Ten Years Of Brazilian Arbitration Law: Overview and Prospects

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Introduction

1. From a pragmatic standpoint we can say that Brazil has been dealing with arbitration ages before the Law n. 9.307/96 came into force, on November 23, 1996.[1]

Historically, Brazil has submitted to arbitration proceedings border disputes with Peru, Argentine and Guyana and indemnification claims resulting from accidents involving Brazilian and Sweden/Norwegian and North-American vessels.

Even civil and commercial statutes and civil procedural codes have provided for arbitration since the middle of XIX century.

However, only after the enactment of law n. 9.307/96 arbitration became popular and useful inasmuch as only a new legislation would be able to break the obstacles that jeopardized the ability of the parties to freely choose a mechanism of solving dispute other than the state's court.

2. Despite the fact that Brazil embraced arbitration in its first Constitution, in 1824, and since then it did rule on arbitration in a variety of Codes, since 1867 two barriers impaired the development of the arbitration in the country.

In 1867 the Decree n. 3.900, purporting to rule on the arbitration ended up by introducing a new juridical concept, namely compromisso (compromise), which was tailored to be the unique legal agreement with power to enforce arbitration proceedings in lieu of state courts.

3. As a result of Decree n. 3.900, the parties, despite the previous existence of an arbitration agreement, had to sign another document at the moment the dispute had erupted - the so called compromisso (compromise) or submission agreement -, being such document the sole legal means to avoid the jurisdiction of the judicial courts.

In other words, the arbitration agreement was not sufficient to ensure the arbitral jurisdiction and hence, was viewed by the scholars and jurisprudence as a non valid clause since it depends upon the fulfilment of the second step, that is, the execution of a compromisso.

Moreover, the parties had no legal obligation to execute the compromisso. What means that the violation of the arbitration clause could not counter on specific performance and losses and damages was basically impossible to be obtained. Henceforth, the arbitration agreement was considered a caput mortum. Its validity was exclusively based on moral and ethical principles.

4. The second barriers were introduced later on in the legal scenario and meant to require a state stamp to

the arbitral award. The decision issued by the arbitrators should be submitted to the state court for reviewing the compliance with formalities subject thereto.

It means that the party had to fulfill the judicial homologation requirement of the arbitral award in order to confer enforceability thereto.

5. These two obstacles were the cause for the débacle of the arbitration in a country surprisingly used to obligatory compulsory arbitration since 1836 controversies arising out of insurance and services agreements and where the most commercial disputes were compulsorily subject to this means of solving disputes, by virtue of the rules contained in the Commercial Code and the Commercial Procedural Code, both of 1850.

6. In fact, the first restriction against arbitration came as a reaction to the obligatory arbitration. In 1866, it was abolished based on the argument that it contravene the public order: state court could not be compulsorily avoided by virtue of any law.

7. The same restrictive concept of public policy did apply to the voluntary arbitration although mitigated by a matter of timing: state courts could only be refrained from their jurisdiction only after the controversies had already arisen out of the agreement entered into by the parties and they have entered into the compromisso.

Therefore, the arbitration agreement, per se, was not valid to adjudicate jurisdiction because it dealt with an “unpredictable” dispute. The party would have the ability to freely and effectively choose arbitration only by signing the submission agreement right after the dispute had arisen out between the parties.

Hence, the arbitration agreement was meant to create an obligation to the party to execute the submission agreement whenever the disputes had erupted. However, this obligation of doing something (i.e. sign the compromisso) could not be enforced by the remedy of specific performance but only spontaneously by the party. It depends upon the will of the parties who would not suffer any penalty otherwise.

Of course, legal issues impaired the development of the arbitration through decades.

The second restriction (i.e. the judicial homologation) simply breaks the arbitration’s advantages of celerity and confidentiality.

8. Basically, arbitration could not be enhanced in Brazil for decades due to these two historical restrictions.

The jurisprudence and the doctrine were so strong on these issues that isolated supports from Court’s decision and scholar’s opinion would not be enough to bring arbitration back to the right position.

To achieve this goal a legislation should be enacted and provide the arbitration with an updated set of rules.

9. However, the few arbitration supporters had to face other challenge in order to reach such objective: arbitration was not even studied at Law Schools and also re-known jurists had never heard about it.

Although inserted in a variety of Codes, nobody knew it. Arbitration was a dead rule with no legal consequences at all.

Nevertheless, during the 80's a fresh air came in to bounce the old legal system structure. Access to justice had to be innovated and enhanced. Procedural rules and myths were under debate.

The 80's Decade

10. During the 80´s arbitration started to be revisited in Brazil. Although still embryonic few discussions amongst Law Professors and legal articles suggested the signal of the new trend.

