Some Remarks On Arbitration In Brazil And The Role Of The Judiciary

Pedro A. Batista Martins

A. Introduction

It would be naive to think that the implementation of arbitration as a dispute settlement mechanism in a given country would - be possible without adequate support from the country's Judiciary Power.

The cooperation of the judiciary is necessary and welcome not only to obtain enforcement of the arbitral awards - provisional, or final - but also to define the scope of application of arbitral rules in concrete cases.

The analysis of arbitral issues by the judiciary, instead of being harmful is thus valuable to strengthen arbitration as a legal institution, stimulates confidence in the system and gives valuable guidelines to be followed by its practitioners.

A good law is a law that is accepted, used and complied with by the citizens. However, for its effective and harmonious application, it is necessary for it to be tested in day-to-day conflicts while the availability of the judiciary to intervene in aid of arbitration is a safety valve that makes arbitration an institution acceptable to its users.

It is a shame that Brazil did not support international arbitration earlier. Today, we could be a country at the jurisprudential and doctrinal vanguard as far as this segment is concerned, and a renowned forum for settlement of conflicts, considering that since the 19th Century, we find express references to arbitration in the Brazil system.

Indeed, the Empire Political Constitution, dated 25th March 1824, permitted the appointment of arbitrators to solve civil disputes; furthermore, it also granted the parties freedom to settle non-appealable causes.

From then on, several constitutions, laws and codes provided for arbitration. However, for a number of reasons, including excessive patriotic feelings and fear of loss of sovereignty, arbitration was disregarded and even ostracised, notwithstanding the plea of the High Court of Justice (STJ) in favor of arbitration in the 'Lage Case'.

These attitudes proved to be detrimental to arbitration. In the 1980s, as a result of criticism by scholars and efforts of the Executive Power - through the Ministry of Justice - academic works resulted in the drafting of three proposed laws related to the subject. However, they were never forwarded to the National Congress.

It was only at the beginning of the 90s that this deadlock was overcome. First, through two decisions rendered by the High Court of Justice that supported arbitration, and subsequently by the enactment of Act n° 9307/96, the result of the efforts of its 'father' in the National Congress, Senator (as he then was),

Marco Maciel (Vice-President of the Republic from 1994 to 2002).

The Brazilian arbitration law firmly establishes arbitration as an institution, and lead to the creation of arbitration chambers throughout Brazil.

Thus, arbitration is about to become an alternative means for settlement of disputes in the struggle against procedural obstacles to the access to justice.

Today, lawyers and other legal professionals regularly negotiate of arbitration agreements in all kinds of contacts.

In view of this new reality, the issue remains as to what the Judiciary's approach on the matter shall be.

The section below proposes an answer, in general, we note that the judicial decisions favorably surprise us and have been positive in shaping and elaborating the contents of the Brazilian arbitration law.

B. The juridical nature of arbitration according to the provisions of the Brazilian law

Before analyzing some arbitral issues submitted to the judgment of the Brazilian courts, it is necessary to highlight the jurisdictional nature of the arbitrator's activity adopted by the Brazilian arbitration law.

The legislator tried to embody in the Brazilian law, the public vocation of the arbitral function, as is evident from various provisions of Act n° 9307/96.

For example, the arbitral award, for all legal purposes, is equivalent to the decisions issued by the state courts. The arbitrator's decision has the same effect as a judicial decision, and, like the latter, may grant declaratory, constitutive and condemnatory relief.

If the arbitral award is condemnatory, the enforcement occurs in the same way as a judicial decision.

The legislator included arbitral awards within the judicially enforceable titles and restricted the arguments of the defendant opposing enforcement.

If the arbitral decisions were deemed to be extra-judicially enforceable titles, the defense possibilities would be considerably broader.

Likewise, by assimilating the effects of arbitral decisions to those rendered by the state courts, the law extends to arbitral decisions the effect of res judicata. Likewise, by assimilating the effects of arbitral decisions to those rendered by the state courts, the law extends to arbitral decisions the effect of res judicata.

It must finally be emphasized that, according to Art. 18 of the arbitration law, no appeal is available against an arbitral award, provided that it does not infringe relevant legal rules, as listed in article 32 (see below).

C. The challenge of unconstitutionality

Soon after the publication of Law n° 9307/96, but prior to the date when it became effective[1], one of the judges of the Supreme Court, taking advantage of a request for approval of an arbitral decision rendered in Spain, reiterated the previous analysis by the eleven judges of the Court as to the possible unconstitutionality of the arbitration law.

The concern of the Judge related to the possible conflict of the arbitration and the content of Art. 5, XXXV of the Federal Constitution: 'The law cannot exclude from the consideration of the courts any violation or threat to a right'.

