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ARBITRATION IN BRAZIL: RECENT DEVELOPMENTS

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After long years of relative disuse of arbitration[i], the enactment of modern legislation in 1996[ii], the resolution of a key constitutional issue in 2001 and the ratification of the New York Convention in 2002[iii] have allowed arbitration to flourish in Brazil. Now, with the general support of the legal community, and more importantly of the courts, the country has become one of the main international players in the field of arbitration, with a steadily rising number of arbitral proceedings and also increasing academic interest.

Among the advances brought by the Arbitration Law, the following stand out: (i) the enshrinement of the autonomy of will; (ii) the distinction between the arbitration clause (*cláusula compromissória*) and the submission agreement (*compromisso arbitral*), two types of the so called "arbitration convention" (*convenção de arbitragem*), with both having a positive effect (requiring a recalcitrant party to submit to arbitration) and a negative one (preventing the judiciary from considering the dispute); (iii) the possibility of seeking specific performance from the judiciary of incomplete or defective arbitration clauses; (iv) the independence of the arbitration clause from the instrument in which it is inserted, so that the invalidity of the latter does not render the former invalid; and (v) the finality of the arbitral award as well as its classification as an enforceable judicial instrument irrespective of judicial ratification.

It can be said, then, that the Arbitration Law resolved the main obstacles to the use of this method of dispute resolution, namely the inefficacy of arbitration clauses, the need for judicial ratification of domestic arbitral awards and the absence of clear regulation of the process for judicial ratification of foreign awards, in the last case cemented by Brazil's ratification of the New York Convention. Nevertheless, the enactment of the law did not definitively establish arbitration as a viable alternative to judicial resolution of disputes, because soon after the Arbitration Law took effect on November 23, 1996, its constitutionality became an issue incidently in a case before the Brazilian Supreme Court. In that case, involving recognition of a foreign arbitral award, the reporting justice[iv] issued an interlocutory decision holding the provisions of the Arbitration Law that enable specific performance of arbitration clauses and determine the dismissal of any lawsuit involving an issue the party undertook to resolve through arbitration to be unconstitutional, based on Article 5, XXXV, of the Federal Constitution, according to which "*the law shall not exclude any injury or threat to a right from the consideration of the Judiciary*". It took nearly five years for the court, sitting en banc, to resolve this matter. On December 12, 2001, the Court finally held these provisions to be constitutional, in a seven-to-four

vote, based on the position that while the law may not exclude access to the courts, the parties, in questions of disposable pecuniary rights (as opposed to inalienable ones), may freely agree to submit their disputes to binding arbitration.

With this obstacle having been overcome and the ratification of the New York Convention, arbitration came to be widely employed for resolution of various types of corporate and contractual disputes (such as construction and energy). Now arbitrations involving one or more Brazilian parties occupy a leading position in the world, according to statistics from the International Chamber of Commerce (ICC).

For this reason, Brazil has attracted the attention of national and international legal scholars, arbitration chambers, lawyers and companies. The consensus is that Brazil now has a solid legal framework for the further development of arbitration as a secure and reliable form of dispute resolution.

A recent example of academic production on arbitration in Brazil is the study of the relationship between arbitration and the judiciary carried out in partnership between the Brazilian Arbitration Committee (CBAr) and the São Paulo Law School of Getulio Vargas Foundation (FGV). The first two reports emerging from this research effort were published in May 2010.

The empirical-jurisprudential research was divided into to phases: a) gathering data/mapping of all decisions issued by Brazilian courts since the Arbitration Law took effect (November 23, 1996) until February 2008; and b) qualitative analysis of the decisions according to thematic fields.

The methodology of the first phase was itself divided into three steps: (i) analysis of the quality of the information gathered by diagnosis of the transparency of the electronic databases of the courts; (ii) search for judicial decisions by key words and sorting of occurrences from examining the headnotes of decisions; and (iii) reading of the full content of the decisions and their tabulation according to the research variables, to compose the final database.

