Development of Arbitration in Brazil

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1. Although Brazil has had a great number of legislation dealing with arbitration, in fact its development in the country was jeopardized due to some legal constrains, i.e. lack of enforceability of the arbitration agreement; need to court certification (homologation) of the arbitral award.

2. Such barriers were so strong that it could not be removed by scholars' opinion nor by jurisprudence.

3. Therefore a specific law was necessary to remove the referred obstacles holding back the development of arbitration in Brazil.

4. Back the development of arbitration in Brazil.

5. Such legislation came in 1996 as Law 9.307/96.

6. Since the enactment of such law and its constitutionality been declared by the Brazilian Supreme Court, arbitration has been pushed forward and it is being used more and more each day in Brazil.

7. The most important innovation of Brazilian arbitration Law can be sum up to you as follows.

8. Now on, the arbitration clause produces all legal effects: positive and negative.

9. Whenever the arbitration clause is agreed, the parties shall go under arbitration procedure.

10. The express consent of the parties in the agreement is enough to remove the state jurisdiction.

11. The homologation of the arbitration award is no longer necessary.

12. Arbitral award produces the same legal effects as a judicial decision. The arbitrate award has been leveled with the judicial decision.

13. Therefore, law grants to the arbitration award the effects of *res judicata.*

14. The arbitrator is regarded as a legitimate judge. He is a *de facto* judge!

15. He is in charge to determine interim or provisional remedies.

16. Arbitrator exercises jurisdictional power, just as state judges, except imperial power (i.e. enforceable or coercitive powers).

17. Together with the validity of the arbitration clause, Brazilian legislation has introduces the principles of the autonomy of the Arbitration Agreement and competence-competence.

18. Regarding recognition and enforcement of foreign arbitral award the legislator has dedicated chapter VI of the Law. It should be stressed that those rules are quite similar to the ones provided for in the New York Convention.

19. One of the provisions contained in Chapter VI did eliminate one of the greatest taboos of the Brazilian public order and which has always been an obstacle to access justice; that is, the procedure of Rogatory Letter to serve Brazilian Party.

20. From now on, service can be executed according to the procedural legislation of the country where arbitration take place or by means established in the arbitration clause (art. 39, sole paragraph). It should be noted that Supreme Court already ruled positively on this respect.

21. According to the Brazilian legislation, the recognition and enforcement of the arbitral award in Brazil can be performed without the prior homologation of the country of origin.

22. Law 9.307/96 has eliminated the so called *double exequatur*.

23. The homologation by the Brazilian Superior Court is the only requirement for the foreign arbitration award to be recognized or enforced in Brazil.

24. Moving the subject to the judicial court approach to arbitration, Brazilian Courts have been very receptive and reasonable when approaching arbitration issues.

25. One example is the decision of the High Court of State of São Paulo that imposed the submission to the arbitration proceeding to a non-signatory of the agreement to arbitrate, based on the evidence that the non-signatory did participate intensively in the negotiation of the agreement. (Trelleborg do Brasil Ltda v. Ariel Empreendimentos Participações e Agropecuária Ltda.).

26. The High Courts of State of Rio de Janeiro and São Paulo already accepted the freedom of the parties to choose foreign law, despite of and old rule inserted in a legislation imposing restriction in the autonomy of the will.

27. It should be stressed that such rule supposedly of the public order traditionally has had the support of scholars and jurisprudence.

28. Nevertheless the court decisions gave course to the art. 2 of the Brazilian Arbitration Act which grants full discretion to the parties to freely choose the applicable law.

29. Other judicial decision rendered by the court of São Paulo holds that the challenge of the foreign arbitral award shall be subject to the jurisdiction where the award was rendered (CAOA vs. RENAULT).

30. On the other hand, justice members of Superior Court have clearly supported arbitration law.

31. Two recent decisions of Superior Court, rendered, unanimously, enforced arbitration agreement against mixed economy companies (electric sector – AES Uruguaiana and Nuclebrás Equipamentos Pesados – NUCLEP – CESSÃO DE ÁREA PORTUÁRIA).

32. These 2 decisions seems to have put an end to the debate usually raised by state companies that cannot waive the right to seek judicial courts without any previous legislation allowing them to sign agreement to arbitrate.

