudice

TJMG (6)
2.0000.00.387898-8/000
1.0024.06.249316-8/001 – dismissal without prejudice
2.0000.00.402474-6 – dismissal without prejudice
2.0000.00.425811-7 – dismissal without prejudice
1.0024.05.643985-4/001 – dismissal without prejudice
1.0024.05.796559-2/001

TJSC (1)
2006.012949-4 – dismissal without prejudice

TJPR (3)
439.800-3
298.297-6 – dismissal without prejudice
385.486-0

TJRS (1)
70011513652 – dismissal without prejudice

TJMT (2)
67125/2006 – lease
72225/2006 – lease

TJDF (1)
1999.00.2.001609-5

TJTO (1)
5736 – lease contract – dismissal without prejudice

7. Distribution Agreement

TJSP (2)
AI no. 089.522-4/8-00 and AgRg no. 089.522-4/0-01
089.522-4/1-02 – appeal requesting clarification of the previous court decision

The Campari Case
TJSP (6)
Civil Appellate Review no. 083.125-4/2
083.125-4/4-01 – appeal requesting clarification of the previous court decision
AI 090.709-4/4
090.709-4/6-01
383.455-4/5-00
149.021-4/8

TJPR (1)
436.798-6 – dismissal without prejudice

TJRS (1)
70011879491 – dismissal without prejudice

STJ (1)
REsp no. 238.174

8. Bankruptcy and Recovery of Companies

TJRJ (1)
200700226921

TJSP (6)
460.034-4/5-00
460.034-4/5-01 – appeal requesting clarification of the previous court decision
198.123-4/7-00 – dismissal without prejudice
425.177-4/0-00
207.960-4/4
207.960-4/6-01

TJPR (1)
370.561-5

9. Insurance Contract and Guarantee

TJSP (1)
653.025-0/2

TJRJ (3)
Civil Appellate Review no. 2006.001.29622
AI 2005.002.28.435 – extension of the arbitration clause from the principal contract to the accessory one (of surety bond)
Civil Appellate Review no. 2007.001.17.081 – extension of the arbitration clause from the principal contract to the accessory one (of surety bond)

TJPR (1)
288.492-8 – counter guarantee contract linked to a commitment of purchase and sale

10. Commercial Representation Agreement

TJSP (1)
1.111.650-0 – agency agreement – dismissal without prejudice

TJRJ (3)
Civil Appellate Review no. 2002.001.28020 – dismissal without prejudice (Code of Civil Procedure, 267, VI – lack of interest in acting and legal possibility of the claim)
Civil Appellate Review no. 31172/2003 – dismissal without prejudice
AI 2003.002.00841 – dismissal without prejudice

TJMG (1)
1.0702.04.169908-4/001 – dismissal without prejudice

TJPR (1)
414.532-4 – dismissal without prejudice

TJRS (1)
70005680558

TJMT (2)
36321/2001 – adhesion contract
36697/2002

STJ (1)
REsp no. 712.566 – dismissal without prejudice

11. Public Power and Arbitration

TJRJ (1)
AI 2003.002.07839

TJPR (8) Copel vs. Energética Rio Pedrinho S.A. and Brascan Energética S.A.
175865-4 – power supply agreement
175.865-4-01
174.874-9
174.874-9/02
247.646-0
145.300-9
174.874-9
169.656-8

TJDF (1)
1998.00.2.003066-9

STJ (2)
MS nº 11.308 – dismissal without prejudice
AgRg no MS nº 11.308 – lease agreement for management, exploitation and operation of the port terminal and the retro-port area (port complex)

12. Transport Contract

TJSP (1)
7086044-7

TJRJ (2)
AI 1997.002.03415 e AI 1997.002.03422 – same court decision, same date – related demands
2002.001.05416 – dismissal without prejudice

TRF2 (2)
2001.51.01.002803-3
2001.51.01.002803-3 – appeal requesting clarification of the previous court decision