This research makes a huge academic contribution to the institute of arbitration, since besides this mapping and examination in the first phase, the second phase entails consideration of the following thematic fields: (i) existence, validity and efficacy of the arbitration commitment (arbitration clause or submission agreement); (ii) urgent and coercive measures; (iii) suits for specific performance of arbitration clauses; (iv) enforcement of arbitral awards; and (iv) recognition of foreign arbitral awards.

From a qualitative standpoint, the decisions identified indicate a positive trend, mainly in view of the consistent position of the Superior Tribunal of Justice, the highest court for non-constitutional matters, to uphold the validity and effectiveness of arbitration commitments and order dismissal of suits without prejudice, in deference to the competence of the arbitral tribunal.

Another important conclusion of the first reports resulting from this research effort is that the great majority of Brazilian arbitrations have proceeded without great obstacles, with the awards having been complied with voluntarily by the parties. Of the small number of awards challenged in the courts, the merit has been re-examined in only a few, and the awards have been set aside in fewer still. Furthermore, when this has happened, it has generally been due to technical issues, and the competence of the arbitrators to resolve the controversy, within the limits imposed by the Law of Arbitration and the arbitration clause, has been respected.

Therefore, even though there are still some divergences among the country's courts, and the decisions that have been issued mainly come from the São Paulo and Rio de Janeiro state appellate courts (a reflection of these two states' importance in the nation's economy and thus in commercial contracts), the research developed jointly by the CBAr and FGV clearly reveals the acceptance of the Arbitration Law and the progressive familiarization of judges with its provisions and consistent application of them.

In support of these conclusions, some recent paradigmatic cases can be mentioned, among them one decided this year by the Superior Court of Justice (STJ, CC n° 113.260) in a suit over multiple contracts covering the same economic transaction but containing conflicting arbitration clauses, indicating two different arbitration chambers. That decision recognized the exclusive competence of the arbitral court to decide on which arbitration clause to apply, revealing respect for the principle of competence-competence, so important to the independence and effectiveness of arbitration.

Another decision this year was issued by the Superior Tribunal of Justice (STJ), involving the nationality of an arbitral award (Special Appeal 1.231.554/RJ).The award in question was issued in Brazil but the request for arbitration had been filed abroad, with the International Court of the ICC, under which the arbitration had been conducted. The STJ held that the award, issued in Rio de Janeiro, must be considered a Brazilian one, based on the territorial criterion contained in Article 34,

sole paragraph, of the Arbitration Law as well as Article I, 1, of the New York Convention (Decree 4,331/2002).

Another important decision, particularly since Brazil has a separate system of federal labor courts, was issued in December 2010 by the Superior Labor Tribunal (TST, the highest labor court – Review Appeal 144300-80.2005.5.02.0040). The court decided for the validity of the use of arbitration in disputes over labor rights, but only those arising after the end of the employment relationship. According to the court, labor rights are inalienable at the moment of contracting and during performance of the labor contract, and hence not subject to arbitration, because employment contracts by their nature are adhesion contracts, with the worker being the weaker party, so that arbitration would result from compulsion rather than free will. Therefore, an arbitration clause inserted in a labor contract is not valid. But after the extinction of the labor contract, in a settlement between the parties calling for future performance of certain obligations resulting from the former employment contract, the parties are free to stipulate arbitration. The reason is that the inherent vulnerability of the worker no longer exists, since "*the ties of dependence and subordination of the worker to the party that intends to hire or hired him significantly fade, and the labor rights, because of their pecuniary nature, become disposable.*"

Notwithstanding these and other decisions favorable to arbitration in the country, another recent decision that poses a potential obstacle must be mentioned. This occurred in June 2010, when a first-level court issued a writ of mandamus ordering an arbitral tribunal to accept the submission of evidence by one of the parties that the tribunal had refused to accept, considering it unnecessary (MS n° 0017261-67.2010.826.0053, 13ª Vara da Fazenda Pública).