11. From the side of the Government a clear message was transmitted to the legal community: the Ministry of Justice drafted for three times an arbitration law envisaging to clean the path for its development in Brazil.

State Courts became overwhelming and procedural changes would take time to be introduced. On the other hand, it was not feasible to enlarge state courts staff and costs to the point required to accommodate the increasing litigation.

For example, in the beginning of 1986, Labour Minister increased the lower and high level Courts throughout Brazil. The statistics proved that the enlargement effort put in place by the Minister was quite insufficient to deal with the large number of new lawsuits filed before the Labour Courts during the same year. Hence, the Minister had no alternative other than sent over to the Congress a draft law whereby individual and collective labour disputes would be solved by arbitration.

12. Unfortunately, neither of the three draft laws prepared by a Committee appointed by the Justice Ministry where even delivered to the Congress for analysis and approvals.

However, they had the advantage of open up a room for discussion of the problem affecting the access to justice, the need to introduce changes in the Civil Procedural Code in order to speed up the Court proceedings and the adoption of arbitration as a collateral means to solve the conflicts.

13. In the earlier 90´s Superior Court of Justice faced a case where the key issue under discussion were the challenge of an arbitral award rendered without the execution of the compromisso.

The leading case upheld the arbitral award and opened a clear room for arbitration in the country.

14. However, in spite of the importance of the judgement the development of arbitration in the country would take a lot of time and be subject to a dramatic juridical doubt if it had to rely on the enhancement of court decisions.

15. Based on this assumption, a draft arbitration law was prepared during the second half of 1992 and submitted to the Senate at the end of the first half of 1993.

At this time, however, it was a direct initiative of the Senate, expressly requested by the well known Senator Marco Maciel, who had the unique opportunity to pass the law, four years later, as Vice-President

of Brazil.

The draft law with minor changes was enacted and publish in September 1996 to enter into force in November 1996, as law n. 9307/96, known as well as Law Marco Maciel, the Senator that filed the draft at the Senate law and provided relevant support to its smooth course in the vary Congress' Commissions.

Overview of the Law n. 9307/96

16. The first two issues tackled by the new arbitration law were the main obstacles that impaired the implementation of the arbitration in Brazil (i.e. ineffectiveness of the arbitration agreement and the need of judicial homologation of the arbitral award).

Henceforth, articles 5, 6 and 72 introduced legal mechanisms to enforce the arbitration agreement.

(a) Whenever the contract establishes an arbitration clause the dispute shall be decided by arbitrators.

(b) The arbitration shall be set up in accordance with the arbitration agreement. It can be either institutional or ad hoc.

(c) If the arbitration agreement does not fix the means to institute the arbitration (white or empty arbitration clause) the interest party, in case of reluctance, shall request the judicial Courts to decide the main points of the Terms of Reference and afterward revert the parties to arbitration.

(d) If the arbitration agreement incorporates by reference the rules of an arbitral chamber (full or black arbitration clause), the arbitration proceedings shall initiate in accordance thereof.

17. The following Court cases confirm the validity of the new legal system[3]:

"[However], in order to avoid the risk of being declared unconstitutional, the Brazilian Arbitration Act (Law n. 9.307/96) provided in its article 7 the possibility to file a petition before the courts whenever there is a resistance as to the initiation of the arbitration, if an arbitration agreement exists." – Sao Paulo State Court – 6th Private Law Chamber – Appeal n. 197.978-4/0 – Appeals Court Judge: Reis Kuntz – 05.09.01.

"According to article 7 of the Brazilian Arbitration Act (Law n. 9.307/96), in case of resistance as to the initiation of the arbitration, the other party may petition the Courts to serve notice to the recalcitrant party to appear in court in order to sign the compromisso or, otherwise, the judge's decision, if in favor of the interested party, shall be deemed to be the compromisso itself." – Rio de Janeiro State Court – 13th Civil Chamber – Appeal n o 28020/2002 – Appeals Court Judge: Ademir Paulo Pimentel – 08.27.03.

"Henceforth, I consider the claim to determine the compliance of the arbitration agreement to be valid, having the respective compromis to be executed…

Since in this case the issue has been submitted to the state courts, this decision shall decide upon the compromis and its content, according to article 7, §3.

(…)

Now I shall start to decide upon the compromisso.

(…)

Each of the parties shall appoint an arbitrator and the appointed arbitrators shall choose a third arbitrator and the chairman of the tribunal shall be chosen amongst themselves.

As to the object, the Respondent is correct to make possible the verification of liability for the eventual breach by the Claimant.

(…)

Regarding the arbitral tribunal, the place and procedural rules of the arbitration, I understand that some of the clauses were equally agreed by the parties, having yet to be established and those which are different shall be decided by this award.