13. Purchase and Sale of Goods

TJSP (1)
1.231.995-2 – dismissal without prejudice

TJRJ (3)
Civil Appellate Review no. 2006.001.21111 (purchase and sale of goods) – dismissal without prejudice
MC 2006.014.00053 (related to the previous court decision)
1999.001.18330

TJRS (1)
70007909534 – inventory purchase agreement and contract manufacturing

TJPR (4)

315.690-3
315.690-3 - dismissal without prejudice

315.690-3 – appeal requesting clarification of the previous court decision – dismissal without prejudice
321.822-2 – dismissal without prejudice

14. Chattel Mortgage

TJRJ (2)
AI 2005.002.06761 – dismissal without prejudice
Civil Appellate Review no. 2006.001.08408

TJMS (1)
2002.012074-0/0000-00

15. Chatter Party

TJRJ (5)
Civil Appellate Review no. 2007.001.21338 – dismissal without prejudice
199900210476 e 200000201608 – dismissal without prejudice – same court decision, same date – related demands
199600203744
199600203747
200000102677 – dismissal without prejudice

16. Method of Dispute Resolution Unduly Designated Arbitration

TJSP (6)

714.706-0/0
1.1. Unimed Case (from reimbursement of medical expenses and collection of medical services – exchanges between cooperative members – to authorization of surgery required by user of the service at the alleged peril of life)[110].
188.533-4/0-00
273.925-4/3-00
237.120.4/6-00
254.456.4/3-00
244.313.4/3-00

TJMG (5)
2.0000.00.379304-6/000
2.0000.00.466298-0/001
1.0023.04.000829-6/001
2.0000.00.413094-5/000
2.0000.00.503787-4

TJPR (1)

[110] **Constituição Unimed (1994).** Establishment of the Great National Constituent Plenary, integrated by all the cooperatives of Unimed, Unicred and Usimed Systems, during the 24th Unimed National Convention, held in Salvador (BA a). The Unimed Constitution is approved and the legal concept of Unimed Forum is introduced, arbitral and regulatory instance whose purpose is to preserve the integrity of the system. It is comprised of all administrative advisers of Unimed Brazil.

181.335-8

17. Technology Transfer Agreement

TJRJ (3)
Civil Appellate Review no. 2001.001.28808 – dismissal without prejudice
EDcl 2001.001.28808 – appeal requesting clarification of the previous court decision – dismissal without prejudice
1997.001.00191 – international contract

18. Loan Agreement

TJSP (2)
465.334.4/0-00
466.729.4/0-00

TJRJ (1)
2004.001.08854

19. Services Agreement

TJSP (1)
980.401-0/8

TJRJ (1)
2006.001.26956

TJMG (7)
2.0000.00.471260-9/000 (1) – medical services agreement
2.0000.00.471260-9/001 (1) – appeal requesting clarification of the previous court decision
2.0000.00.393297-8 – dismissal without prejudice
2.0000.00.393297-8/001 – dismissal without prejudice – requesting clarification of the previous court decision
1.0024.06.206390-4/001 (1)
1.0024.06.206390-4/001 (1)
2.0000.00.392186-6-1 – dismissal without prejudice

TJPR (1)
275.650-5 – dismissal without prejudice

TJDF (1)
2005.01.1.038212-9

20. Commercialization of Electrical Power, Oil and/or Gas

TJMS (2)
2006.009393-1/0000-00
2006.009393-1/0001-00 – appeal requesting clarification of the previous court decision

TJPR (6) – Copel vs. UEG Araucária Ltda. case (contract of purchase and sale of electrical power)
142.683-1 e 145.895-3 – *anti-suit injunction* – same court decision, same date – related demands
0149555-0
160213-7
0161371-8
0170132-0
0162874-8

TJRS (1)

70004535662

STJ (3)
REsp no. 612.439 – dismissal without prejudice
EDcl no. REsp 612.439 – dismissal without prejudice
REsp no. 606.345 – dismissal without prejudice

TRF2 (2)
2003.01.008906-5-1
116.300

21. Others:

TJSP (13)

