Execution and Enforcement Proceedings in Brazilian Law

Antonio CABRAL*

1. Introduction

This presentation whishes to highlight some of the latest trends in execution proceedings in Brazilian Civil Procedure. Our main focus will be the instruments to balance the rights of debtor and creditor, attempting to achieve efficiency without harm to fundamental constitutional guarantees.

Indeed, one of the main problems of execution proceedings in Brazil (and throughout the world) is efficiency. Execution and enforcement proceedings in Brazil last twice longer than cognitive proceedings,[1] and some of the main problems faced in Brazil are the difficulties of finding the debtor and her assets, as well as bringing the procedure to an end in reasonable time, with full payment of the creditor and avoiding depreciation of the assets market value.

Well, in order to make proceedings more expedite and efficient, enforcement of judgments has gone through significant changes in the last years in Brazilian Civil Procedure. This movement began with the approval of statutes nº 11.232/2005 and nº 11.382/2006, that have modified many rules concerning execution proceedings. In 2015, after four years of debate through several commissions, a new Code of Civil Procedure was approved in the Brazilian Parliament and brought some innovation since it came into legal force in March, 2016.[2]

In Brazil, there are several different proceedings that vary depending on the nature of the asset and the type of execution. There is, for example, execution proceeding to collect a sum of money (article 523 until 527 and 824 and following); proceedings to enforce ob-

* Professor at the University of Rio de Janeiro, in Brazil.

1) The National Council of Justice (an administrative body that organises Civil Justice in Brazil) publishes yearly a report (Justice in Numbers or "Justiça em Números"). The last report, of 2017, says that in total, the new cases filed regarding execution are 6.900.525 (almost 7 million). In the last 5 years, almost 25 million new cases. Execution proceedings not only last longer in Brazil than cognition proceeding, but they also tend to burden the Judiciary much more. More than half of all pending procedures in the country relate to execution. In most cases, the main difficulty is to find the debitors assets.

2) There is an English translation of the new Brazilian Code of Civil Procedure, which is available at my profile at the website academia.edu at the following link: https://www.academia.edu/34624319/Brazilian_Code_of_Civil_Procedure_-_Translated_to_English. In the same webpage there is a Spanish version of the Code as well.

ligations to do something or to deliver or hand over a specific movable good (articles 536 and following and articles 814 until 821); proceedings to collect child support or alimony (articles 528 until 533 and 911 until 913); and proceedings regarding execution against the State or state companies (article 910).[3)]

Before the recent legislative modifications, in any case it was necessary an autonomous judicial process for enforcing any judgments and a special procedure was required for this purpose.

The general rule for the enforcement of judicial decisions is currently based on the idea of a *syncretic* process, in which enforcement has become an additional stage of the cognitive proceeding and there is no need for bringing up a new action to enforce the judgment.

However, in some other cases, as enforcement of extrajudicial titles[4)] and the judgments in which a State organ (administrative bodies or government agencies) is a party, the autonomous enforcement process is still required.

2. Constitutional limitation on the enforcement of judgments

2.1. Human dignity and *Existenzminimum*

The limitations on enforcement of judgments are focused in the protection of the individual, guided by the general principle of human dignity, that has constitutional status (art.1 of the Brazilian Federal Constitution) and protects the minimum necessary for the existence of a human being (in Germany known as *Existenzminimum*).[5)] As an outcome of this constitutional norm, execution of judgments in Brazil has to develop itself respecting the so-called principle of the "least onerous means of enforcement", (article 805 of the new Code of Civil Procedure). The principle states that enforcement has to be carried out in the least burdensome way possible for the debtor and applies to any type of procedural act at any stage of judicial proceedings.[6)] Of course it should only apply if more than one means

3) The main differences are the execution measures that can be uses in either one; and the possibilities for the judge to act on her own motion.

4) The list of titles in Brazil is very generous. Article 515 of the Code of Civil Procedure lists the titles of judicial origin, such as decisions, sentences and the judicial confirmation of transactions or agreements betwenn the parties. And article 784 lists titles of contractual basis. These comprehend checks, lettres, duplicates, warrants, and some types of contracts (as long as they are in written terms, with 2 witnesses, or signed by members of the Public Prosecution Office or Public Defender Service). Brazilian Law also provides for a proceeding called "ação monitória", similar to european Mahnverfahren, by which the creditor files a complaint with written proof of the credit (articles 700 until 702 of the Code of Civil Procedure). The judge issues a payment order against the debitor and, depending on the debitors atitude (if she does not oppose to it), this order becomes an executive title and the proceeding follows an enforcement track. If the debitor opposes to it, defending against the payment order, the proceeding follows a congtive track similar to a normal lawsuit for the decision about the existence of the debt.