(…)

After considering all the presented facts and issues, I consider the claim valid, determining the compliance with the arbitration agreement, defining the compromisso as it follows. ”- Suit n. 000.02.192914-9 - São Paulo State Court - 19th Central Civil Chamber.

“Today, the arbitration agreement allows the parties to previously establish the way to commence the arbitration proceeding, being able to adopt the rules of an arbitral institution or specialized entity, international or not, considering that the parties shall observe its rules. The parties may also establish in the arbitration agreement or in a separate document the way in which the arbitration shall start (article 5).

In the case of, absence of a provision as to the method of initiating the arbitration, the interested party shall serve the opposing party, by mail or other means, relying on the arbitration agreement to start the arbitration, through the execution of a submission agreement (compromisso). If the opposing party does not show up or refuses to sign the submission agreement (compromisso), the other party may rely on the State Courts, filing a suit for celebration of the submission agreement, considering the resistance of the other party to start the arbitration.

Henceforth, there are two kinds of arbitration clause. One, which does not provide for the rules concerning the initiation of the arbitration. Other, which brings them. The first ones, are known as complete clauses, or full; the second ones, are known as empty clauses. The question that arises is to know whether, for specific performance, both of them require the interference of the State Courts. Two different opinions arose.

The first one believes that, when existing an arbitration agreement, if one of the parties resists to the initiation of the arbitration, the resource to the State Courts is necessary. The second opinion defends that only in the cases of empty arbitration clauses the State Courts shall be called to interfere. This is explained because, in order to commence the arbitration, the complete arbitration clause allows the

adoption of the rules of an arbitral institution or specialized entity, rules which shall be observed in the initiation of the arbitration proceeding. And, concerning the complete arbitration clauses, it is also allowed to establish some specific rules of the submission agreement, or even all of them.

The empty arbitration clause is the one which provides for the obligation to establish a submission agreement, without, however, the existence of a previous agreement about the way to commence the arbitration. It's the ancient arbitration agreement, treated in the old Brazilian legislation, being that, nowadays, the arbitration agreement allows specific performance, as provided in articles 6 and 7 of Law n. 9.307/96. On the full arbitration clause, considering that both parties commonly choose the arbitral institution or entity, which rules shall be observed, the arbitration shall start when the parties go to the arbitral institution, relying on it to establish the arbitration.

Thus, it is not necessary to go to the competent State Court, because the terms of the submission agreement (compromisso) to be applied shall observe the rules of the arbitral institution or entity. Hence, it is not necessary for the judge to establish neither the content of the submission agreement nor to nominate arbitrators to solve the dispute. This is the new aspect of Brazilian Law, with respect to the arbitration agreement, created under the influence of the Geneva Protocol, as mentioned above." – Sao Paulo State Court, Interlocutory Appeal n. 124.217.4/0 (Renault – Caoa Case) – Appeals Court Judge Rodrigues de Carvalho – 09.16.99.

"Now I shall start to analyze the classification observing the rules concerning the initiation of the arbitration. In this case, there shall be 3 (three) kinds of arbitration clause:

1. A clause making reference to the rules of an arbitral institution or specialized entity.

The first of them, when the clause provides for 'the rules of an arbitral institution or specialized entity' (article 5, first part). Regarding this kind, the law expressly provides that:

'(...) the arbitration shall start (...) according to such rules (...)' (article 5, first part).

In this case, the institution of the arbitration, that is, the commitment of the arbitrator (article 19), shall observe the rules adopted by the arbitral institution or entity.

(...)

The action mentioned in article 7 is not applicable to the other kinds of arbitration clause, that is, those which make reference to the rules of an arbitral institution or specialized entity or those which contain an agreement for the initiation of the arbitration.

Those kinds of arbitration clauses turn it unnecessary to make a new agreement, all because there is already a 'previous agreement regarding the form to start the arbitration', as the law provides (article 6).

The information concerning the initiation of the arbitration, on the other clauses, is entirely defined or can be defined by previous rules:

1. the rules of the arbitral institution; or

2. the rules of the arbitral specialized entity; or

3. those fixed by the arbitrator; or

4. the rules provided for on the clause;

In fact, in such cases, the arising of the conflict on a later date acts as a condition regarding the validity of the rules related to the initiation of the arbitration. The conflict is a condition precedent.

That is exactly why the action provided in article 7 is exclusively applicable to the 'empty aritration clause'.

Such clause is the only one which needs a decision concerning the initiation of the arbitration, because 'there is no previous agreement about the way to (...) commence the arbitration (article 6).

On the other kinds of clauses, in a way or another, there are provisions and previous rules for the initiation of the arbitration." – Opinion of Supreme Court Judge Nelson Jobim, published on the Review of Banking Law, Financial Market and Arbitration n. 11, pp. 361 to 374.

