

Superior Court of Justice rules on arbitration and piercing of corporate veil

25 October 2018 | Contributed by [Carvalho, Machado e Timm Advogados](#)

[Arbitration & ADR Brazil](#)

[Introduction](#)

[Facts](#)

[Lower judge decision](#)

[Arbitral tribunal decision](#)

[Special appeal](#)

[Superior Court of Justice decision](#)

[Comment](#)

Introduction

The Superior Court of Justice – the highest authority on all federal laws except for the Constitution – recently ruled on a number of arbitration-related issues,⁽¹⁾ including:

- the courts' power to grant pre-arbitral interim measures;
- the piercing of the corporate veil; and
- whether non-signatory parties are governed by arbitration clauses.

Facts

The case involved interim measures requested by a tyre factory (the claimant) against a construction contractor (the main respondent) and a number of individuals and corporates (collectively, the economic group).

The claimant hired the main respondent to expand its tyre factory in Camacari, Bahia under a construction and engineering contract. The contract included an arbitration clause, which specified that the Centre for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (CAM-CCBC) was the relevant arbitral institution.

According to the Superior Court of Justice, the contract was considered to be a fixed-price contract – similar to an engineering, procurement and construction agreement – with an estimated cost of \$33 million.

The claimant alleged that there had been delays in the delivery of hired services during the contract's execution and that the main respondent had not used prepaid financial resources to complete the construction work. As such, the claimant issued a notice terminating the contract.

The claimant alleged that it had suffered losses of approximately \$25 million, the reimbursement of which would be discussed in arbitral proceedings administered by the CAM-CCBC.

However, before the arbitration commenced, the claimant requested interim measures seeking to block the economic group's assets and gain assurance that a future arbitral award condemning the economic group and the respondent could be enforced. The claimant required the respondent's corporate veil to be pierced in order to also block the economic group's assets. The claimant alleged that there had been fraud and an abuse of corporate veil protection on the part of the respondent, which had supposedly transferred its assets to third parties with the intent of preventing the fulfilment of its obligations.

Lower judge decision

A lower judge conceded the piercing of the main respondent's corporate veil and ordered the seizure of the economic group's assets.

Between the issuance of the lower judge's decision and that of the Sao Paulo State Court regarding the subsequent appeal, an arbitral tribunal was effectively constituted under the CAM-CCBC. Therefore, in accordance with Article 22(4) of the Arbitration Act (Federal Law 9.307/1996), the lower judge requested the arbitral tribunal to decide on the interim measures.

Arbitral tribunal decision

The arbitral tribunal held that it did not have jurisdiction to rule on the court's interim measures on the grounds that such a decision would have repercussions for the rights of third parties that had not executed the contract and therefore not signed the arbitration clause (ie, the economic group, which had been included in that interim measure). The arbitral tribunal also based its decision on the fact that the claimant had not requested the arbitrators to decide on piercing the main respondent's corporate veil and consequently on the binding effect of the arbitration clause on the economic group.

Special appeal

The interim measures were ultimately confirmed by the lower judge and upheld by the Sao Paulo State Court. In a special appeal to the Superior Court of Justice, the main respondent and the economic group alleged, among other things, a procedural detail – namely, that under Article 308 of the Civil Procedure Code (CPC) 2015 – or Article 806 of the CPC 1973, which was valid at that time – the claimant should have filed a lawsuit

on the merits of the case with regard to the economic group. Its failure to do so meant that the measures could not be upheld.

Superior Court of Justice decision

The first controversial point to be decided by the Superior Court of Justice, as posed in the respondent's special appeal, was whether the interim measures had lost their efficacy because the claimant had failed to initiate the arbitration (ie, the discussion on the merits of the case) within 30 days from the granting of the interim measures against the economic group and the claimant.

In order to provide a thorough basis for his judgment on this issue, Judge Marco Aurélio Bellizze – the rapporteur of the judgment – discussed the limits of public jurisdiction on interim measures when the involved parties have signed an arbitration agreement. In this regard, the court reached four main conclusions.

First, the court indicated that despite the arbitral tribunal's decision, the commencement of the arbitration had precluded the jurisdiction of the public courts even on the interim measures. Therefore, under Articles 22-A and 22-B of the Arbitration Act and Article 806 of the CPC 1973, the lower judge, on becoming aware of the arbitral proceedings, should have simply surrendered its jurisdiction in favour of the tribunal. According to the Superior Court of Justice, both the lower judge and the arbitral tribunal had erred – the former because it should not have proceeded with the case and the latter because it should have decided on the issue regardless of the fact that the arbitration agreement did not involve the third parties.

The second controversy referred to a contradiction: the claimant had tried to execute the interim measures against the respondent and the economic group even though the latter had not participated in the arbitral proceedings. However, if the economic group were not part of the arbitration, there would be no need to block its assets for future execution because it would never be condemned by the arbitral tribunal and no award would need enforcement.

The third point brought by the Superior Court of Justice concerned the possibility that the arbitral tribunal might – or even need to – deliberate on piercing the main respondent's corporate veil, which, according to the arbitrators, would mean bringing third parties under an arbitration agreement that they had not signed. According to the judge, the corporate veil matter, despite having initially been discussed before the public judiciary, should also have been brought before an arbitral tribunal, which the claimant had failed to do.

Because the interim measures had involved third-party assets, the Superior Court of Justice reinforced the inseparable nature of such matters and concluded that the arbitral tribunal should have ruled on piercing the corporate veil, regardless of the fact that the other parties had not signed the arbitration agreement.

Moreover, the court considered that, even though party autonomy is the cornerstone of arbitration and arbitration clauses can bind only the agreement's signatories, consent may, in certain exceptional cases, be tacit (ie, demonstrated through conduct other than the signing of an agreement). The court admitted that tacit or implicit consent may exist

in situations where a third party has exercised its control over other parties to abuse the rights derived from a corporate veil (eg, the theory of economic groups).

Following its considerations on arbitral agreements, the Superior Court of Justice ruled in favour of the special appeal of the respondent and the economic group and revoked all of the judicial interim measures involving the blocking of assets and the piercing of the corporate veil. The court also took into account the fact that a party that requests an interim measure under the CPC must initiate an arbitration against all parties of an economic group (the respondent and the economic group in the case at hand) within 30 days. Since the claimant had failed to do so – either before the public judge or the arbitral tribunal – the interim measures should not persist.

Comment

The Superior Court of Justice's decision has broadened the interpretation of consent to an arbitration agreement to include economic groups, which could – by implication – pierce the corporate veil in such cases and extend arbitral jurisdiction to non-signatory parties. The decision sets a precedent for this issue and will serve as a parameter for future decisions by both the lower courts and the Superior Court of Justice.

For further information please contact [Luciano Timm](#) at Carvalho, Machado & Timm Advogados (+55 11 2872 4760) or email (ltimm@cmtlaw.com.br). The Carvalho, Machado & Timm Advogados website can be accessed at www.cmtlaw.com.br.

Endnotes

(1) REsp 1698730/SP, Rel Min, Marco Aurélio Bellizze, 8 May 2018; DJe 21 May 2018.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription.

[Forward](#) [Share](#) [Print](#)

Author



Luciano Timm