OECD

The Fifth Meeting of the
Latin American Corporate Governance Roundtable

8 - 9 October, 2004

Arbitration in Brazil by

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Session 4: Improving the Variety and Capacity of Mechanisms for Adjudicating Disputes

Brazil has for many years had a reputation for being hostile to arbitration and outside the international arbitration community. In fact, Brazil has a long tradition of arbitration, and its new arbitration statute - recently upheld as constitutional by the Brazilian Supreme Court - brings Brazil into line with the prevailing international respect for arbitration as a preferred method of dispute resolution.

History

Contrary to common perception, Brazil has a rich history in the use of arbitration as a means of dispute resolution.

As an example, since the 19th century, Brazil has successfully used arbitration to settle international border and territory disputes.

In the late 1800s and early 1900s, Brazil joined many countries, including Chile, Switzerland, France, China, Great Britain and the United States, in signing treaties in which the countries made a commitment to solve potential disputes by arbitration.

Brazil settled border disputes with Argentina and British Guyana by arbitral award in 1900.

The highly contested dispute with Bolivia over the territory of Acre was also resolved by arbitration.

Arbitration was also used in 1910 to successfully settle the mutual claims with Peru regarding problems originating in the territory Alto of Juruá and Alto Purus.

An early example of the success of arbitration in the international scenario was the settlement of claims with the United States over the indemnities that resulted from the shipwreck of the American ship on Brazilian shores.

Arbitration was also used to settle issues resulting from nautical collisions with Sweden and Norway in the same time period.

In addition, prominent Brazilian citizens were called to participate as members of arbitration panels to solve relevant international conflicts, as the case of the Earl of Itajubá who took part in the resolution of conflicts arising out of the War of Secession (namely the Alabama case).

Legislation

The Brazilian tradition of arbitration can also be followed in Positive Law.

The first Political Constitution of 1824 contained provisions for settling disputes between nationals and foreigners by arbitration.

Moreover, the arbitrator' decision could not be appealed if the parties had established a non-recourse clause.

A short time later, arbitration was implemented as the mandatory process for resolving disputes arising from insurance contracts (1831) and services contracts (1837).

The Commercial Code was enacted in 1850, and arbitration quickly gained a stronghold in resolving corporate dilemmas, in addition to contractual and bankruptcy disputes.

Arbitration was also recognized legally for dispute resolution in the 1916 Civil Code and the Civil Procedure Codes of 1939 and 1973.

As we see Brazil has traditionally used arbitration to resolve sovereignty issues and, international bilateral matters, and has, since the first constitution, reserved and dedicated legal space in the positive law.

Therefore, the real question is *why* has the use of arbitration remained dormant in recent decades, only to resurface now as established practice?

The "Compromisso"

To answer this question, we must look back to the year 1867, when Decree n. 3900 expressly conditioned the effectiveness of arbitral clauses on the execution by the parties of a new and special agreement designated the "compromisso," which can perhaps best be translated as submission agreement.

By the terms of Decree n. 3900, the *compromisso* was the only suitable means to bypass state jurisdiction.

A contract could not provide in advance for any solution other than litigation.

Only after a controversy would arise, the parties were allowed in a separate document to establish.

Since then, an arbitral clause has been considered by most legal doctrine and jurisprudence to be a mere *pactum de compromittendo,* or promise to agree, depending on the later signature of *the compromisso* to give it validity and enforceability.

In practical terms, in spite of the theoretical possibility of demanding loss and damages from the party who defaults on its obligation to enter into a compromisso, the arbitral clause had in reality become a true *caput mortuum* - a dead letter.

Bad as the 1867 arbitration provision was later laws made the situation worse.

Following the arbitration contractual doctrine, legislation began to require that the State court "homologate," or approve, any arbitral award in order for it to have legal effect.

The insertion of an arbitral clause in a contract was thus not enough. It was necessary that the parties both sign a compromisso after the dispute arose and, in addition, that they receive judicial approval (*homologation*) of the award entered by the arbitrator to resolve the dispute.