18. Currently, there is no doubt about the negative and positive effectiveness of the arbitration agreement. The Clause is self sufficient to impose the arbitration (positive legal effect) or to avoid the Court jurisdiction (negative legal effect).

The following Court cases are self explanatory[4]:

"According to articles 4 and 9 of the Brazilian Arbitration Act (Law n. 9.307/96), the mere existence of any form of arbitration agreement established in the law - arbitration clause or compromisso – leads to the termination of the pending suit, only if it is claimed by the opposing party, since none of the contracting parties may regret its previous voluntarily and freely agreement choosing arbitration as the means to solve the disputes between them." - Minas Gerais State Court – 3rd Civil Chamber – Appeal no 254.852-9 – Appeals Court Judge Gilberto Rego – 08.15.98.

"Dismissal – The arbitration agreement previously agreed leads to the dismissal without prejudice, taking into account that the access to state courts is guaranteed in the cases of claim for nullity of the award or action to stay the execution, since the arbitral award is to be considered a valid document to commence an enforcement action. – Appeal denied."- Rio de Janeiro State Court – 8th Civil Court – Appeal n. 16.786/2003 – Appeals Court Judge Adriano Celso Guimarães – 03.09.04.

"In this matter, considering that Law n. 9.307/96 was already in full force and effect, the partners entered into an arbitration agreement, which should be complied with. After all, according to scholars, this agreement 'has a binding and mandatory nature. Henceforth, once the private way of arbitration is elected to solve the disputes, the parties can no longer appeal to the Judicial Courts.' (JOEL DIAS FIGUEIRA JÚNIOR, "Manual de Arbitragem", Ed. RT, 1997, p.115)" – São Paulo State Court – 1st Private Law Chamber - Appeal n o 159.487-4/1-00 – Appeals Court Judge Gildo dos Santos – 10.03.00.

19. The enforceability of the arbitration agreement is only subject to future confirmation when inserted in

adhesion contract.

In fact, even in adhesion agreements the clause is valid although its enforceability depends upon the will of the contracting party (the "weak party") at the moment the dispute has arisen out of the agreement.

Basically, the sole exception to the full enforcement of the arbitration clause lies on the adhesion agreement.[5]

20. Marco Maciel's Law took also the opportunity to remove the homologation barriers.

Article 18 establishes that the arbitral award is not subject to state court's homologation proceedings.

Therefore, the arbitral award shall have the same effect on the parties and their successors, of a judgement issued by State Courts, and if establishes an obligation for payment, or either for doing or not doing something, it shall constitute an executory title therefore (art. 31).

From the standpoint of a foreign arbitral award, the law also extinguished the need for the so called double exequatur.

Until the enactment of the Law n. 9.307/96, any arbitral decision rendered abroad had to obtain homologation in the country of origin as a precedent condition to seek the recognition in Brazil.

Now, in order to be recognized or enforced in the country, a foreign arbitral award is subject only to the homologation by the Superior Court of Justice (art. 35).

21. Autonomy of the will is of the essence of the Brazilian arbitration law.

The parties are free to choose, (i) the place of seat; (ii) the rules applicable to the proceedings; (iii) the number of arbitrators; (iv) the local where the arbitration shall be performed; (v) the time period for rendering the award; (vi) institutional or ad hoc arbitration.

Moreover, the parties have the choice to decide upon the law applicable to the merits of the case. Even equity or amiable compositeur can be legally agreed upon thereto.

As establishes in article 2 of the law, the parties may freely choose the rules of law applicable in the arbitration provided that their choice does not violate good morals and public policy. The arbitration shall also be governed by the general principles of law, customs, usages and international rules of trade.

The following Court decisions gave course to the freedom of the parties in arbitration proceedings even against an old rule included in the Introduction Law to the Civil Code (art. 9) purported to be mandatory and hence, was considered against the autonomy of will in fixing the rules that govern the agreement.[6]

"1) Arbitration – Constitutionality – Agency agreement with an arbitration clause, subjected to French law – Validity – Content of article 2 of Law nº 9.307/96 – Applicability of the principle of the autonomy of will – 2) Dismissal of the statement of claim – Lack of ground to be sued – Non existence – Statement of claim that fulfils legal conditions – Claim of existence of an oral agency agreement - Acceptance –

Appeal partially accepted." – Sao Paulo State court – 1º TAC – 7th Chamber - Appeal nº 1.111.650-0.

"Civil Procedure – Indemnification claim – Arbitration agreement through which the contract is submitted to arbitration – Dismissal without prejudice for not appointing the procedural right – Appeal denied.