The debate regarding the constitutionality issue undoubtedly had an ideological content and brought to light the extreme conservativeness of some members of the Supreme Court.

Voices were raised against the 'privatization of justice' and the subsequent loss of prestige of the courts. It seemed impossible for some that the arbitrator could be qualified as a 'de facto and lawful judge', according to the provisions contained in article 18 of the law.

However, a more modern approach prevailed and by seven favorable votes against four, the arbitration law was declared constitutional.

It must be stressed that the Supreme Court had already unanimously expressed this understanding in the 60's, in a proceeding where the Federal Government tried to avoid the payment of a condemnation imposed in an arbitral procedure.

D. Effectiveness of the arbitration agreement

One of the great obstacles to the development of arbitration in Brazil was the ineffectiveness of the arbitration clause. - Arbitration always required a contractual commitment of the parties (i.e. compromise), after the dispute had arisen.

Only such a compromise had the power to bind the parties to the submission of the conflict to an arbitral tribunal.

Today, with the enactment of the new Arbitration Law, the arbitration clause agreed upon in a bilateral contract whose subject-matter is an available patrimonial right has double effect: (i) it excludes the state jurisdiction (the judge is forced to stop the procedure without judging the merits of the case) and (ii) it establishes the jurisdiction of an arbitral tribunal, according to the provisions contained in articles 5 and 7 of Act No. 9307/96.

Both legal effects, positive and negative, have already been subject to several judicial decisions in support of arbitration.

E. No approval by the state courts required

According to the new Brazilian law, the approval of arbitral decisions is no longer necessary.[2]

Neither domestic nor international awards depend on court approval anymore, except for the latter, in

case of the imperative aspect of the exequatur by the Supreme Court, due to constitutional provisions.

Arbitral awards issued in Brazil produce an automatic and immediate effect. An approval by the federal courts is no longer necessary, pursuant to the terms of the arbitration law and the jurisprudence accepted in the courts.

The same applies to the foreign arbitral awards.

The Brazilian legislation no longer requires these awards to be approved by the federal court of the country of origin.

The so-called double exequatur has been abandoned .

For the acceptance of the international value, all that is required is the homologation by the Federal Supreme Court. In this aspect the jurisprudence of the Supreme Court is firm.

The Attorney General's Office, which intervenes in the framework of requests ('homologation') regarding foreign arbitral awards, has been strict when fighting against parties trying to prevent the approval of an arbitral award based, on frivolous arguments. Fines have been requested by the Attorney General in such cases.

F. Arbitration and Public Law

The arbitrability of disputes involving public interest, as in many other jurisdictions, is always subject to considerable controversies.

There has been a lot of resistance to the use of arbitration to settle conflicts involving state companies or public utility concessions.

In the beginning, its opponents argued that sovereign immunity would be jeopardized.

After the Supreme Court indicated that sovereign immunity only applies to acts of state (imperium), those opposing arbitration raised another issue, the need of a prior and mandatory legal basis authorizing arbitration agreement. Such understanding was based on the fact that the disposal of public assets and rights was always conditioned to previous legislative authorization.

The effects of this theory, although still debated, have been mitigated by judicial decisions and lawmaking.

In this sense, the Federal District Justice Court and the National ;Audit Court have already positioned themselves favorably to arbitration for solution of disputes arising from administrative contracts.

Similarly, the Public Utility Concession and Permission Law, the General Telecommunications Law, the Petroleum Law and the Water and Land Transportation Law expressly allow the adoption of arbitration as a means to settle disputes.

G. The challenge of arbitral awards

The Brazilian Arbitration Act basically reproduces the grounds of nullity for arbitral awards provided in the UNCITRAL Model Law:

Art. 32. An arbitral award shall be null and void if:

I. the submission agreement ('compromise') is null and void;

II.it was rendered by someone who may not serve as an arbitrator;

III. it does not fulfill the requirements of article 26 of this Act;

IV. it is rendered outside the scope and limits of the arbitration agreement;

V. it does not solve the entire dispute submitted to arbitration;

VI. it is evidenced that it was rendered after breach of trust, force or passive corruption;

VII. it is rendered after the time limit expired, with respect to article 12, Section III of this Act; and

VIII. the legal principles referred to in article 21, paragraph 2 of this Act are breached.

According to Art. 33 of the Act, the party who lost the arbitration is given a 90-day period to challenge the award before the state court.

This period cannot be interrupted or suspended. It is not subject to any legal constraint.

Despite the fact that the Act was enacted in 1996, there are only few records of lawsuits challenging arbitration awards before state courts.

Doux S.A., one of these cases, deserves a brief comment:

In this case, a company challenged the arbitral award after it failed to succeed in the arbitration where it had claimed for compensation of tax and labor contingencies that had arisen after the acquisition of a controlling stake[3] in a company.