In addition to these two evident obstacles to the use of arbitration, other obstacles of a psychological or cultural nature existed and are still concerns today.

State paternalism permeates Brazilian society. There is an expectation that the state will solve societal problems, even when the relevant issues do not pertain to the traditional role of the State.

The omnipresence of the Brazilian State greatly affected the development of private alternatives to the State Court.

This history of paternalism impeded the practice of arbitration, from finding a place in Brazil.

The power of the State does not allow for independent methods of justice.

State protectionism does not tolerate a court that exists only because of the will of the parties.

If only the State has the power to resolve disputes among those in its vast jurisdiction, the individual must accommodate, capitulate, and find himself unable to solve his own problems.

In such a paternalistic environment characterized by the psychological weakness of the individual, the development of a legal institution based in the freedom to contract is difficult. Arbitration, by definition, is a corollary of the autonomy of the will, which asserts that the independence of the citizen is absolute, subject only to his intentions and close personal interests However, new winds are now blowing in favor of modernity.

The privatization and the deregulation of the economic sectors in the early 1990s have given a new vitality to Brazilian culture in general.

Now that the State has started to play a more traditional role in society, the opportunity to do private business has increased.

Moreover, the previous *status quo* has been abandoned, and the State is now advocating greater citizen participation in the formation of administrative, legal, and political decisions.

This new scenario, combined with a general dissatisfaction of society with the inactivity and passivity of the State, especially in relation to access to justice, has led to the introduction in 1996 of Law n. 9307/96, which now governs arbitration in Brazil.

The Constitutionality of Law n. 9307/96

The constitutionality of the 1996 Arbitration Law, Law No. 9307/96, was called into question in the Supreme Court of Brazil, in a peculiar proceeding. One of the members of the court itself raised the question of whether the Arbitration Law was constitutional, and argued its unconstitutionality. His argument was based on article 5, item XXXV, of the Brazilian Constitution (inserted for the first time in the Constitution of 1946), which states that: " *the law will not be able to exclude from the judgment of the Judiciary any violation or threat to a legal right*".

The argument against the constitutionality of the Arbitration Law was implicitly motivated by a conservative ideological and cultural viewpoint. A natural fear of the unknown, of what has been termed the "privatization" of Justice, and the acceptance of the paternalistic order previously described has permeated the unconscious minds of some of the eminent members of our Supreme Court.

However, the systematic and historical interpretation of the aforementioned constitutional rule leads a scholar to easily disregard any concern about the unconstitutionality of arbitration. In fact, as declared by Pontes de Miranda, one of the most celebrated Brazilian jurists, "*what the legislator set forth explicitly in our 1946 constitution can be interpreted implicitly in our legal system."*

This provision was inserted in the Constitution as a means of protecting citizens from abuses committed by governmental authorities. This provision reflects the political environment immediately before the 1946 Constitution. At that time, Brazil was under a dictatorship, which authorized the creation of tribunals distinct from the Judiciary. These tribunals did not respect due process, and the Judiciary did not have the right to review the decisions made by the tribunals. These tribunals were created and upheld by law.

Therefore, the aforementioned constitutional rule was aimed at the legislative authorities themselves. The objective was to protect the citizen from potential abuse or arbitrary acts committed by the Executive or the Legislative.

The constitutional rule does not deprive the citizen of the right to choose. A citizen should be free to waive a right, to settle a dispute out-of-court, or to present a claim to a State Court or an Arbitration Panel. It was this interpretation that prevailed in the judgment affirming the constitutionality of the Brazilian arbitration Law. In December 2001, the Supreme Court voted 7 to 4 to validate *in totum* Law n. 9307/96.

It is noteworthy that the arbitration law is likely to gain additional support in the Supreme Court. Over the next 3 years, three of the judges traditionally opposed to the Arbitration Law will have reached the age limit and, therefore, will be replaced by new judges appointed by the President of the Republic.

