Arbitration in Brazil: Some New Developments

Pedro A. Batista Martins

1. Introduction.

1.1. In September 2006, the legislation governing arbitration in Brazil, Law n. 9307, will complete 10 years.

The Arbitration Law's 10th anniversary will be cause for celebration amongst the members of the arbitration community in Brazil.

The improvements that arbitration has made in the country over the past nine years have exceeded all expectations.

Not only are arbitration agreements commonly found in the most varied types of contracts, but arbitration chambers record a consistent increase in the number of conflicts submitted to arbitration.

There is good news from the Courts, as well: judicial decisions show that, as a general rule, judges are giving full, and proper, application to the Arbitration Law.

Although there is still work to be done in disseminating the culture of arbitration in Brazil, significant progress has already been made through books, articles, courses and seminars.

The last nine years have been productive: Brazil now has three legal periodicals dedicated exclusively to arbitration, two published quarterly and one annually.

Every year Brazil hosts at least two international arbitration seminars, with the participation of renowned arbitration scholars and practitioners, giving greater exposure to arbitration in general and an important opportunity for professionals to expand and refine their knowledge.

These symposia are particularly important because it is lawyers who have shown themselves to be most reluctant in adopting arbitration as a means of dispute resolution.

One of the reasons for this reluctance is that legal education encourages lawyers to litigate and, especially, to use as much as possible the right of appeal.

In fact, the exercise of such "right" has far exceed its limits and has been misused in the course of judicial proceedings.

1.2. The worldwide crisis affecting the judiciary calls for both a complete review on how the courts should exercise their jurisdiction and a new attitude on the part of litigation attorneys.

Business people and lawyers in Brazil today live in a reality that is quite different from the one that existed 20 years ago.

In the 1980s, for example, it was still possible for lawyers to link their fees to a case's procedural stages. One installment would be payable when the lawsuit was filed, another at the hearing, a third installment on decision at Court's first level, a further installment on decision at the second instance, and so on until judgment became final.

That kind of arrangement is no longer possible. Business people, faced with the dynamics of their businesses and intense competition, are not willing to wait even for a decision at first level, let alone on appeal. The same holds true for lawyers and their fees - it is just not viable to wait for the conclusion of each procedural stage.

The result is that both the client and the attorney focus their energies on the success of urgent measures that give, directly or indirectly, the outcome they seek in the final decision.

In other words, in practical terms, the dispute is resolved when preliminary relief is obtained, even though the victory is provisional and can be overturned at any time, up to and including judgment on the merits of the case.

The provisional nature of the relief becomes irrelevant when delaying the final decision is sufficient, in most cases, for the client to achieve the initial objective, whether that objective is upholding his rights, even on a temporary basis, or hindering an action brought by the adverse party.

These days it is difficult for attorneys to contemplate linking payment of their fees to a decision at Court's first level, and payment only when a final decision is issued is an even more remote possibility. Agreeing to payment of fees only when a case is finally decided is akin to bequeathing the fees to the attorney's children and grandchildren.

The fact is that the client's interest wanes after the preliminary relief has been obtained - or not - and so the attorney fixes his fees based on that phase of the dispute.

Neither the client's nor the attorney's reasoning can be faulted, since a fight over preliminary measures can reach, in an extreme case, the fourth judicial instance (the Supreme Federal Court).

The decision that grants, or denies, the preliminary relief is subject to an interlocutory appeal (agravo), to the Courts of Appeal.

Once before the Courts of Appeal, the appeal is first decided by a single judge, who maintains, or overturns, the original decision. The judge then submits his or her decision to the other two judges of the Chamber. The Chamber can revise the decision.

Although there are some procedural nuances, recourse then lies from the Chamber's decision to the Superior Court of Justice. The recourse is first judged by a sole justice and then is submitted to the Panel for decision.

And in a few situations, the matter can be taken from Superior Court of Justice to the Supreme Federal Court.