33. In other case where one of the parties was challenging the arbitration on the basis that the dispute was not capable of being arbitrated, the Superior Court ruled in favor of the *kompetenz-kompetenz* and determined the submission of the conflict to arbitration (Justice Nancy Andrighi).

34. In recent conferences justice members of Superior Court said that the court is clearly willing to uphold and help the development of the arbitration in the country.

35. In fact, in the conference where I had the pleasure to host Justice Luiz Fux, he expressly said to the audience the guidelines that the Superior Court will follow with respect to the arbitration in Brazil:

36. a. Treaties, conventions and agreements shall prevail – the court will show to the international community that the terms and conditions established in the agreement will be respected and enforced in Brazil.

37. b. They will give due course to the autonomy of will – nobody will be accepted to use the judicial court to hide from the agreement to arbitrate validly agreed upon in the contract.

38. c. The general rule is the recognition and enforcement of foreign arbitral award. The non-recognition will be the exception – what is implied in this assumption is the willingness of the court members to clearly minimize the so called Brazil's risks.

39. d. Provisional measures shall have due course in Brazil through rogatory letter if any type of certification has been granted by the local relevant authority (judiciary power).

40. e. However, on the other hand, the arbitral award, to be recognized in Brazil, will be subject to the double exequatur just in case any court certificate is required under the procedural law of the country of origin.

41. f. No recognition shall be granted if the due process of law has been violated.

42. g. Arbitral awards dealing with matters that under Brazilian Civil Procedural Code are subject to unique and exclusive jurisdiction of Brazilian Court (v.g. matters involving real state located in Brazil inventory and partition of a succession regarding assets located in Brazil) will not be recognized in Brazil provided, however, that if the decision can be divided into parts, the valid part should be recognized in Brazil.

43. h. Doubts on *Lis Pendens* – court members are still in doubt how to deal iwht concurrent proceedings, that is, arbitration abroad and judicial law suit in Brazil. In the very first case the court debated the matter and up to now have decided to refrain from recognizing the foreign arbitral award by suspending the recognition process in order to wait the result of the Brazilian law suit.

44. i. The other doubt concerns the applicability of the current arbitration law to agreements entered into

before the enactment of the Brazilian Arbitration Law in 1996. There are two decisions issued by the Superior Court in one side and the other.

45. Homologation of foreign award – New Jurisdiction

46. On December 8, 2004, an amendment to the Brazilian Constitution transferred from Supreme Court to the Superior Court the jurisdiction to recognize and enforce foreign awards, which includes arbitral decisions.

47. The change was intended to reduce the backlog cases pending before the Supreme Court but also to clean up the court with matters that do not involve constitutional subject.

48. Here a parentheses: basically, Superior Court is the last judicial resource to non-constitutional issues.

49. Supreme Court is intended to deal only with disputes related to constitutional matters; however, it is still in charge of some disputes unrelated to the constitution (political crimes).

50. Just for information: Supreme Court with eleven justices members judges in 1991 aprx. 14.000 cases – 10 years later, 2001 issued aprox. 110.000 judgements, an increase of 663%!

51. The transfer of jurisdiction to the Superior Court brought a fresh air to counter the conservative approach adopted by the Supreme Court so far.

52. To rule on the recognition and enforcement proceedings, Superior Court issued resolution n. 9, on may 4, 2005 which depart from the Supreme Court prior understanding.

53. First of all, Resolution n. 9 allows the rendering of urgent provisional remedy during the recognition proceedings.

54. Such approach goes far beyond the technical position taken for years by the Supreme Court: in the opinion of the Supreme Court so far the homologation process did not authorize the exercise of coercive jurisdiction since homologation is a very limited proceeding (*giudizio di delibazione*). This power could only be exercised after the whole proceeding had been exhausted, I mean, by the Federal Court which is in charge to enforce foreign award.

55. Now, Superior Court changed completely the Supreme Court approach which is of great importance to the creditor who wishes to protect its interest in Brazil because it opens the way of a quicker response to arbitral awards that are intended to be recognized and enforced in Brazil.

56. To sum up, creditors have now at their disposal the right to request urgent remedies while in course the request for recognition or enforcement of foreign arbitral award.

57. Another relevant improvement contained in the Resolution at issue relates to provisional remedy issued by foreign courts, including arbitral tribunal, such as attachment of property.