(…)

It is lawful the contractual clause which provides that any disputes arising from or related to the contract, its interpretation and enforcement or related to any rights and obligations regarding the contract that can not be solved by the management agents of both parties shall be submitted to arbitration according to the laws of Ontario, Canada." – Rio de Janeiro State Court – 13th Civil Chamber – Appeal n. 28.020/2002 – Appeal's Court Judge: Ademir Paulo Pimentel – 08.27.03.

22. We should mention that although Brazilian law prohibits the use of arbitration to solve non-disposable right, there is no impediment for arbitrators to deal with matters of public order. Even though all non-disposable rights are of public policy not all rights of public order are of non-disposable right. Hence, disputes that involves matters of public policy can be subject to arbitration.

Nevertheless, the arbitral award can not violate relevant rules of public order, otherwise it shall be subject to a claim of nullity.

23. Other relevant rules included in the Brazilian arbitration law are the principles of autonomy of the arbitration agreement andkompetenz-kompetenz.[7]

Those rules close the rigid legal circle that surrounds the effectiveness of the arbitration agreement. As a general principle, whenever you have an arbitration agreement the arbitrator shall have the first jurisdiction to decide upon its own competence.

The arbitration agreement is prima facie immune to any defect that may affect either the contract or the clause. These principles are the bottom line of a valid choice made by the parties at the time they signed the agreement.

They also correspond to a guaranty of the autonomy of the will and the bona fide which shall underline any transaction.

24. Although such principles are difficult to be assimilated in a system historically subject to state interventions we feel confident that they will have all support of the High Court that retains jurisdiction to decide infra constitutional matters (Superior Court of Justice).

In fact, one judgement issued by this Court already gave course to the rules contained in article 8 of the law, verbis:

"Brazilian Arbitration Act – Judicial enforcement of the compromisso – Grounds of the dispute – Non – compliance of contractual clauses – Validity – Absence of omission.

(…)

III – If the parties have validly established that the future disputes related to the agency agreement would be solved through proceedings stated at the Brazilian Arbitration Act, the discussion about the non-compliance to its clauses as well as the right to any indemnification are also to be subject to arbitration. Appeal denied.

(…)

Henceforth, there shall not be any doubt about the submission of the present dispute to arbitration, as claimed by Respondents, since only the arbitral tribunal is competent to decide upon the issue. In this matter, it is interesting, one pointed out on the appealed decision, which states that 'whether there was or not any breach, this is a matter to be decided by the arbitrators, not in the present appeal to this state court.'

Hence, there is not any violation to article 7 of Law nº 9.307/96. Henceforth, I entirely agree with the previous vote to deny the present appeal." – Superior Court of Justice (STJ) – 3rd Chamber – Appeal n. 450.881 DF – 2002/0079342- Superior Court Minister: Castro Filho – 04.11.03.

25. The High Court of Rio de Janeiro clearly has been supportive to the principle of autonomy of will, verbis:

"An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, since it is a legal act which is independent of the contract in which it is inserted. Such independence means that the termination of the main contract does not entail ipso jure the invalidity of the arbitration clause which established arbitration as the means of solving the disputes arising from or related to the same contract." – Rio de Janeiro State Court – 6th Civil Chamber – Appeal no 28808/2001 – Appeals Court Judge: Gilberto Rego – 04.30.02.

"Furthermore, the nullity of an arbitration agreement does not imply the termination of the contract, which is maintained valid and effective, taking into account the independence of the arbitration agreement, as stated in article 8 of the Brazilian Arbitration Act (Law nº 9.307/96)." - Rio de Janeiro State Court – 13th Civil Chamber – Appeal no 07839/2003 - Appeal Court Judge: Ademir Paulo Pimentel.

25. The Law Marco Maciel clearly adopted the jurisdictional concept of arbitrators' activities.

Although few scholars understand that arbitration is a mix of private and public nature, the law expressly opted to grant jurisdiction to the arbitrators.

First of all, art. 18 consider the arbitrator's activities equivalent to the legal performance carried out by the judge and his award is neither subject to appeal nor homologation.

It means that the arbitrator has full power to hear witnesses, assess documents and any other evidence necessary for rendering the decision. The arbitrator has the power and jurisdiction to issue the award which shall be final. He has therefore iudicium (to apply the law) the most relevant of the five items that

compound the jurisdiction. He acts and functions as a judge. His award cannot be reviewed in the merits or even on the formalities (i.e. homologation) by the State Courts.

His award has the same legal effectiveness as State Courts' judgement. It can impose a payment or any other obligation to the defaulting party. It can declare, modify, create or extinguish a right.

In case the creditor seeks the enforcement of the award in Court, it is considered a judicial title for all purposes, mainly to expedite the proceedings and restrict the right of defense.