5) An influence of the *favor debitoris* that has its origins in roman Law. See Ovídio Baptista da Silva, Jurisdição e execução, São Paulo, 1998, p.91-100.

6) Dinamarco. *Instituições de Direito Processual Civil*, vol.4, São Paulo, 3rd ed., 2009, p.62.

to enforce has efficacy.[7] On the other hand, the liability of the creditor for the wrongdoing at enforcement proceedings is due to strict liability (that is without consideration of fault) and eventual undue losses suffered by the debtor have to be refunded by the creditor.[8]

Along with article 5th, that establishes a general principle of good faith in civil procedure, article 805 of the Code of Civil Procedure protects the good-faith and prevents the abuse of rights by the creditor. However, the principle has to be interpreted in balance with the article 797 of the Code of Civil Procedure, that entails a clear message that the goal of execution is to enforce and give full effect to the "title" (the name the roman tradition uses to refer to an execution instrument, either a judicial decision or a document that the law attributes force to start the enforcement proceeding regardless of a previous cognitive proceeding[9]) in favor of the creditor. Therefore, there ought to be an equilibrium between both ideas of effectiveness of the enforcement measures and the debtor's dignity in the proceeding.

2.2. Specific performance and "no money judgments". The revolution of the general clauses for coercion and induction

Brazilian Civil Procedure foments specific performance in enforcement proceedings, that is the search of a most adequate and precise execution means to enforce the execution instrument.[10] In order to achieve this goal the judge is to avoid converting all obligations into an equivalent monetary sum, and is allowed to manage and adapt the execution measures to an optimal result, also using the so-called "no money judgments", forcing and pressuring the debtor to comply with coercive (and often indirect) measures.[11]

Nevertheless, it is worth mentioning that coercive measures in enforcement proceeding in Brazil were eminently monetary in nature, with very limited possibility of personal constraint.

The Brazilian Federal Constitution establishes in article 5th, LXVII, a clear prohibition of the civil imprisonment by reason of debt, except to the charge of voluntary and inexcusable breach referring to the payment of alimony or in the case of the "unfaithful depositary in breach of duty" (also called "faulty bailee", that is the case of the individual who was in possession and responsible for the safekeeping of goods that were not his property and does not regularly comply with the obligation). In reference to the latter, after some decisions, in 2009 the Supreme Court edited its binding precedent statement nº 25 and

7) Fredie Didier Jr; Leonardo da Cunha; Paula Braga; Rafael Oliveira. *Curso de Direito Processual Civil*, vol.5, Salvador, 4th ed., 2012, p.56.

8) Art.520 and 776 of the Code of Civil Procedure. Didier Jr-Cunha-Braga-Oliveira. *Curso de Direito Processual Civil, cit.,* p.63.

9) Cãndido Dinamarco. *Instituições de Direito Processual Civil*, *cit.*, p.207.

10) Sérgio Shimura, *Título executivo.* São Paulo, 2nd ed., 2005.

11) Eduardo Talamini. *Tutela relativa aos deveres de fazer e não fazer.* São Paulo, 2th ed., 2003, p.230, 336.

determined that this case of civil imprisonment is unconstitutional because it was an excessive (and thus not proportional) means to achieve compliance of a debt.

Nowadays, the sole case in which personal coercion is allowed is the execution for collecting child support or other family support. These type of proceedings in Brazil are very rigorous to the debtor as the creditor can ask for the arrest of the debtor. This is the only type of civil procedure in which the party can be arrested due to a debt (article 528, CPC).But there is a time limit to this arrest, that can be imposed from 1 to 3 months.

The greatest and most interesting innovation of the Code of Civil Procedure in this regard are the general clauses established in articles 139, IV, 536 § 1° and 537 (the last two specific for enforcement proceedings), that allow the judge to order measures to force the debtor to pay the debt and to comply to judicial commands. Since these rules are general clauses, they do not restrain the possibilities and open a big room for judicial discretion.

So far, we have seen judges determining the apprehension of passports, driver's license and imposing limitation on the exercise of the debtor's rights, such as prohibitions to participate in public working sites, prohibitions to contract with public organs and institutions, restriction to obtain loans, and the like. With regard to faliure to comply with court orders, some enterprises have had their activities temporarily suspended.[12)]

Brazilian case-law has been still struggling to handle with these new provisions, and we cannot estimate to which extent the higher courts in the country will permit the use of such measures against the debtor. This is a question that will have to wait for the developments of the topic in the future.