A preliminary dispute over provisional relief can therefore take a significant amount of time to be resolved, and it is unusual, in the meantime, for the judge at first level to decide the merits of the case.

The overriding interest in preliminary measures can be understood: by the time a decision on the merits is issued, both the claimant and the defendant have been driven by market forces to focus on other issues.

Still, although preliminary decisions offer a "quicker return" to both client and attorney, they are not an efficient means for the resolution of any and all conflicts, nor do they promote the fundamental right of access to justice.

Arbitration has therefore become an important alternative to the courts, and it has shown consistent growth in Brazil.

The following section of this paper gives a brief overview of recent developments in Brazilian arbitration law and practice.

2. Requirement for Recognition of Foreign Arbitral Awards.

2.1. The Brazilian Arbitration Law, in article 34, sole paragraph, provides that "a foreign arbitration award is any award that has been rendered outside Brazilian territory".

Article 35 states that "in order to be recognized or enforced in Brazil, a foreign arbitration award is subject solely to homologation by the Supreme Federal Court".[1]

On July 23, 2002, the New York Convention came into force in Brazil under Decree no. 4311. Article III of the Convention provides that " [t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

Because Brazil assimilates Conventions and Treaties (except those dealing with human rights) to the hierarchy of ordinary domestic legislation, some scholars have taken the position that the requirement that foreign arbitration awards be confirmed, "imposed under art. 35 of the Arbitration Law", was revoked by art. III of the New York Convention.

According to those scholars, homologation of foreign awards implies a more onerous condition than is imposed on domestic awards, since arbitral decisions rendered in Brazil are not subject to homologation (art. 18).

Although the theory is defended by renowned professors of law, I do not believe it will be accepted by the judicial courts.

First, the purpose of art. 35 of Law 9307/96 is not simply to confer jurisdiction on the Superior Court to homologate foreign arbitration awards. In establishing that recognition and enforcement of foreign awards is subject solely to homologation by the Superior Court, the legislator sought to exclude the double exequatur that formerly applied to foreign arbitral decisions.

Second, the Superior Court's jurisdiction with respect to the homologation of foreign awards is contained in art. 105 (I) (i) of the Federal Constitution (formerly art. 102 (I) (h)). Hence, being a constitutional rule it could not be changed by an ordinary law, as the case of the brazilian arbitration act.

On the other hand, it cannot be said that the Federal Constitution restricts the requirement for recognition to foreign judicial judgments, since, historically, the Supreme Federal Court homologated decisions of an administrative nature and, in any case, an arbitral award is assimilated to a judgment issued by the judicial courts, as expressly provides the Law n. 9.307/96 (art. 32).[2]

For these reasons, I believe that the theory that the requirement for homologation of foreign arbitral awards has been revoked will not prevail in the Brazilian courts.

3. Recognition of Foreign Awards - Transfer of Jurisdiction from the Supreme Federal Court to the Superior Court of Justice.

3.1. On December 8, 2004, Constitutional Amendment no. 45 transferred jurisdiction over recognition of foreign judgments, including foreign arbitration awards, from the Supreme Federal Court to the Superior Court of Justice.

The change was intended to reduce the backlog of cases pending before the Supreme Federal Court, whose 11 justices decide more than 100,000 proceedings per year.[3]

Although the Superior Court of Justice also suffers from a backlog, 4 the recent change has increased the scope of its work.

In this respect, the transfer of jurisdiction to the Superior Court has brought a breath of fresh air to counter the conservative posture adopted by the Supreme Federal Court.

First, the Superior Court issued Resolution no. 9 on May 4, 2005, dealing with its own jurisdiction. Although the Resolution, is in effect only on a transitional basis (pending ratification by its justice members), it departs from the Supreme Federal Court's established precedents by allowing the Court to grant urgent provisional relief during homologation proceedings (art. 4, §3).[5]

The possibility of provisional relief is significant for the party which is successful under arbitration proceedings and wishes to protect its interests in Brazil. The Superior Court of Justice's attitude reflects the principle of substantive due process and opens the way to a quicker response to arbitral decisions that are intended to be recognized and enforced in Brazil.