The Legal Nature of Arbitration

It is certain that the legislators opted to conform the publicist or jurisdictional nature of arbitration to the Brazilian Legal System.

This practice is illustrated in various passages of Law n. 9307/96. In compliance with its terms: *the sentence in arbitration produces between the parities and its successors, the same effect of the sentence pronounced by the Judiciary and, being condemnatory, constitutes a legal and enforceable title (art. 30).*

In a didactic fashion, the Brazilian Law of Arbitration adopted the term "sentence" (used specifically for State Court decisions) in lieu of "award." The law confers that an arbitration "sentence" carries the same *declaratory, constitutive, and condemnatory nature as the one issued by the Judiciary.*

In the instance where the decision needs to be executed by the Judiciary, it becomes a judicial executive title, which strongly restricts the defaulting party' arguments on defense. (art. 41).

This comparison of the effect of the arbitral award to a state sentence leads to a status of *res judicata*. The arbitral award *is, therefore, conclusive between parties in the same action or subsequent proceeding.* The arbitration decision cannot be appealed (art. 18), except in the instances of nullity set forth in article 32.

The arbitration law purposely does not require that national or international arbitration awards be ratified. (arts. 18 and 35). In compliance with the Brazilian Constitution, the international arbitration awards (art. 35) are subject to Supreme Court *exequatur.*

Finally, the arbitrator conducts the examination and determines the necessary *cautionary and/or coercive measures* (art. 22, paragraph 4). If a party decides not to abide by the arbitrator' decision, a state judge shall intervene to guarantee compliance with the decision. It is clear that Brazilian law has opted to grant jurisdictional powers to the arbitrator. According to Article 18, the arbitrator is *de facto* and legally a judge.

The Arbitration of Disputes

In conformity with international practice, controversies related to available patrimonial rights are subject to arbitration (art. 1). This includes controversies concerning labor and consumer relations and administrative law disputes where the public sector acts as a manager.

There are many arbitral decisions in the labor area, and they are supported by judicial jurisprudence. Because the termination of the employment contract makes worker' rights disposable and the consumer code does not apply to all consumer relations scholarly commentary supports resolving issues of labor disputes and rights by arbitration.

There is still no consensus of the role of arbitration in consumer rights, but to date there have been no disputes presented before the State Court. We understand that the prohibition of arbitration contained in the Consumer Code does not apply to individual consumer relations; as a general rule, only to uniform contracts concluded en masse, where the consumer is in a weak position with no bargaining or negotiating power.

The arbitration law already protects the contracting party from the type of situation where the efficacy of a compromise clause in a contract of adhesion is subject to the contractor' free and spontaneous desire to accept arbitration, after the advent of the controversy (art. 4, paragraph 2).

Concerning the validity of arbitration clauses in administrative agreements, it is necessary to say that Brazilian courts dismissed jurisdictional immunity arguments many years ago with a leading Supreme Court decision at the end of the 1980s. Hence, immunity is no longer absolute but relative; relative to *ius imperium* acts, thus not applicable to *ius gestionis* acts. In fact, as early as the 1960s, the Supreme Court, by unanimous decision of its eleven members, confirmed and validated an arbitration procedure in which the Federal Union was sentenced to pay a certain indemnification ("The Lage Case").

Nevertheless, opposition to the enforceability of the Arbitration Clause in the Administration field have put their efforts into another formal obstacle to replace the defeated theory of jurisdictional immunity. The opposition argues that, since the disposal of public rights and assets are subject to a prior express authorization, the validity of arbitration clauses inserted in administrative agreements should, likewise, be subject to it. This is the last and the only supported thesis of those who insist on submitting all public questions of law before the State Court.

