BRAZILIAN MAGISTRATES' ASSOCIATION

Third Study Commission Questionnaire 2023

Taiwan

For 2023, the Third Study Commission, which focuses on Criminal Law, decided to study "Mutual cooperation in the investigation of criminal cases and in the presentation of evidence".

In order to facilitate discussion and to assist us in learning from colleagues, we ask that each country answers the following questions:

1. Does your country have any legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year - mutual cooperation in the investigation of criminal cases and in the presentation of evidence in a criminal proceeding at court? Please explain[1].

Yes. There are three forms of international legal cooperation in criminal matters: letter rogatory, direct assistance and the ratification of a foreign court decision.

Letter rogatory is the most formal instrument and is entirely processed in the judiciary. It is a request from a judge in one country to carry out procedural steps in another court, generally involving mere procedural steps and instructional measures (such as service of summons, subpoenas and examination of witnesses) or acts aimed at obtaining evidence.

Direct legal assistance is a foreign request that, if it complies with the formalities of the requested State, will be considered as if it were a national. However, as a rule, it will not be carry out by a court. In criminal matters, as a rule, it occurs through the Public Prosecutor Office. Normally, the Court does not take part in this procedure.

Finally, the ratification of foreign court decision is the process by which decisions handed down by the Judiciary of other countries become effective in Brazil, and thus can produce effects in the national territory.

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[1] We express our gratitude to the Federal Prosecutor Tatiana Almeida de Andrade Dornelles for her assistance on this report.

2. In your country, when a crime is being investigated does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?

Yes. The request can be made through letter rogatory. In direct assistance, the Judge can be demanded to perform the act when it depends on a Court decision.

3. If your answer to either 2 (a) or 2 (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?

The letter rogatory is a formal request from a national Court to a foreign Court to perform some judicial act. It can be active, when a Brazil send a request to other countries; or passive, when Brazil receives the request. The letters rogatory, in addition, can be used for the serving of a summons, subpoena or other legal notice, the taking of evidence and the execution of a civil judgment.

The Ministry of Foreign Affairs is responsible for receiving the letter rogatory in Brazil, and sends it to the President of the Superior Court of Justice, which has jurisdiction to grant the *exequatur* (which means "enforce it"). A letter rogatory without *exequatur* has no effects in Brazilian territory (article 105, I, of the Constitution). After the *exequatur*, the next step is to send the letter rogatory a Federal Trial Court that will enforce the order (article 109, X, of the Constitution).

Any Brazilian judge can use letters rogatory on criminal proceedings. The procedure occurs through the Ministry of Justice. Letters rogatory are provided for in the Code of Criminal Procedure (articles 783 and following) and must comply with the Interministerial Ordinance No. 501, of March 21, 2012, of the Ministry of Justice and the Ministry of Foreign Affairs, as well as with the Resolution No. 05 of the Superior Court of Justice.

Direct assistance is class of legal cooperation that whose legal basis can be an international treaty or on a guarantee of reciprocity for similar cases. The Central Authorities will be in charge of presenting and receiving, normally through direct communication between them, requests for direct legal assistance. There is no need for a Court decision.

In general, the law in force for the fulfillment of an act of cooperation is the *lex diligentiae*. Therefore, the law of the *requested* State that will enforce the cooperative act will define the procedure for collecting evidence, possibility of adaptation to the requested procedure, and when and for what reason the cooperative act may or should be refused. Furthermore, Brazilian courts cannot accept evidence that national law does not admits (article 13 of Decree 4.657 of 1942).

Finally, the ratification of a foreign court decision requires: 1) a decision from a Judge with regular jurisdiction; 2) the process must have been preceded by regular summons; 3) the court decision must necessarily be enforced in the country where it was decided, and be final and unappealable; 4) be authenticated

by a Brazilian consul or have been processed through central authorities; and 5) cannot violate Brazilian sovereignty or public order (article 105 of the Constitution).

4. What is the legislation or court rules that relate to the taking of evidence from a witness in a foreign state, or the giving of evidence from a witness in your country to a court in a foreign country? Please explain these including the role played by a judge in both scenarios.

The hearing of witnesses in a foreign state can be carried out by means of a letter rogatory or direct assistance. In the letter rogatory, the Judge has the role of sending the requests and overseeing the procedures. In direct assistance, the Judge is responsible for overseeing the regularity of the international cooperation procedure presided over by the central authority.

A hearing of a witness in Brazil by request of a foreign court can occur through letter rogatory of direct assistance. In both cases, it always occurs in a Federal Trial Court. In the letter rogatory, the Brazilian courts will assess formal requirements such as respect to public order and to national sovereignty to give the *exequatur* and, consequently, do the hearing accordingly to national law. In direct assistance, the Judge subjects the procedure to a broader analysis that may involve merit.

Foreign agents in the national territory can only give assistance to the competent Brazilian authorities, whose presence and direction in all acts is always mandatory (accordingly to the Supreme Court in CR 8.577/AR). Therefore, foreign agents cannot perform legal acts, but can give assistance and be present during the execution.

5. As a judge, if you receive a request for assistance from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), is it relevant to your determination of whether and how to assist that the basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected? Please explain.

Yes, in addition to the formal regularity in the country of origin, the Brazilian legal system does not allow the enforcement of judicial orders that offend national sovereignty or local public order. It includes respect for international human rights treaties to which Brazil is a party, such as would be the case of some information obtained through torture.

6. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in

order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.

It does not apply.