2.3. Assets protection and inadmissibility of attachment

Brazilian law states that the whole sum of actual property of the debtor (*rectius*: the defendant in an enforcement proceeding) is responsible for the payment of the debt, as is generally expressed in article 789 of the Code of Civil Procedure. It is important to note that only *present* or *future* assets of the debtor can be attached, that is, assets that are currently part of her property or that become part of her property because acquired in the course of the proceedings. Past assets – those that were sold – can only be subjected to execution if proven to be disposed or sold by fraud.

Among present assets of the debtor, there are some that are immune from judicial seizure or attachment, another protection of the debtor's dignity and means of subsistence. This represents a form of protection to the property of the debtor that limits the enforcement activity and preserves the dignity of the defendant at execution proceedings. The immunity works as a normative exception of the pecuniary liability of the debtor to the en-

12) The most debated case is that of the telephone app called WhatsApp. The enterprise who owns the app refused to obbey to court orders to identify users and provide messages, and therefore had been temporalily suspended and the app was shut down for some days.

forcement. In the Brazilian legal order, rules concerning immunity are characterized by indeterminate legal concepts which give them some flexibility.[13)]

In this framework, the Code of Civil Procedure has previously stated some immunity from judicial seizure or attachment in articles 833 and 834, however it is necessary for the judges to analyze each case in accordance with the criteria of appropriateness and proportionality to decide whether the immunity is applicable or not. Article 833 relates to the "absolute" impossibility of attachment, which means those assets cannot be attached or seized in any case, even if there are no other assets available; while article 834 refers to the "relative" impossibility of attachment, applicable to those assets that usually won't suffer any execution unless they are the only free and available assets that could satisfy the obligation.

Among the hypotheses of impossibility of attachment, it is important to highlight the so-called "family assets". The Brazilian Constitution has specific provisions that focus on the protection of the family in order to guarantee its dignity and the right of housing. The family property and the family assets are legally protected also by statute nº 8.009/90. In its first article it is expressly determined that the real state where the family lives is immune from judicial attachment or seizure and does not respond for any kind of debt, either civil, commercial or due to taxes, or any other contracted by the family members. The sole paragraph of article first extends the immunity to the land on which the construction is set, plantations, improvements of any nature and all equipment, including the ones of professional use or movable goods, if fully paid for.

The family asset differs from other assets protected against attachment (either absolute or relative impossibility), due to the existence of some exclusionary rules of the primary legal protection, as it is stated in article 3 of statute nº 8.009/90. This special kind of asset protection for family assets differs from the relative impossibility of attachment because the attachment of family assets is prohibited without any other conditions. On the other hand, the relatively "unseizable" and "unattachable" assets should only be submitted to enforcement in no other assets of the debtor are available. So legislation provides three different types of immunity from judicial seizure.

To understand the cases in which family assets are protected one should ask herself about the concept of family, a concept that has deeply evolved in Brazil and quickly shifted away from the broadly accepted stereotype of a family with two parents (mother and father) and children. The Constitution (in article 226 § 4º) protects diverse types of family, an not only those formed by marriage. This extensive protection does not arise only from Constitution and legislation; it was a development of case law. The jurisprudence of the Superior Court of Justice in Brazil relating to the enforcement of family assets has evolved along with the modifications in family law, namely the modern concept of family itself,

13) Didier Jr-Cunha-Braga-Oliveira. *Curso de Direito Processual Civil, cit.,* p.553.

expanding the protection of this kind of assets in the enforcement proceeding. The single-parent family and the civil union (even the one between two people of same gender) are also protected as a "family unit" or "family core".

The Superior Court, as an example, has considered the immunity of the assets from a family constituted by a divorced partner.[14] As a result of repeated appeals judged by the Court involving the enforcement of assets of singles, widows and divorced partners, the Superior Court had issued precedent statement nº 364,[15] consolidating the expansion of the concept of family and considering these assets immune from judicial seizure or attachment. Apart from the Superior Court of Justice, the Supreme Court also follows the same tendency in its rulings. The Supreme Court has included in the concept of family the same-sex civil unions[16] ensuring their housing rights.

This continuous expansion of the concept and protection of family assets faces some criticism because project higher transaction costs and payment risks, and therefore entails a possible demand of more guarantees to conclude legal transactions, especially those involving real estate and urban land lease. Thus, the protection of human dignity and the right of housing could in the long run generate a systemic backfire turning more prejudicial to the individual, moving away from the original goal of legislation.

3. Public interest litigation

There is another peculiarity of enforcement of judgments in the Brazilian legal system referring to cases in which the State (public organs of the Executive, administrative bodies and government agencies) is a party of the proceeding. Differing from many European jurisdictions in which the State does not litigate under the same rules and at the same courts as private individuals, Brazil does not have administrative courts or separated administrative procedural rules. However, there are some specialized courts, sections or chambers − mainly at federal but also at state jurisdictions − to deal with administrative cases.