The arbitrator has also the power to determine coercive or provisional relief and in case of non-appearance of a party it does not prevent him from rendering the award (art. 22).

26. The judicial Courts seem to have assimilated the arbitrators' right to issue provisional or interim relief.

The court's jurisprudence has confirmed the state intervention only before the confirmation of the Arbitral Tribunal's members and seem to avoid any interference during the arbitration proceedings, unless otherwise agreed by the parties.

Under Brazilian procedural regime there are some lawsuits that is filed on urgent basis and therefore is of provisional nature since they serve to obtain an injunction to safeguard the right to be judged on the main lawsuit.

In these cases, the party has 30 days to file the main lawsuit as a condition to maintain in force the relief previously granted.

When the agreement establishes an arbitral clause is well accepted by the State Courts the right of the party to fulfil the 30 days condition by requesting the arbitration institution to initiate the arbitration proceedings. Moreover, when the panel is set up, the arbitrators retain jurisdiction to review the injunction issued by the State Court for purposes of modifying or even cancel the provisional relief.

Henceforth, the jurisdictional nature of the arbitrators' activities implies the power of determining interim relief and Court's jurisprudence has support such practice, as follow:

"In second place, as mentioned on the statement of claim, the arbitral tribunal will determine interim and provisional measures, as stated in article 22, paragraph 4, of law n. 9.307/96, so that the arbitrators may request to the judicial body the compliance of the interim measures. Hence, in arbitral issues, the state courts act upon the request of the arbitrator, not upon the request of the parties. There is no cause of action for the present suit. Because of this, the dismissal is mandatory. Considering the facts, I dismiss without prejudice the present interim measure according to article 267, I and 295, I from the Civil Procedure Code." – Sao Paulo State Court – 27th Central Civil Chamber – Suit n. 05.207125-5 – Judge Vitor Frederico Kümpel – 12.12.2005.

"As expressly provided in § 4of article 22 of law n. 9.307/96, the competence for granting provisional measures belongs to the arbitral tribunal, because if we consider such measures to act anticipating (totally or partially) the effects of the relief requested in the claim (article 273, Civil Procedure Code), and since it

is the competence of this court to decide on the merits of the dispute, it is also its competence to decide, in the same way, upon granting or not the effects of this decision. Doctrine admits the appeal to state courts only when the arbitration has not yet been established, considering the urgent nature of the measure (J. E. Carreira Alvim, Direito Arbitral. Rio de Janeiro: Forense, 2004, pp. 334/341).

(...)

Civil Procedure – Interlocutory Appeal – Arbitration Rule –Jurisdiction to rule on the disputes – Arbitral Tribunal.

I. The appeal to state courts is only admitted when the arbitration has not yet been established, considering the urgent nature of the measure.

II. When exist an arbitration agreement, the arbitral tribunal has jurisdiction to analyses the merits of the dispute as well as to decide upon the granting of the injunction.

Appeal partially upheld." – Federal Regional Court (TRF) / 2nd Region –1st Chamber – Interlocutory Appeal n o 2003.02.01.010784-5 – Federal Appeal Court Judge Carreira Alvim – 06.22.04.

"However, as soon as the arbitration proceedings is in place and whenever there is a competent arbitrator for the evaluation of the dispute, including the potential granting of interim measures (Brazilian Arbitration Act, article 22, § 4), there is no possible way to allow an action related to the matter subject to the arbitral tribunal to take course on state courts, even if it is an interim measure.

Article 22, § 4, of law n. 9.307/96 provides that "Subject to paragraph 2, the arbitrators may request to the judicial body that would have originally been competent to hear the case, to grant interim measures of protection.". Henceforth, once the arbitral tribunal has been established, it is no longer possible the coexistence of the state and the arbitral jurisdictions.

On the contrary, the state courts jurisdictional activity shall be over, including the pending suits (article 267, VII, Civil Procedure Code), considering that it is deemed to the arbitrator – and only himself – to request the granting of interim measures of protection to the judicial body, according to article 22, § 4 of the Brazilian Arbitration Act." – Sao Paulo State Courts – 6th Private Law Chamber – Interlocutory Appeal n o 280.034-4/3 – Appeals Court Judge: Sebastião Carlos Garcia - 02.27.03.

27. Chapter VI of the arbitration law treats the recognition and enforcement of foreign arbitral award.

It is interesting to note that while the international community was complaining about the non acceptance by Brazil of the New York Convention, on the other hand the most important rules contained therein were already introduced in the country's legal regime by virtue of the arbitration law provisions.

Basically, the foreign award was protected in Brazil since the year 1996, due to the similarity of the New York Convention and the Brazilian arbitration rules contained in the Chapter VI.