This article will not enter into detail on this argument, but the fact remains that the Law of Concession and Permission of Public Services (Law n. 8987/95), the General Law of Telecommunications (Law n. 9472/97), the petroleum Law (Law n. 9478/97) and the Law of Land and Water Transports (Law n. 10.233/01) have put an end to this unfruitful debate by expressly stipulating the *possibility of using arbitration to solve administrative matters.*

Incidentally, following the issue of Law n. 9307/96, the Federal Audit Court reconsidered a previous decision and accepted the arbitral clause in the Contract of Concession of the bridge that connects the city of Rio de Janeiro to the neighboring city of Niterói (The Rio-Niterói Bridge). Furthermore on May 18, 1999, the Court of Justice of the Federal District unanimously approved the arbitration clause in a contract for the adaptation and enlargement of the Station of Treatment of Sewers of the city of Brasilia, following the leading vote of the Appeals Court judge Nancy Andrighi (now a member of the Superior Court of Justice).

Lastly, the recent changes in the Brazilian Company Law (Law n. 10.303/01) mentions arbitration as an efficient way to settle corporate controversies involving companies and shareholders.

The Legal Effects of the Arbitral Clause

The acceptance and proven efficacy of the arbitral clause thus far has proven its validity against future resistance or attacks on the adoption of arbitration. With the new legal shape given to arbitration by Law n. 9307/96, its effectiveness has both purpose and reach: it is useful to bypass state jurisdiction (*negative effectiveness*) and, in case of resistance to the arbitration process, it assures the party full rights to set up arbitration (*positive effectiveness*). The only exception to this rule of law is that no such clause may be inserted in contracts of adhesion (art. 4, paragraph 2).

This legal framework was created to replace the obstacles set forth by Decree n. 3900, dated as of 1867, as clarified above, and it has been validated by recent decisions. If an arbitral clause is included in a contract, therefore, the Judiciary will not judge the dispute. Rather, the Judiciary has the duty to end the lawsuit without giving a judgment on the merits (art. 41).

If arbitration is not spontaneously accepted by one of the parties, it can be directly activated by the arbitration entity, which the parties have submitted to (art. 5). It can also be determined by judicial decree (art. 7) if the parties have not chosen an arbitration board or have not detailed the proceeding adequately in order to begin the arbitral process (*blank or empty arbitral clause*).

We support this opinion against the resistance of those that believe the Judiciary has exclusive rights to initiate the arbitration process should one of the parties be recalcitrant; recently, our understanding has been the subject of a favorable decision by the Court of Justice of São Paulo, dated as of 09-16-1999, and has also been discussed by Justice Nelson Jobim, of the Supreme Court, in his vote for the constitutionality of Law n. 9307/96 previously discussed in this article. Thus, it is possible to initiate the arbitration process without following the provisions set forth in art. 7 of the arbitration law.

Another critique of the arbitration law involves keeping the *compromisso* when there is already an established legal framework for the arbitral clause. These critics forget that it is because of the reinforcement conferred to the arbitral clause that *the compromisso*, despite the clear conservatism in keeping it in the Law, has lost its past charms and strength.

It is only an accessory to the law, and it holds insignificant importance in the mechanics of the Brazilian Arbitration Law. The obligation of the parties that stipulate to the arbitral clause is to institute the arbitration process (according to arts. 5, 6 and 7). Article 19 declares that arbitration is considered instituted when the arbitrator accepts the nomination. Hence, the arbitral clause is no longer an agreement

to agree; agreement occurs when the parties agree to that stipulation in the scope of their autonomy to manifest their will. The simple existence of a valid arbitral clause is enough to institute the arbitration.

The Principle of the Autonomy of the Arbitral Clause

Brazilian law has absorbed, in its totality, the concept of the autonomy of the arbitral clause. In art.8, the clause is independent of the contract in which it is inserted, in such a way that the nullity of the contract does not imply, necessarily, the nullity of the arbitral clause. Thus, the weaknesses of the contract are not transferred to the arbitral clause, which keeps it validity for the purpose of establishing the arbitration.