214.528-4/1-01
132.793.4/0 (Renault vs. CAOA)
381.781-4/8-00 – dismissal without prejudice
381.782-4/2-00 – dismissal without prejudice
197.978-4/0
197.978-4/2-01 – appeal requesting clarification of the previous court decision
257.2704/8-01
257.2704/0-02 – appeal requesting clarification of the previous court decision
7.061.705-9 – stock market
510.575-4/1-00 – indemnity
237.442-4/5-00 – indemnity – farmer's cooperative – dismissal without prejudice
237.442-4/7-01 – indemnity – farmer's cooperative – dismissal without prejudice
82.862.4/8 – atypical commercial contract

TJRJ (9)
Civil Appellate Review no. 2007.001.26162 - dismissal without prejudice (indemnity for traffic accident)
AI 2006.002.025293 – dismissal without prejudice
Civil Appellate Review no. 2005.001.44039 – dismissal without prejudice
AI 2006.002.23053
AI 2005.002.18103 – dismissal without prejudice
Civil Appellate Review no. 2004.001.15960 – dismissal without prejudice
AI 2005.002.24569

Civil Appellate Review no. (7596/2004) – alegação da existência de convenção arbitral em exceção de pré-executividade
Civil Appellate Review no. 2007.001.18271 (Aguia de Haia Court) – indemnity claim against the Board of Arbitration for irregularity

TJMG (23)
2.0000.00.353467-8/000 – collection action
2.0000.00.452321-5/000 – assignment of radiophonic fees agreement
2.0000.00.404361-2/000 – execution of credit instrument
2.0000.00.470808-5/000 – contract of confession of indebtness
1.0024.04.339124-2/001 – *citra petita* decision and unfair terms
2.0000.00.445064-4/000(1) – indemnity for an accident at work (compulsory insurance)
1.0024.05.821971-8/001(1)
1.0000.00.110013-0/000(1)
1.0027.03.002681-2/001(1)
2.0000.00.337082-5/000(1)
1.0105.05.169591-1/001 – dismissal without prejudice
1.0261.06.046074-6/001 – collection action – arbitration clause inserted in Brazilian bank credit instrument – dismissal without prejudice
2.0000.00.360662-4 – agricultural partnership agreement
2.0000.00.394534-0 – commercial contract – industrial machinery – dismissal without prejudice
2.0000.00.404141-0 – consortium agreement
1.0024.04.520866-7/001 – event organization – dismissal without prejudice
2.0000.00.511747-5/000 – assignment of credit instrument
2.0000.00.511747-5/001 – assignment of credit instrument
1.0024.03.147645-0/001 – rescission of contract with claim for damages com – dismissal without prejudice
1.0024.03.147645-0/002 – dismissal without prejudice – appeal requesting clarification of the previous court decision
2.0000.00.498081-2 – cotton purchase agreement in Commodities and Futures Exchange – dismissal without prejudice
2.0000.00.457198-6 – review of contract clause – dismissal without prejudice
2.0000.00.457449-8 – review of contract clause – dismissal without prejudice (court decision identical to 2.0000.00.457198-6, for it involves other joint party)

TJPR (4)
432.974-0
145.300-9
372.439-6 – supply contract – dismissal without prejudice
157.238-9 – collection action – international representation – dismissal without prejudice

TJRS (3)
70010662740
70011081148
70008934861 – rescission of contract

TJMT (1)
47783/2003 – agricultural bond issued by producers (*cédula de produto rural*)

TJDF (3)
1999.01.1.056750-2 – authorized agent agreement – dismissal without prejudice
1998.01.1.048313-4 – declaratory of the absence of an arbitration clause
2003.01.1.040229-4 – notary public's doubts presented to the judge so as to elucidate how to proceed in a particular registry (*dúvida registrária*)

TRF2 (1)
2003.02.01.009436-0

STJ (1)
AgRg in AI no. 692.697 – dismissal without prejudice – maintenance of the decision

STF (1)
Provisional Remedy in Interlocutory Injunction 212-5 RJ