58. It seems from the resolution that such decisions can now be enforced by means of a rogatory letter.

59. Until now Supreme Court had taken the position that provisional relief should not be enforced by rogatory letter but only through the recognition proceedings.

60. Therefore, provisional remedies were never recognized by Supreme Court since it required, as a condition precedent to the recognition, a *res judicata* decision what is against the nature of such remedy.

61. In short, Supreme Court never gave course to provisional relief rendered abroad!! Either judicial or arbitral!!!

62. Superior Court changed this approach which is consistent with its less rigid and conservative tradition.

63. Another parentheses: Long before enactment of Brazilian Arbitration Law, Superior Court in a leading case, upheld a foreign arbitral award bases on the existence of the arbitration agreement at a time when *compromisso* was the only legal mechanism capable of setting aside the court's jurisdiction. Recently Justice José Delgado said only change in the arbitration law would be the one to grant more power to the arbitrator to enforce his award without intervention of the judiciary. These 2 examples demonstrates how Superior Court members differ from Supreme Court justices.

64. Another relevant improvement introduced by Resolution n. 9 is the possibility of partial homologation of foreign awards.

65. This is another taboo that Superior Court did break!!

66. If it is possible to detach the part of the award affected by some defect that prevents confirmation, the remainder decision will be processed normally, in order to ensure that the foreign award produces maximum effects in Brazil.

67. Although the Arbitration Law already provides for partial homologation, the fact that the Superior Court now permits the same for judicial judgments stress a real advance in procedural law concept.

68. This means that the taboo regarding the validity of partial arbitral award will certainly be mitigate.

69. What I should stress is that procedural law professors have challenged the validity of partial arbitral award in brazil.

70. They say that it violates a procedure law of compulsory principle: the unity of awards.

71. In short, the judgment shall address all the questions of merit submitted to judgment.

72. In other words, the arbitrator is not allow to split the decisions because the award puts an end to the proceedings as a whole!

73. However, Brazilian Constitution has been recently amended to include a provision which grants to all individuals a *reasonable duration of the proceeding and the means to ensure a celebrity thereto.*

74. Based on that provision and the flexible approach of Superior Court I assume the partial arbitral award will be accepted in court and the new trend shall be to change the concept of the unity of awards.

75. Instead of putting an end to the proceeding it shall be viewed as putting an end to the dispute by means of partial awards.

76. The negative point of the transfer of jurisdiction to Superior Court is that the recognition and enforcement's judgement can be subject to appeal to the Supreme Court, if it violates federal constitution.

77. Unfortunately, there is no final decision yet on such formal subject. We expect a final decision by Supreme Court still this year.

78. To conclude, we cannot fail to highlight that Brazilian Courts have been dealing quite well with our arbitration law.

79. Most of decisions have been favorable to arbitration.

80. It must be stressed that the Public Attorneys, who intervenes in the homologation requests of foreign arbitral award before Supreme Court, have been strict when opposing those trying to prevent the homologation of an arbitral award based on frivolous arguments.

81. The enforcement of penalties due to bad faith litigation has been requested by the Public Attorneys in such case.

82. From the legislative standpoint, arbitration has been receiving increasing support.

83. Concerning the Public Law field, there are many laws admitting the solution of conflicts by extra-judicial means.

84. For instance, there is the Oil Law, Telecommunication Law, Permit and Concessionaire of Public Services Law and Electric Power Law. More recently, Public Private Partnership Law.

85. A recent amendment in the Corporate Law has allowed arbitration procedure to solve conflicts amongst shareholders and the company.

86. The Brazilian Stock Exchange (BOVESPA) has formed an arbitration chamber and recommends arbitration as a good practice of corporate governance.

87. There are projects of law of the public and private sectors being discussed at the Brazilian Congress and which stipulate arbitration to solve conflicts.

88. Scholars are actively publishing legal papers on the subject, in addition to holding Seminars, Conferences and Courses.

89. Mostly important, the Arbitration Agreement has become common practice in contractual negotiations.

90. Therefore, I may finish my presentation confirming that Brazil and its Institutions have assimilated quite well the arbitration law.

91. New York, Feb. 2004

1. Advogado, Professor e Consultor em Arbitragem. ?