In our view, the Supreme Federal Court's precedents, based as they were on purely technical legal points, often ended up denying justice.[6]

3.2. Another important point under Resolution no. 9/2005 is the possibility of partial recognition of foreign decisions.[7]

This is another taboo that the Superior Court of Justice has broken so far. If it is possible to detach the part of the award affected by some defect that prevents its homologation, the remainder of the decision

will be processed normally, so as to ensure that the foreign award produces maximum effects in Brazil.

The new vision the Superior Court of Justice has brought to homologation proceedings confirms a trend to minimize certain myths of procedural law, such as the unity of awards, which, as we will see below, has been an argument used to bar the admission of partial awards in Brazil.

With Resolution no. 9/2005, the Superior Court of Justice has given clear notice of its intention to impress a new rhythm on homologation proceedings, markedly in favor of the recognition and enforcement of foreign arbitral awards in Brazil.

3.3. Another important improvement contained in Resolution no. 9/2005 relates to provisional decisions issued by foreign courts with a view to securing the effects of final awards (such as the attachment of property).

It seems, from the Resolution, that such decisions can now be executed in Brazil by means of letters rogatory.

Until now, the Supreme Federal Court had taken the position that provisional decisions should be subject to homologation and could not be executed through letters rogatory. 8 However, provisional decisions were never homologated by the Supreme Federal Court since it required, as a condition for homologation, a res judicata decision.

In short, the Supreme Federal Court only executed letters rogatory that requested assistance in non-decisional matters such as service of process, deposition of witnesses, and technical assessment.

Resolution no. 9/2005 opens new horizons for the enforcement of provisional measures in Brazil: article 7 of the Resolution provides that " letters rogatory may be of decisional or non-decisional nature".

This new trend is consistent with the Superior Court of Justice's less rigid and conservative tradition and indicates anew era in the recognition and enforcement of foreign judgments, including arbitral awards.[9]

3.4. One negative aspect of the transfer of jurisdiction to the Superior Court of Justice is that the recognition and enforcement's judgment can be appealed to the Supreme Federal Court, if it violates the Federal Constitution.

4. The Myth of the Partial Award.

4.1. Over the years, procedural law has been developed in such a unilateral and individualistic manner that it has become isolated from its own purpose.

From a collateral nature of law, a mere vehicle to re-establish violated substantive rights, it has become an end in itself.

It is common, in the ordinary courts, for judges to apply the law but fail to do justice. In other words, procedural rules are applied so rigidly that they prevent to touch the merits of the case. In practice, judicial procedure can serve as a weapon in the hands of the defendant, preventing access to justice.

Often the defendant comes out the winner, through the adoption of merely procedural techniques.

The overestimation of the purported "procedural legal science" has generated a number of myths including the unity of awards, a principle which, in the eyes of the civil procedural law professors, would prevent the adoption of a partial award.

4.2. For those professors, a judgment is a unique and indivisible act that puts an end to the proceeding and, accordingly, should, in a single act, address all the questions of merit submitted to judgment.[10]

This understanding is focused primarily at avoiding a pathological situation in which multiple appeals are generated from issues that, initially, were joined in a single proceeding. However reasonable this concern might be, it must be re-examined in the light of the dynamics of business transactions and the problems faced by the users of judicial services.

There is another, more urgent cause to revisit the principle of the unity of awards. A recent amendment to the Federal Constitution introduced a new provision under the title " Fundamental Rights and Guarantees of the Individual" (art. 5 (LXXVIII), which seeks to ensure effectiveness to any and all legal proceedings. The provision reads:

Within both the administrative and judicial sphere, all individuals are guaranteed a reasonable duration of proceedings and the means to ensure a celerity thereto.