Nevertheless, Brazil ratified the New York Convention in 2002 and had already ratified the Panama Convention, right before the enactment of the arbitration law.

28. It should be stressed that the arbitration law seeks to give full course to the international conventions over the provisions of the law. As established in art. 34, a foreign arbitral award shall be recognized or enforced in Brazil pursuant to international treaties effective in the national legal system, or, if non-existent, strictly in accordance with the law at issue.

Currently, the jurisprudence of the Supreme Court put the treaties on a level with the ordinary laws which means that the treaties and the ordinary law can derogate each other depending upon at the moment of their ratification or enactment. The new derogates the old one.

29. Brazil adopted the territoriality principle to define the nationality of the award. A foreign arbitral decision is an award rendered outside of the national territory (art. 34, sole paragraph).

Even in case the arbitration is carried out between brazilian parties, by brazilian arbitrators and under the laws of Brazil, if the place of seat is outside Brazil's boundaries the award shall be considered non domestic and therefore shall be subject to recognition before the Superior Court of Justice to be effective in the country.

Note that it is not necessary to submit the foreign award to the homologation procedure in the country of origin but before the Brazilian Superior Court, in Brasília. As per art. 35, in order to be recognized or enforced in Brazil, a foreign arbitral award is subject only to homologation by the Superior Court of Justice.

30. It should be pointed out that an old procedural taboo that used to impair the access to jurisdiction was abolished by the arbitration law: the need to formaly serve the brazilian or a foreign party through the rogatory letter.

An offense to the Brazilian rules of public policy shall not be deemed to have occurred if process is served on the party resident or domiciled in Brazil pursuant to the arbitration agreement or the procedural laws effective in the country where the arbitration procedure was conducted; for such purpose, service of process by mail against unequivocal proof of receipt shall also be admitted, provided that the Brazilian party is given time enough to exercise its right of defense (art. 39, sole paragraph).

31. Finally, it should be mentioned that the Law n. 9.307/96 applies to domestic and international arbitration.

The rules contained in the law are so broad and non-restrictive that an international procedure can easily be carried out under the same provisions applied to domestic arbitration. The legislative option seems to have been corrected because it did benefit the freedom and the autonomy of will and did not impose any specific restriction that could trigger the need of flexibility for international purposes.

Prospects of the Arbitration in Brazil

32. There are many reasons why Brazilian shall be optimist with respect to the arbitration prospects in the country.

First of all, since the enactment of Law n. 9.307/96 many books and articles have been dedicated to the

subject. Two Legal Reviews are published on a quarterly basis and one on a year basis, which includes aspects involving mediation.

Some Law School has introduced arbitration in the regular legal discipline and have successfully launched it as a post graduation course.

It is uncountable the number of national and international conferences held every year in Brazil since 1996. The legal community has enhanced quite fast an arbitration background and has also take advantages from international development through the exchange of knowledge.

33. A variety of laws have passed along the last decade which expressly provide for arbitration as a mean of solving disputes. Moreover, some of those laws deal with public matter. For example, the Permission and Concession of Public Services Law (Law n. 8.987/95), Petroleum Law (Law n. 9.478/97), Telecommunication Law (Law n. 9.472/97) and the Water Transportation Law (Law n. 10.233/2001).

On the other hand, even the government has tried to apply the compulsory arbitration which was included in a Medida Provisória. Although the compulsory arbitration was excluded later on, we can extract from such approach a clear message in favour of arbitration.

Recently, in 2004, arbitration was established in the law that deals with the Public-Private Partnership (Law n. 11.079).

It is under congressional debate the change to Law n. 9.615/98 (Project of Bill 5.186/2005), which establishes the general rules of sports, being one of the modification the insertion of a provision whereby any commercial and labour disputes can be subject to arbitration.

In 2001, Law n. 10.303, introduced the arbitration in the context of corporation controversies arising out of majority and minority shareholders and those related to the company and its shareholders.

34. Brazil did ratify the Panama and New York Conventions and has also ratified other international agreement within the Mercosur scope which does contemplate arbitral provisions.

35. Many mediation and arbitration chambers have been set up with the support of well known traditional institutions. For instance, Centro Brasileiro de Mediação e Arbitragem (Rio de Janeiro Trade Association and Insurance and Industry Federation); Câmara de Arbitragem (Brazil-Canada, Brazil-United States and Brazil-Argentina’s Chambers of Commerce), Centro de Conciliação e Arbitragem (Minas Gerais Industry Association) and Câmara FGV de Conciliação e Arbitragem (Fundação Getulio Vargas).

Brazilian Stock Exchange has also an arbitration chamber aiming at solving corporate disputes.