Consequent to this peculiarity, the Brazilian system provides for different rules for enforcement of judgments in cases wherein the public administration is a party, granting them certain privileges and excluding the application of certain rules from the typical enforcement proceeding involving only private individuals.[17]

The rules applicable to enforcement in disputes regarding public administrative bodies

14) Superior Tribunal de Justiça - REsp 859.937/SP, j.04.12.2007.

15) Brazil has a civil law system, so precedents usually have only persuasive effect, with exception from the "binding precedents" of the Supreme Court ("Supremo Tribunal Federal", the highest court in the country). This model should change to a "hybrid" model with the coming into legal force of the new Code of Civil Procedure of 2015, which establishes binding precedents in the Brazilian legal system.

16) Supremo Tribunal Federal - ADPF: 132 RJ, j.05/05/2011.

17) Bueno, "Execução por quantia certa contra a Fazenda Pública – uma proposta de sistematização" *in* Shimura-Wambier. *Processo de Execução*, São Paulo, 2001, p.123.

are those of article 910 of the Code of Civil Procedure, that consider the fact that the public assets are unseizable and inalienable. Therefore, the traditional measures for an effective enforcement cannot be used in this type of proceeding. The State and all public organs have to comply with the payment obligation through a different method, stated in article 100 of the Constitution. It consists in a order of payment called "*precatório*", issued by the president of the court aiming to include that specific amount in the public budget for payment in the following year.[18] This order of payment is issued after the end of the execution proceeding (still autonomous in relation to the cognitive proceeding), in which the possibility for the State to discuss the amount of debt, among other matters relating to the decision that is being executed, is guaranteed.

Those orders of payment follow a list of preference to be paid based on chronological order, which is a guarantee of an equal treatment from the State to its creditors. That means the State pays its judicial-determined-obligations in a public and previously organized list. This chronological order of payment cannot be modified and if payments disobey that order, this conduct is sanctioned by the Code of Civil Procedure: any creditor can file a petition to seize the amount illegally paid to those who were not prior than her on the list.[19]

This type of execution of judicial decisions against the State is often criticized because it diminishes the creditors rights and prevents a fast and effective enforcement of decisions against the State. As public expenses have to be programmed in advance in inserted in the public budget, this also generates a scenario in which the creditor will only be paid sometimes years after the judicial decision had become final.

In order to facilitate payment and to correct the unjust system of enforcement against the State, Brazilian procedural law altered in 2001 the execution of small claims decisions. Whenever administrative bodies are convicted of a sum up to US$ 18.000 or € 13.000, the execution shifts from the "*precatório"* order and is enforced immediately by the judge that sentenced the case (and not by the president of the court). The sentencing judge issues an electronic order of payment that is enforced within no more than 60 days. So far this system has been working really well.

4. Procedural measures for an effective enforcement

Turning back to the traditional enforcement proceeding, among private individuals, articles 523 and 829 state that the enforced party (the defendant) has to pay the debt as determined by the judgment. As mentioned before, specific performance is preferred.

In the case of article 523, which is applicable for the cases that do not require an

18) Leonardo da Cunha, *A Fazenda Pública em Juízo*, 11th ed., São Paulo, 2013, p.307-308.

19) Alexandre Câmara, *Lições de Direito Processual Civil*, 7th Ed., Rio de Janeiro, 2003, vol.2, p.343.

autonomous proceeding for enforcement (that is, enforcement of judicial decisions in which execution is a second phase of a unique process intertwined with the cognitive phase), the deadline for payment is 15 days after being notified by the judge. On the other hand, in the case of the article 829, applicable for extrajudicial titles (documents) and other cases of specific and autonomous enforcement (such as the proceeding for collecting child or other family support, the debtor has 3 days after the court service to perform payment. Service is combined with a writ of attachment. If the debtor does not pay within the prescribed term, the clerk shall immediately effect the seizure of property and its evaluation, communicating the defendant of the seizure on the same occasion.

In the petition that begins the proceeding, the creditor must indicate the assets of the debtor which are going to be seized. This was a change in the Brazilian legal order after the reform of the enforcement procedure brought by statutes nº 11. 382/2006 and nº 11.232/2005. Prior to this reform, the debtor had 24 hours after service to indicate his own assets for seizure, which was a prerogative very criticized. On the one hand, the law was designed to offer this opportunity as on of the rights of the debtor, and not as a procedural duty. On the other hand, the debtor usually adopted a "wait and see attitude", waiting for the court to determine the seizure and (not rarely) gaining some time to transfer funds from his bank accounts, selling real state or engaging in many other types of fraud to avoid execution.