There can be no doubt that the constitutional amendment seeks to impose significant changes on judicial activity.

4.3. Indeed, based on the recent improvements made in civil procedural law we can say that some of the concepts underlying the principle of partial award are already in place.

One example is the new authority for courts to grant provisional measures to secure, in part, the relief sought by the calimant. 11 It means that by granting the relief up front the judge is pre-judging and ensuring at the outset of the dispute what the party seeks to obtain at the end, when the final decision is rendered.

Another is Resolution no. 9/2005, issued by the Superior Court of Justice, which allows partial homologation of foreign judgments.

What lies beneath these legislative trends is a modern and flexible legal standpoint, focused on the achievement of the effectiveness of the law. The new procedural rules are "an open door" for the acceptance of partial award in the judicial sphere.

Contemporary thinking repudiates the concept of a judgment as an act that puts an end to the proceeding. The end of every decision is to resolve the conflict, to decide the substantive right. A judgment, therefore, should be taken to be an act that puts an end to the controversy, not the proceeding.

Thus, if a sole case contemplates various distinct and divisible claims, and some are ready to be judged, there should be nothing to prevent decision of those claims by means of a partial award.

This alternative has even greater scope for application in arbitrations, since arbitral awards are not subject to appeal.

Although there are no judicial precedents on this subject, we believe that the ordinary courts would accept the concept of a partial arbitral award.[12]

5. Validity of the Parties' Choice of Law

5.1. Under art. 2 of Law 9307/96, The arbitration may be carried out on the basis of law or of equity, at the parties' option. §1. The parties may freely choose the rules of law that will be applied in the arbitration, provided that good morals and public order are not violated. §2. The parties may also agree that the arbitration be carried out on the basis of the general principles of law, usages and customs and the rules of international trade.

Although this provision clearly gives the parties free choice of the applicable law, scholars have cast doubt on the question by referring to article 9 of the Law of Introduction to the Civil Code (LICC).

Article 9 provides that "[t] he rules of law of the country in which obligations are constituted shall apply to govern the agrement. §2. An obligation resulting from a contract is deemed to have been constituted in the place in which the proponent resides".

Many scholars take article 9 of the LICC to be a rule of public order. Accordingly, they argue, it must prevail over the more liberal provision established in the Arbitration Law (freedom to choose the applicable law).

My position is that the LICC does not apply to agreements that are submitted to arbitration because the Arbitration Law clearly intends that parties should have complete freedom in their choice of applicable law. Although the autonomy of will is a principle inherent to arbitration system the brazilian law goes even further by expressly provide that the party may freely choose the rules of law, including equity.

5.2. More recently, two decisions, one by the Rio de Janeiro Court of Appeal and the other by the Court of Appeal of São Paulo, have confirmed that the choice of foreign law in a contract containing an arbitration agreement is valid.[13]

In both cases, the Courts held that the LICC merely supplements the will of the parties.

Because the majority of legal scholars believe that the LICC establishes rules of public order, and since the decisions referred to above did not examine the question in depth, it is likely that this issue will be revisited by the judicial courts. In any event, we understand the Courts will confirm that where a contract contains an arbitration agreement, the parties are free to choose the law that governs the arbitration.

6. Arbitration under the Law of Private-Public Partnerships

6.1. The legislation governing Public-Private Partnerships ("PPPs") in Brazil, Law 11.079, was issued on December 30, 2004.

Article 11, (III) of the Law authorizes the use of the arbitration to solve conflicts arising out of PPP agreements. Nevertheless, the provision imposes certain restrictions: the arbitration must take place in Brazil, and in the Portuguese language.

6.2. As to the first restriction - that the arbitration must be carried out in Brazil - a lapse in the drafting of the Law leads the interpreter to conclude that the seat of the arbitration may be one of international jurisdiction, although the proceeding must be conducted in Brazil.