The applicant alleged the nullity of the arbitration award, arguing that the arbitration decision was rendered ultra and extra petita (i.e. outside the scope and limits of the arbitration agreement. Art. 32, IV).

The claim was dismissed not only in the lower but also in the higher Court of the Rio de Janeiro Court of Justice.

The Court's findings, in favor of arbitration, are noteworthy:

- The free choice of arbitrators, as well as the reliability assigned

thereto, results in greater responsibility for claimants regarding the decisions issued by the Arbitral .Tribunal. Therefore, a mere formal error will not lead to the nullity of awards, even if such error would be a ground of the nullity of judicial decisions in the context of court jurisdiction.

- The state justice should be cautious when finding the nullity of an arbitral award since such a decision will not put an end to the existing arbitration between the parties, but, on the contrary, will renew it.
- The principle of legal confidence does not allow the review of the arbitration award in view of a potential disappointment of the expectations of the losing-party, as to the advantages of the arbitration process even when it is known that one of the reasons that leads the parties to opt for arbitration is the confidentiality of the arbitration procedure. When challenging the arbitration award, (even if within the regular use of the Law), the challenging party may be going against interests of the defending party to limit disclosure of the dispute, and its reliance that confidentiality would be maintained.
- The mere formal error in the arbitration award, which could be corrected by issuing another arbitration award, possibly in the same precise terms of the preceding award, does not lead to a damage justifying the annulment of the award rendered by the Arbitral Tribunal.

This judgment, rendered in one of the most important Brazilian states (i.e. Rib de Janeiro), demonstrates the spirit of cooperation of the state courts with the arbitration process and, even more, the maturity of the

Brazilian courts when settling arbitration issues.

H. The insertion of the New York Convention in the Brazilian context

Four decades after the elaboration of the New York Convention (1958), Brazil finally embodied in its legal system the rules contained in the Convention.[4]

The key point for Brazil to adopt the New York Convention was to send a clear message to international community of Brazil's willingness to comply with foreign arbitration awards.

However, to those who have been seeking recognition and enforcement of foreign arbitral awards in Brazil, the adoption of the New York Convention is more a formal than a material issue.

Indeed, in practice the rules contained in the Convention had already been adopted by Brazil since the enactment of the new arbitration law, in 1996.

In fact, the drafters of the Brazilian arbitration act were concerned with Brazil's failure to ratify the New York Convention attempted to resolve the issue pragmatically by incorporating the Convention provisions in Chapter VI of the Act, which establishes the rules to be followed by parties seeking recognition and enforcement of foreign arbitral awards in Brazil.

Since 1996 whoever sought exequatur by the Brazilian Supreme Court had to comply with the same rules provided for in the New York Convention, due to the provisions contained in Chapter VI of the Arbitration Act.

In spite of that pragmatic solution, and most likely influenced by the enhancement of the arbitration culture in Brazil, the government decided in the year 2002 to ratify the New York Convention and align the country to the other 120 signatories.

However, immediately upon the accession to the New York Convention, a legal issue caught the attention of the practitioners and has been subject to strong debate among scholars. Article III of the Convention determines that the recognition or the enforcement of foreign arbitral decisions shall not be subject to more onerous conditions than the recognition or enforcement of domestic arbitration awards.

Taking into consideration that for the recognition and enforcement of a domestic award the approval by court is not required, it was questioned whether the homologation of the foreign arbitration decision by the Supreme Court as a condition precedent to its validity and enforceability in Brazilian jurisdiction would constitute a more onerous condition, prohibited by article III of the New York Convention.

Notwithstanding opinions stating otherwise, it is my understanding that, despite the effectiveness of the New York Convention in the Brazilian jurisdiction, the foreign arbitration award to be recognized and enforced in Brazil shall be subject to the Supreme Court's exequatur by virtue of article 102, h, of the Constitution, which grants to Supreme Court not only exclusive jurisdiction but also the duty to approve foreign decisions.

Endnotes

(1) The law was issued on 24.9.1996 and became effective 60 davs later

(2) In the past the foreign arbitral decision depended on the previous approval, by the state justice of the country of origin, as a condition for the approval request before the Supreme Court.

(3) Doux S.A. e Frangosul S.A. Agro Avicula Industrial vs. W. M. Empreendimentos Societarios Ltda. e outros - 44° Civil Court - Civil Appeal n° 20.942/2002 - 4" Camara Civel - Court Decision of 22.10.2002.

(4) Issued by Decree 43 11 of 23 July 2002, and published in the Federal Official Gazette of 07/24/2002. The ratification instrument was filed with the UN on 17 June 2002.