The reformed rule determines that the creditor has to indicate the debtor's assets that are going to be seized in the pleading that starts the enforcement procedure. The creditor has the obligation to nominate which assets of the debtor should preferably be seized or attached in the initial filing (articles 524 and 798, II, letter "c" of the Code of Civil Procedure). One could ask by which method may a creditor obtain information regarding the debtor's assets. Well, it is possible for a creditor to search such information using the name of a debtor through databases owned by the government, if such information is not protected by bank or fiscal secrecy. The creditor can also go to the notary, pay a fee and obtain a certified document that shows the property chain and the actual owners of a certain immovable good, car or boat, their description and location.

If the creditor could not find assets, which was a problem in the past, is now practically solved by a various number of measures the judge can impose upon the debtor. The rules are applicable to the enforcement of both judicial decisions and extrajudicial instruments. But for these norms to apply, the creditor has to prove to have taken all possible measures to identify and to locate the debtor assets. If the creditor shows that she has tried to find assets in public records and notary services, but this search was unsuccessful, this is enough for the Judiciary to order the debtor to disclose them.

The new Code of Civil Procedure also establishes intense duties of debtors to disclose the location of goods, including bank accounts.According to article 847 § 2º of the Code of Civil Procedure, if the debtor does not pay voluntarily and his assets are not found, after

being notified by the judge, the debtor has the procedural *duty* to present information as to the identification and location of her property. The judge will fix a term for the debtor to comply (art.774, V), and noncompliance will be considered an act offensive to the "dignity of justice" (somehow similar to contempt of court in common law systems, but without imprisonment).[20] It is understood that the debtor does not need to indicate all assets of her property, but has to indicate assets that are able to cover the debt and also to provide information as to where the assets can be found.[21] If she does not comply with the obligation, there is a sanction provided in article 774, sole paragraph, of the Code of Civil Procedure: the debtor will have to pay a huge fine and this sum is in favor of the creditor. If the debtor provides false statements in a judicial process, she might be commiting a criminal offence, and could be criminally prosecuted (article 347 of the Criminal Code: fraud in a judicial process).

As an extension of the duty of acting in good-faith in enforcement proceedings, there are some other situations in which the debtor can practice such an act of disobedience or contempt. Article 847, § 2º states clearly that it is a duty of the debtor, within the term prescribed by the court, to indicate assets subject to enforcement, showing proof of his property and, if applicable, the "certificate of negative charge", a notary certificate that the real state is free of any claims by a third-party. Also the debtor has to refrain from doing anything that would obstruct the seizure or any other execution act, in accordance to the general duty of good-faith established in article s 5th and 77 § 2º of the Code of Civil Procedure.

There is a rule in the Code of Civil Procedure (article 828) that allows the registration of the seizure of an asset in the notarial real state register, which is important to protect the good faith of a third-party and also guarantees an eventual preference in sale, in case of multiple enforcements or bankruptcy.[22]

Upon identification of the assets, the judge can electronically attach assets and seize property, and can also order third-parties to reveal such assets if they so know or if debtor's assets are registred in records administrated by third-parties. Both public institutions (including notary services) and private organizations (such as banks) are subjected to property inquiry and must collaborate and comply with court orders. If they do not comply, they could be fined or even shut down.[23]

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20) Dinamarco. *Instituições de Direito Processual Civil*, *cit.*, p.80.

21) Didier Jr-Cunha-Braga-Oliveira. *Curso de Direito Processual Civil, cit.,* p.328-329.

22) Araken de Assis. *Manual da Execução.* São Paulo, 11th ed, 2007, p.260, 441.

23) However, there are some information that are protected by bank secrecy. Banks must inform on the existence of assets (for example, the existence of bank accounts) and the amount of money deposited (article 854 of the Code of Civil Procedure). Banks are not obliged, though, to present the full records of transfers, persons that deposited etc, for these specific records the Judiciary must issue a specific order to unveil bank secrecy.

5. Balance between conflicting interests of the creditor and the debtor: Moratorium and sales by private initiative

Some contemporary changes in Brazilian Civil Procedure represent a balancing between conflicting interests of the creditor and the debtor, such as the judicial moratorium and the modernization of executions sales that can now be done by private initiative.

The *moratorium* is stated in article 916 of the Code of Civil Procedure and some conditions are established to grant it to the debtor. The first is the recognition or acknowledgement of the debt within the deadline for the submittal of the defense. After admitting the debt, the debtor renounces to defense allegations and cannot engage in further debates about the existence of the debt or its amount. And now she is able to request the judge the deposit of 30% of the debt (including procedural costs and attorney fees) and to pay the remaining amount monthly in no more than 6 months (six installments).[24)]

The legal literature sees this mechanism as an important new measure to balance conflicting interests of the parties and to solve the case with equilibrium. It is an advantage to the creditor, as she can get the 30% deposit right away and will surely have the entire amount within the prescribed term of six months, in which she would unlikely see the proceeding to be finished (specially if the debtor filed her defense). But it also benefits the debtor because she will be able to obtain an easier way to pay the debt with more advantages than she would get if she reached out to loans at financial institutions. So, the measure is interesting for both parties.