However, it is not clear whether this was the legislator's intention. This point may be clarified in the bid prospectus or in the draft PPP agreement.

On the other hand, one positive result of fixing Brazil as the seat of the arbitration is that it will make it easier for foreign investor to to enforce provisional relief, since any decision granting such remedy will not have to be confirmed by the Superior Court of Justice.

6.3. The requirement that the arbitration be in the Portuguese language appears to be more objective and less flexible. The Law is, after all, quite clear in stating that the arbitration be conducted in Portuguese, which presupposes that all documents, procedural orders, depositions and so on must also be in that language.

Nevertheless, nothing would prevent the use of a foreign language in the proceeding and documents, provided both parties are agreed and the costs of translation are assumed by the foreign investor.

Endnotes

1 Constitutional Amendment no. 45 of December 8, 2004 transferred this jurisdiction to the Superior Court of Justice.

2 In addition to the above arguments, the Superior Court of Justice recently affirmed its jurisdiction to homologate " non-judicial decisions which, under Brazilian law, would have the nature of a judgment" in Resolution no. 9 of April 4, 2005.

3 In 1991, the Supreme Federal Court decided 14,366 proceedings; in 2001, 109,692, an increase of 663.5%.

4 In 1991, the Superior Court of Justice judged 19,267 proceedings; in 2001, 198,613, a 930.8% increase.

5 The Supreme Federal Court had taken the position that its powers of homologation did not authorize the exercise of coercive jurisdiction, since homologation is a very limited proceeding (deliberative jurisdiction " giudizio di delibazione"). Thus, only after the homologation process was complete could a party seek provisional relief, in the context of execution proceedings before the first-instance federal courts.

6 Exception was made for countries which had treaties with Brazil, as in the case of Mercosur.

7 Although the Arbitration Law provides for partial homologation (art. 38 (V)), the fact that the Superior

Court of Justice now permits the same for judicial judgments stress a real advance in procedural law.

8 Exception was made for countries which had treaties with Brazil, such as the Mercosur countries.

9 In fact, it was the Superior Court of Justice which, long before the Arbitration Law was enacted, validated a foreign arbitral award based simply on the existence of an arbitration clause, at a time when the compromisso was the only instrument capable of setting aside the jurisdiction of the state courts. More recently, one of the Court's members, Justice José Delgado, admitted that the only change he would make in the Arbitration Law would be precisely to give greater powers to the arbitrator and, specifically, the power to issue an enforcement order for the immediate compliance of his decision, without need for intervention by the judicial courts, including the power to impose a daily penalty for non-compliance. (in Revista Jurídica Consulex, ano VII, n. 161, 30.09.2003). More recently, the 2nd Chamber judged valid and enforced an arbitration agreement incuded in a public contract executed as a result of a bid proceedings (Justice João Otávio Noronha reporting, judged October 25, 2005).

10 Articles 162 (1), 458 and 459 of the Brazilian Code of Civil Procedure.

11 Tutela antecipada is a grant of the relief sought prior to judgment on the merits. Accordingly, it is not a decision that is merely instrumental in nature, since it directly affects the substance of the case (art. 273 of the Code of Civil Procedure).

12 We have notice of a unique case brought to the courts of São Paulo challenging the validity of a partial arbitral award. However, and despite of being unsuccessful at first level, the judge did not address this issue.

13 South Marketing Ltda. vs. Air Canada, Rio de Janeiro Court of Appeal, Civil Appeal no. 28.020/2002, 13th Civil Chamber, Justice Des. Ademir Paulo Pinto reporting, judged March 12, 2003. Gevisa S.A. vs. GVA Representações e Engenharia Ltda., Interlocutory Appeal 1.085.233-4, 1st Court of Civil Appeals of São Paulo, 7th Chamber, Justice Juiz Nelson Ferreira reporting, judged April 16, 2002.