

BRAZIL'S NEW CODE OF CIVIL PROCEDURE

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After taking more than five years to make its way through the two chambers of Brazil's National Congress, on 16 December 2014 the Federal Senate approved the basic text of the new Code of Civil Procedure (New CCP). The new code will come into force one year after it is published, which is expected to occur in March 2015.

The creation of the New CCP is one more piece in the legislative and judicial reforms that have been made with a view to achieving quicker and more efficient administration of justice.

With exactly this objective in mind, the New CCP makes significant changes in the appeals system, eliminating some types of appeals (such as *embargos infringentes*, which is a type of application for rehearing when an appeal decision modifying judgment at first instance is not unanimous), restricting the circumstances in which an appeal will lie in others (limiting, for example, the matters that can be subject to the interlocutory appeal known as *agravo de instrumento*), and establishing rules to make bringing appeals generally a more costly process (under the New CCP, for example, court-awarded attorneys' fees will also be owed in the appeal phase).

The search for efficiency is also behind a new incidental proceeding that is intended to resolve "repetitive claims", so that all actions that involve only the same question of law can be judged once only, with the court's decision applying to all the actions.

In a clear departure from earlier codes, the New CCP promotes alternative dispute resolution mechanisms, especially conciliation and mediation, by introducing conciliation hearings in the first stages of a proceeding to attempt a settlement between plaintiff and defendant.

The new legislation hopes to encourage citizens and companies to incorporate a peace-making culture in their daily lives, and to foster that aim, courthouses will expand and improve judicial conciliation and mediation centers, which will be staffed by specialists.

The New CCP also introduces a new rule on the production of evidence, by giving the judge the power to reverse the burden of proof. In practice, this means that in certain situations, the judge can determine that the defendant must produce evidence to disprove the plaintiff's allegations, and if the defendant fails to do so, the absence of evidence could result in judgment against the defendant.

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This new rule will affect the day-to-day routine of companies, which are defendants in a significant number of legal proceedings. After all, if companies are aware that the judge can reverse the burden of proof, they are likely to improve their systems for control and preservation of documents and information, if only to ensure that they can make an adequate defense, and avoid an unfavorable result that could have been avoided if they had been able to produce convincing evidence.

The New CCP puts an end to a long-standing controversy among scholars and in the courts over whether the parties to a contract can exclude the jurisdiction of the Brazilian courts and elect the courts of a foreign jurisdiction to resolve their disputes. By expressly allowing the parties to choose the jurisdiction for resolution of disputes, the New CCP creates greater legal certainty for contracting parties.

In response to concerns expressed by businesses, the New CCP makes important changes to the rules governing collection of debts against companies and their shareholders or partners.

One of the most significant changes deals with lifting the corporate veil. The procedural legislation currently in force does not address the matter at all, and the Civil Code's treatment of the possibility of lifting the corporate veil is timid. The New CCP addresses this lack by establishing a specific procedure that must be followed by the court when it intends to lift the corporate veil to impose liability on a company's owners. The procedure for lifting the corporate veil includes submissions by the persons whose property will be affected if the corporate veil is lifted, who can request the production of evidence.

The New CCP also creates rules for attachment of businesses' receivables, providing that the judge must set a limit in light of the facts of each case that works toward ensuring payment of the creditor's claim within a reasonable amount of time, but does not make it impossible for the debtor to continue doing business.

Another change designed to facilitate enforcement of debts is that judges can now include debtors' names in debtor blacklists, as an inducement to pay the debt under collection.

Overall, the general expectation is that the New CCP should make court proceedings faster but potentially more costly for the party that ends up losing, a combination that should alleviate the backlog faced by the Brazilian courts.

Individuals and companies, with the help of their attorneys, should carefully assess their real chances of success in existing and potential litigation, particularly in light of the dominant position taken in precedent cases, which will take on a more important role under the New CCP.

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