This autonomy is also useful to enable the choice of law that will govern the arbitral clause. The law governing the arbitral clause may differ from the law governing the contract. This choice of law divergence is clearly set forth in art. 38, II, of the arbitration law: the homologation of a foreign award may be denied if the defendant demonstrates that the arbitration convention was not valid according to the law to which the parties had submitted it; or, lacking the specification, as a result of the law of the country where the award was given.

The principle of *competence-competence* was also assimilated by the Brazilian Legal system. Following this principle, the arbitrator decides *ex officio*, or on the parties' demand, issues concerning the existence, the validity and the effectiveness of the arbitration convention and the contract that carries the arbitral clause (art. 8, sole paragraph). In essence, such issues must be presented at the first possible opportunity after the institution of the arbitration (art. 20).

Cautionary and Coercive Measures

Given the jurisdictional nature adopted by the Brazilian Law of Arbitration, the arbitrator has the power to examine and to grant, or not to grant, cautionary and coercive measures (art. 22, paragraph 4). Should the party fail to comply, the Judiciary will cooperate with the arbitrator and, through an authoritative act determine the compliance with the provisional decision. This interpretation of the Law is the majority view by those scholars involved in the debate.

Foreign Arbitral Awards

The Arbitration Law defines a foreign award as one issued outside the domestic territory (art. 34, sole paragraph). The recognition and the execution of those decisions, according to the constitution, must be submitted to the Supreme Court for approval for the purpose of integration and consequent effectiveness in Brazil. The legislature, aware of the inexplicable Brazilian aversion to the ratification of international treaties and conventions, decided to introduce a significant portion of the New York Convention by legislation.[1]

The legislature attempted to assure the supremacy of international conventions when establishing that the foreign award will be recognized or will be executed in Brazil in accordance with international treaties effective in the domestic order and, in their absence, strictly in accordance with the terms of the Arbitration Law (art. 34). Nevertheless, the theory of equal positioning of international and domestic law, by which the newest law supersedes the oldest, still prevails in the Supreme Court. It is noteworthy that the Convention of Panama became effective in Brazil four months before Law n. 9307/96.

As already mentioned, the previous homologation of a foreign arbitral award by the state court with jurisdiction on the matter (i.e. double exequatur) has become unnecessary by virtue of an express provision set forth in the Brazilian Arbitration Law. This provision has been challenged, but the Supreme Court has consistently confirmed its validity.

The Brazilian Arbitration Law is also unique in that it has defeated a public order taboo - the need to summon the party with a letter of request to initiate the arbitration process. The summoning of a party resident or domiciled in Brazil is no longer considered a violation of the national public order, if carried out in accordance with the terms established by the parties in the arbitration convention or according to procedural rules of the country where the arbitration took place. It is also acceptable to deliver a summons by mail, as long as the party holds unequivocal proof of receiving notice, and the Brazilian party is granted enough time to exercise its defense (art. 39, sole paragraph).

Conclusion

By the initiative of then Senator Marco Maciel, currently the Vice-president of the Republic, Law n. 9307/96 became effective in November 1996 after three unsuccessful attempts by the Executive in the 1980s. Praised by supporters and applauded by jurists, the Arbitration Law is naturally still criticized by some conservatives and by a few members of the Judiciary. The highest court of Brazil has now approved the law, and it has great supporters in the Superior Court of Justice, the second most important court in Brazil.

The remaining Brazilian Courts are also in agreement. They have not opposed the Arbitration Law and have given consistent interpretation to its legal provisions. Scholars are actively publishing articles and papers on the subject, in addition to holding seminars, conferences, and courses. Important institutions have given support to arbitration panels. In Rio de Janeiro, for example, the Trade Association, the National Insurance Federation, and the Industrial Federation have recently established the Brazilian Center of Mediation and Arbitration.

Most importantly, the arbitral clause has become common practice in contractual negotiations. In conclusion, the first stages for the implementation of arbitration in Brazil have gained a stronghold in Brazilian law and practice.

NOTAS

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Brazil' process of ratifying the New York Convention is advancing, with the Constitutional and Judicial Commission of the Assembly having approved it.