36. On the other hand, on December 8, 2004 an amendment to the Brazilian Constitution transfer from the Supreme Court to the Superior Court of Justice9 the jurisdiction to recognize and enforce foreign awards, which includes arbitral decisions.

Such jurisdictional change brought a fresh air to counter the conservative approach adopted by the Supreme Court so far. The Resolution n. 9, of May 4, 2005 confirms the Superior Court flexible

standpoint on the issues regarding the internalization of decisions issued outside Brazilian borders.

Basically, urgent provisional remedies can be obtained while in course the recognition request. Provisional relief issued by foreign jurisdiction can be enforced in Brazil through a rogatory letter proceedings. The partial recognition of foreign award is now a reality that reinforce the approach in favor of foreign awards.

37. Nevertheless, there is still pending of enhancement some measures to move ahead the arbitration in the country.

The most important one is the improvement of the arbitration culture amongst the attorneys. Most of them are still reluctant, or does not even know, about arbitration, the law and the proceedings. For sure they are concerned with the fact that the award is final and binding to the parties. The lack of appeal really afraid the attorneys educated to fight for years and to appeal as much as feasible.

However, there is a right at the end of the tunnel: in 2004, the Rio de Janeiro Bar Association held 5 conferences regarding the Brazilian Arbitration Law and more than 800 attorneys attended the course.

Moreover, the same Bar Association instituted an arbitration chamber aiming at solving the conflicts involving law firm and its partners and attorneys.

Although Brazil needs to make some progress in the field of arbitration, it seems that the good news happened recently and in a such short time frame demonstrate that an optimistic future scenario is not unrealistic, even more if we take into consideration the number of arbitration agreements that have been inserted in all types of contracts in the last 3 years.

Endnotes

1. The Arbitration Act was published on September 24, 1996 and provided for a 60 days vacatio legis.

2. “Article 5 - When the arbitration clause makes reference to the rules of a particular arbitral institution or specialized entity, the arbitration shall be instituted and conducted in accordance with such rules, unless otherwise agreed by the parties.

Article 6 - In the event of absence of provision as to the means of instituting the arbitration, the interested party shall serve the other party with a written notice by registered letter or by any other means which provides a record of delivery, calling for the other party to appear at a set date, time and place in order to sign the compromisso.

Sole Paragraph: Where the party to whom notice is served fails to appear or refuses to sign the compromisso, the other party can, pursuant to article 7 of this law, seek assistance from the Judicial Court which originally would have had jurisdiction to hear the case.

Article 7 - Where there is an arbitration clause but one of the parties shows resistance as to the initiation of arbitration, the interested party may petition the Courts to serve notice on the other party to appear in court in order to sign the compromisso, whereupon the judge shall schedule a special hearing for such

purpose.

§ 1 - The claimant shall indicate precisely the object of the arbitration, including the document which contains the arbitration clause.

§ 2 - The judge, previously to the signature of the compromisso, shall try to bring the parties into a settlement. Failing such agreement, the judge shall lead the parties to approve, by mutual agreement, the compromisso.

§ 3 - When the parties fail to agree as to the terms of the compromisso, the judge, after hearing the defendant at the same hearing or within 10 days therefrom and pursuant to articles 10 and 21 § 2º of this law, subject to the provisions of the arbitration clause, shall decide the issue.

§ 4 - If the arbitration clause makes no express reference to the appointment of arbitrators, the judge shall hear the parties in this respect and then decide on the issue with powers to appoint a sole arbitrator for the resolution of the conflict.

§ 5 - Should the claimant, without reasonable excuse, fails to appear at the hearing to sign the compromisso, the proceedings shall be deemed to have been terminated without judgments on its merits.

§ 6 - Should the defendant fails to appear, it will be up to the judge, having heard the claimant, to rule with respect to the content of the compromisso, nominating a sole arbitrator.

§ 7 - The judge's decision favorable to the petition shall be deemed to be the compromisso itself.

3. Free translation.

4. Free translation.

5. "Article 4 - An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract.

§ 1 - The arbitration clause shall be in writing and it can be inserted in the main contract or in a document to which it refers.

§ 2 - In adhesion contracts, the arbitration clause shall only be effective if the signee takes the initiative of instating the arbitration or if he expressly agrees to instatement thereof, in an attached written document or on boldface, and provided that such clause bears his signature or initial."

6. Free translation.

7. Pursuant to article 8, "Article 8 - An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Sole paragraph - It shall be up to the arbitrator to decide on its own motion or per request of the parties,

the issues concerning the existence, validity and efficacy of the arbitration agreement and of the contract which contains the arbitration clause."

8. It is a "law" prepared and addressed by the Executive Power to be reviewed by the Congress. Meanwhile, it produces all legal effects.

9. The Court is the last judicial resource to non-constitutional matters.