This decision triggered alarm and was widely criticized by the national and international arbitration community, since if allowed to stand it would undermine the autonomy of the parties to choose arbitration, with the resulting exclusion of the judiciary through the "negative effect of the arbitration clause".

However, on March, 2011, the São Paulo State Court of Appeal reverted the effects of this decision (A.I. n° 0284191-48.2010.8.26.0000) which makes arbitral community believe that the previous decision was a real exception.

Overall, despite some negative decisions, the balance of court decisions is highly positive to arbitration. This fact is clearly reflected in the steep rise in the number of arbitral proceedings in the country, both

involving domestic and cross-border disputes, especially notable in the past two years.

An indication of the growing importance of Brazil in the sphere of international arbitration was the holding of the 2010 Conference of the ICCA (International Council for Commercial Arbitration) in the city of Rio de Janeiro, from May 24 to 26. The event set a new attendance record, attracting some 900 people, 600 of them foreigners. It served as a forum for discussion of the latest themes related to international arbitration practice and for exchange of ideas and experiences among jurists from Brazil and many other countries.

The conference was followed by a visit by members of the ICAA and the Brazilian Arbitration Committee to the Superior Tribunal of Justice, in a meeting symbolic of the increasing integration between the judiciary and arbitration institutions and signaling the desire to further strengthen this means of dispute resolution in Brazil.

In May 2011, the Brazilian Arbitration Committee organized an event at the headquarters of the Brazilian Supreme Court, entitled "Arbitration and the Judiciary: A Necessary Dialog". Among those attending were foreign professors such as Donald Donovan and Albert Jan van den Berg, judges of the Supreme Court and STJ and approximately 100 lower-level judges from throughout the country. That event helped strengthen the already solid relationship between arbitration and the judiciary.

In September 2011, the Brazilian Arbitration Committee held the tenth version of its annual international conference in Brazil's capital, Brasília. The theme was "Arbitration and the Public Interest". The conference attracted about 400 participants, among them important public authorities (representing regulatory agencies in the areas of electricity, telecommunications and petroleum as well as leading judges) and served as a venue for debate on the use of arbitration involving public questions.

These events also contributed to confirm Brazil's standout position in Latin America. Since 2006 the country has been the leader in the region in number of arbitral proceedings conducted under the auspices of the ICC. For instance, according to its statistics in 2009 the city of São Paulo was the seat chosen in 18% of all ICC arbitral proceedings, besting the percentages of cities such as Paris, New York and London.

This reflects the fact that Brazilian companies can call on steadily expanding resources to arbitrate their international disputes in Brazil and to choose Brazilian law as applicable.

In conclusion, the collaboration of Brazil's courts, the increasing number of arbitrations seated in the country, the realization of important

events and the growing academic interest in arbitration all are indications that arbitration has developed into a viable alternative to the courts as a fast and secure means to resolve disputes on a wide range of issues. Brazil has thus consolidated its position as an effective international player.

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i. Arbitration is not new in Brazil. Indeed, inspired by Portuguese practice from medieval times, Brazil's first Constitution in 1824 provided for the possibility of arbitration, and its Commercial Code of 1850 even required arbitration of certain disputes. But later substantive and procedural legislation, particularly the Civil Code of 1916, revoked or greatly hampered arbitration, a situation that existed until the enactment of the Arbitration Law of 1996 (Law 9,307/96).

ii. The Arbitration Law was largely inspired by the UNICRITAL Model Law and the Spanish Arbitration Law of 1988.

iii. Incorporated into the Brazilian legal system by congressional ratification through Decree 4,311/02.

iv. All appellate cases are first assigned to a reporting judge (*relator*), whose job is to examine the case in detail, summarize the issues for the other judges of the panel, chamber or full court and write a leading opinion (which may or may not prevail in the final vote). The reporting judge may also issue certain interlocutory decisions acting alone, subject to review by the full court/chamber/panel.

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