Someone may argue that the debtor might go for the moratorium just to buy herself some time. But that conduct would not be rational because would have serious consequences for the debtor. As already said, if she does not perform the obligation she would not be able to exercise his right of defense anymore (because she admitted to the debt) and she would lose the 30% deposit she already made. So the moratorium is a mechanism that would call out for the debtor that really wants to comply, but perhaps is experiencing financial difficulties that might be solved in a short term.

On the other hand, the judicial sale of seized assets was traditionally carried out by public services of the Judiciary. New rules allow the sale by private initiative since 2006 (article 825, II and 880 of the Code of Civil Procedure). The possibility entitles the creditor to ask the judge for the sale to be implemented by her or by a professional third party (accreditor broker). The legislator had aimed efficiency in these cases, considering that public auctions can be often inefficient and expensive to the parties.

However, to ensure due process, article 880 § 1º determines that the judge shall fix the term within which the sale must be made, the form of publicity, the minimum price,

24) Theodoro Jr., *A nova execução de título extrajudicial*, Rio de Janeiro, 2007, p.217-219.

the payment terms and guarantees, as well as, if applicable, the brokerage commission. This is also an instrument that is established in favor both of the creditor and the debtor, as obtaining the optimal result of the auction will at the same time allow full payment of the debt and guarantee that the sale was not underpriced.

6. Requirements for enforcement of foreign judgments: Case law

In Brazil, any judgment issued by a foreign Court is only enforceable after its recognition, which is done through a specific proceeding that is called "*homologação de sentença estrangeira*", by which and *exequatur* decision is granted. It is a proceeding for a formal act of recognition practiced by the national Judiciary that enables the judgment to become effective in Brazil.[25] The proceeding for enforcement of foreign judgment is set out in article 960 and following of the Brazilian Code of Civil Procedure and it has jurisdictional nature.[26] The text of the article 961 is cristal clear stating that the foreign court judgment will only have efficacy in Brazil after being accepted and declared enforceable by the Brazilian Justice.

Originally, the exclusive jurisdiction to accept foreign judgments and to grant the *exequatur* was from the Supreme Court (our highest and also Constitutional Court), in accordance with the article 102, I, *h* of the Constitution. However, the jurisdiction of the ratification and recognition proceeding was modified in 2004 through a Constitutional Amendment, which transferred the *exequatur* power to the Brazilian Superior Court of Justice (the second most important court in Brazil). Due to this modification, article 102, I, *h* was revoked and now jurisdiction of Superior Court of Justice is stated in article 105, I, *i*, of the Constitution. The *exequatur* is specifically given by the President or by a Special Chamber of the Superior Court.[27]

The proceeding is essentially formal and does not interfere on the merits of the decision rendered by the foreign court or issued by the foreign authority. The Brazilian system for the recognition and enforcement of foreign judgments is based on a formal control which is called "*juízo de delibação*", a mostly procedural analysis with slight and superficial examine of the merits.[28] The Superior Court will analyze if the legislation requirements are fulfilled, with the aim to ascertain whether the decision is compatible with national sovereignty and public order and if it had observed minimum procedural guarantees.

In addition to the abovementioned articles of the Brazilian Code of Civil Procedure and the Constitutional provision, Resolution nº 9, edited by the Superior Court of Justice in 2005, also regulates the *exequatur* proceeding. Article 4 of Resolution nº 9 provides not

25) José Carlos Barbosa Moreira, *Comentários ao Código de Processo Civil*, vol. V, Rio de Janeiro, 2011, 16th ed., p.63.

26) José Carlos Barbosa Moreira, *Comentários ao Código de Processo Civil*, cit., p.83.

27) José Carlos Barbosa Moreira, *Comentários ao Código de Processo Civil*, cit., p.83.

28) José Carlos Barbosa Moreira, *Comentários ao Código de Processo Civil*, cit., p.60-61.

only the same rule stated in article 963 of the Code of Civil Procedure, but also establishes other rules that are important for the granting of the *exequatur*. In the first paragraph of article 4, it is stated that foreign non-judicial acts can be declared enforceable, even those dealing with issues which, under Brazilian Law, would necessarily be decided by a judicial sentence. This provision highlights that the significant criteria for defining which type of act can be executed is a substantial one: the court analyzes if the foreign act has the *content* and the *typical effects* of a sentence in the Brazilian legal order. So it is not necessarily a judicial decision.[29)]

There are some examples in case-law that can illustrate this respect both to acts issued by administrative bodies, and foreign judgments (rendered by the Judiciary), in the *exequatur* proceeding in Brazil. The divorce obtained by the act of the king of Denmark or the administrative authorities from Denmark and Norway was recognized by the Brazilian Superior Court as able to have *exequatur*. Also the divorce registered under the mayor in Japan was admitted by the Court, being another example that case law presented in which *exequatur* was granted.[30)] One should note that the new Code of Civil Procedure (art.961 § 5º) states that the foreign decisions about divorce (if consensual) do not need to be ratified.

The conditions for enforcement of foreign judgment in Brazil were not listed on the former Code of Civil Procedure, but in the Article 15 and Article 17 of the Statute of Introduction to the Brazilian Norms, combined with Article 5 and 6 of Resolution nº 9. The new Code of Civil Procedure contains provisions about it, and should be interpreted along with the other norms. Before listing the conditions stated in the legislation, it is worth remembering that the Superior Court does not review the merits of the foreign judgment. The proceeding is focused in the analysis of the existence of the external and formal requirements provided in the legislation, taking into account the law of the State in which the judgment was rendered.[31)]

The first requirement for enforcement of foreign judgment in Brazil is that the judgment or act must have been given by an authority with jurisdiction to adjudicate the controversy.[32)] As a second requirement for the enforcement, the parties must have been regularly summoned or the default must have been legally verified.[33)]

Previously to the edition of the new Code of Civil Procedure, the law demanded that the judgment was final.[34)] The new legislation abandoned this requirement, allowing the

29) José Carlos Barbosa Moreira, *Comentários ao Código de Processo Civil*, cit., p.64.
30) José Carlos Barbosa Moreira, *Comentários ao Código de Processo Civil*, cit., p.65.
31) José Carlos Barbosa Moreira, *Comentários ao Código de Processo Civil*, cit., p.84.
32) Article 15, *a*, Statute of Introduction to the Brazilian Norms and 5thArticle, I, Resolution nº 9/2005, Superior Court of Justice.
33) Article 15, *b,* Statute of Introduction to the Brazilian Norms and 5thArticle, II, Resolution nº 9/2005, Superior Court of Justice.
34) Article 15, *c,* Statute of Introduction to the Brazilian Norms and 5thArticle, III, Resolution nº 9/2005, Superior Court of Justice.

recognition of interim measures imposed on foreign sentences.

The last requirement is that the decision or award must be authenticated by the Brazilian consulate, followed by a translation by an official translator or sworn translator in Brazil.[35] In addition article 6 of Resolution nº 9/2005 of the Superior Court of Justice brings another requirement referring that the foreign judgment cannot represent a violation to national sovereignty or public order. The foreign judgment is only confirmed if all these requirements are all fulfilled.

The Resolution also states the possibility of a partial *exequatur* and the granting of provisional remedies in order to ensure the effectiveness of the judicial relief expected by parties.[36] In the end of the proceeding, when the decision that declares the foreign judgment enforceable becomes final, the party has to request the certified copy of the judgment. After this, the interested party is able to proceed in first instance with the enforcement of the foreign decision or award before a *federal* court.[37]

Within Mercosur States, the rules for the *exequatur* proceeding are simplified, provided in the Las Leñas Protocol of 27th July 1992. In fact, Chapter V of the Protocol establishes the rules for the proceeding of enforcement and recognition of judgments and arbitral awards between Member States. According to article 18 of the Protocol, its provisions shall apply to the recognition and enforcement of judgments and arbitral awards pronounced in the jurisdictions of the Member States in civil, commercial, labor and administrative matters, and shall also apply to judgments concerning damages and restitution of goods pronounced in criminal cases.

Article 19 provides that the recognition for the Member States of Mercosur is going to be made by the procedure of letters rogatory and will be transmitted through the central authority or through diplomatic or consular channels, in accordance with domestic law. Despite the facilitated proceeding, the Brazilian Supreme Court determined that the simplified proceeding does not preclude the need for the procedure of *exequatur* itself before the Brazilian Judiciary.[38] The decision was rendered in 1997, when the jurisdiction for the *exequatur* was of the Supreme Court itself. Nowadays, the *ratio decidendi* can still be applicable, only observing that the jurisdiction for the proceeding of *exequatur* was altered and now shall be decided by the Superior Court of Justice.

7. Other trends of the new Code of Civil Procedure of 2015

All of the previous evolution in execution proceedings was operated by punctual modifications of the former Code of Civil Procedure. Since 2010, a draft of a new Code of

35) 5thArticle, IV, Resolution nº 9/2005, Superior Tribunal de Justiça.
36) 4thArticle, § 2º and § 3º, Resolution nº 9/2005, Superior Tribunal de Justiça.
37) Art. 109, X, Constitution and Art. 12, Resolution nº 9/2005, Superior Tribunal de Justiça.
38) Supremo Tribunal Federal - CR-AgR: 7613 AT , j. 03/04/1997.

Civil Procedure has been debated in the Brazilian Parliament, and the path towards approval came to an end in march 2015. The new Code will come into legal force in one year, in March 2016.

As the execution proceedings reforms were one of the most recent, the Brazilian legislator chose not to innovate a lot regarding enforcement but only to consolidate the previous changes. But some developments can nevertheless be seen.

For instance, some alternatives to judicial execution were strengthened. Brazilian courts have been admitting for quite some time the use of a notice of dishonor ("protesto") of judicial sentences before notary service as a means to force the debtor to pay. The notarized notice of dishonor makes it difficult to the debtor to obtain credit in the financial market or prevents a person (whether an individual or an enterprise) to engage for example in public competitions to contract with an organ of the Executive or a body or branch of public administration, because one needs proof of being free of any debt. Once the debtor is pressured with a notarized notice of dishonor, and plans to participate in public contracts, she would rather pay the debt than resist a judicial execution. So for quite some time this practice has grown in Brazil.

The new Code of Civil Procedure turned this into a formally admissible procedural alternative (article 517). The creditor herself can bring a certified copy of the sentence to the notary and ask for the notice of dishonor. The only condition is that the judicial decision must be final (*res iudicata*). The notice shall be cancelled by order of the judge if the debt is fully payed.

Another means that functions as pressure on the debtor to pay are the possibilities to include her name in public "bad debtors lists" or "credit score public records" financed and maintained by services similar to others around the world such as creditorwatch, creditor protection service, credit bureaus, credit reference agency and so on. The so-called "lists of credit protection" are normally private registers maintained by private pools of enterprises that share among each other and with the general public (by payment of a small fee) information about anyone that has not fully payed his debts after being adequately notified.

The new Civil Procedure Code allows debts determined by judicial decisions and that have not yet been payed to be included in those lists (art.782 § 3º). This measure will be immediately cancelled if the debt is payed or if the execution proceedings come to an end by any reason, even on procedural grounds.

Last, but not least, the new Civil Procedure Code innovates a lot in terms of contract procedure, that is, agreements about procedural norms and procedural legal situations.[39)]

39) Antonio Cabral. *Convenções processuais*. Salvador, 2nd Ed., 2018; Antonio Cabral and Pedro Nogueira (org.). *Negócios processuais*. Salvador, 3rd ed., 2017; Antonio Cabral. Accordi processuali nel diritto brasiliano. *Rivista di Diritto Processuale*, LXXI, 2016. The influence of the german literature and the French praxis in Brazil's new Code of Civil Procedure regarding contract procedure is highlighted in Antonio Cabral. Der Einfluss des deutschen Rechts auf die neue brasilianische Zivilprozessordnung. ↗

Article 190 establishes a general clause of procedural negotiation: "If the cause deals with rights that admit agreements, the parties, if fully capable, are entitled to stipulate changes in the proceeding to fit the specifics of the cause and may agree upon their powers, faculties and procedural obligations, prior to or during the judicial process".

This general provision allows parties to agree upon a large number of situations and norms in execution proceedings such as: seizable assets; forms of service and notifications in general; the choice of specific private companies or persons to sell debtor assets; the collaborative shaping of a calendar for the procedural acts and follow-up measures;[40] and even, some might argue, if a certain document could be enforced as an execution instrument, regardless of a statutory provision.[41]

8. Conclusive remarks

This essay intended to highlight some of the latest trends in execution of proceedings in Brazilian Civil Procedure, not only of the latest reforms and tendencies of case-law, but also the design of the new Code of Civil Procedure. Our main focus were the instruments to balance the rights of debtor and creditor, attempting to achieve efficiency without harm to fundamental constitutional guarantees.

* This paper was supported by the Shihokyokai.

↘ *Zeitschrift für Zivilprozess International*, vol.20, 2015; Antonio Cabral, Les conventions sur la procédure en droit processuel brésilien. *Revue internationale de droit comparé,* n.3, 2016.

40) Fredie Didier Jr. and Antonio Cabral. Negócios jurídicos processuais atípicos e execução. Revista de Processo, 2018.

41) Antonio Cabral. *Convenções processuais. cit.*, p.316-317. Fabiano Carvalho. Comentários ao art. 771. *in Breves comentários ao Código de Processo Civil.* Teresa Wambier, Fredie Didier Jr., Eduardo Talamini and Bruno Dantas (coord.). São Paulo, 2015, p.1772.