An Overview of the Development and Current Status of the Legal Framework for Arbitration in Brazil

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In 1996, Brazil enacted a modern national arbitration law,[2] which did not remove all the obstacles to arbitration but significantly improved the status of arbitration in Brazil. However, soon after the enactment of the law, the constitutionality of the Brazilian Arbitration Law was challenged in the Brazilian Supreme Court and such challenge put the enforceability of an arbitration clause in question.

Article 7 of the Brazilian Arbitration Law called for national courts to compel specific performance of an arbitration clause to resolve disputes if there is an arbitration clause and one of the parties is not willing to collaborate. The Brazilian Supreme Court found that Article 7 was an unconstitutional violation of Article 5 (XXXV) of the Brazilian Federal Constitution, which guarantees the right of access to the state courts. Although this view was not universally accepted, it was sufficient to delay the development of arbitration in Brazil for 5 years.

In December 2001, the debate on the constitutionality of the Brazilian Arbitration Law was finally over, when the Brazilian Supreme Court issued a decision holding the constitutionality of the Brazilian Arbitration Law.[3] Once the constitutionality of the Brazilian Arbitration Law was affirmed, there was a noticeable growth in the number of arbitration clauses incorporated into contracts with Brazilian parties and a significant increase of national and international arbitration proceedings involving Brazilian parties.

The Brazilian Arbitration Law did not completely follow the UNCITRAL Model Law and it did not solve all the problems in the Brazilian legal framework for arbitration. However, it has brought the legal framework of arbitration in Brazil closer to the internationally accepted standards of arbitration. In fact, a brief examination of the Brazilian Arbitration Law shows that it provides a wide scope of arbitrability,[4] recognizes the autonomy of the parties[5] and provides an improved mechanism for enforcement of foreign arbitral awards.[6]

Regarding the ratification of international conventions, Brazil ratified the Inter-American Convention on International Commercial Arbitration (Panama 1975),[7] in 1995, and the Inter-American Convention on Extraterritorial Effects of Foreign Judgment and Arbitral Awards (Montevideo 1979) in 1997. Then, in 2002 the Brazilian Congress approved the New York Convention,[8] which entered into force in Brazil on 24th of July 2002, following the signature of the Presidential Decree No.4311.[9]

In this context, there have been some decisions from the Superior Court of Justice as well as a number of decisions in different State courts throughout Brazil, which shows the

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[2] Lei No. 9.307, 23 September, 1996, D.O.U., 24.09.1996 (Braz) [hereinafter referred to as Brazilian Arbitration Law].

[3] S.T.F., SE 5206 AgR, Relator: Min. Sepulveda Pertence, 12.12.2001, D.J. 30.04.2004, S.T.F.J. [referred to as *M.B.V. Commercial and Export Management Establishment v Resil Industria e Comercial Ltda*].

[4] The Brazilian Arbitration Law provides for a wide scope of arbitrability and Article 1, which deals with arbitrability under the Brazilian Law, states that persons capable of entering into contracts will be able to avail themselves of arbitration in order to resolve disputes relating to freely transferable property rights.

[5] The principle of procedural party autonomy has been endorsed by Art. 21 of the Brazilian Arbitration Law, which provides that parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. The Brazilian Law also endorsed the principle of party autonomy in relation to the applicable law and Article 2 (1) of the Brazilian Arbitration Law provides that states that the parties may freely choose the rules of law to be applied in the arbitration.

[6] Article 34 of the Brazilian Arbitration Law improves the framework of enforcement of foreign awards stating that arbitral awards would be recognized and enforced in Brazil in accordance with international treaties ratified by Brazil. In addition, Article 35 of the Brazilian Arbitration Law provides that foreign arbitral awards are subject only to homologation by the Federal Supreme Court (STF). Nevertheless, since the constitutional amendment No. 45 of 2004 , the power of homologation has been transferred from the Federal Supreme Court to the Superior Court of Justice, in order to speed the process of recognition and enforcement of arbitral awards. Thus, foreign awards can now be enforced in Brazil, even if they were not confirmed before the local court of the State where the award was issued. Those provisions improved the legal framework for enforcement of arbitral awards in Brazil.

[7] Organization of American States (OAS), Inter-American Convention on International Commercial Arbitration, [hereinafter Panama Convention], January 30, 1975 O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975).

[8] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. [hereinafter New York Convention],

[9] Decreto No. 4311, de 24 de julho de 2002, D.O.U. 07.24.2002 (Braz.). In the past, Brazil had been criticized a number of times and even referred to as the *black sheep* of Latin America in the context of international commercial arbitration because of its late ratification of the New York Convention.

positive attitude of Brazilian Courts towards arbitration. For example, there have been a number of decisions in which different Brazilian Courts respected the will of the parties who voluntarily chose arbitration as a method of dispute resolution.[10]

Furthermore, Brazilian courts have decided, and it is now widely accepted, that the Brazilian Arbitration Law applies to arbitration agreements signed before 1996, i.e. the year in which the Brazilian Arbitration Law entered into force.[11] In addition, there have been some decisions in which Brazilian courts made it clear that they will not try not to interfere with the decisions of arbitral tribunals and will not review the merits of an arbitral award but will simply consider whether the formal requirements of the Brazilian Arbitration Law were met.[12]

However, Brazilian courts are not always pro-arbitration. In fact, sometimes, they could be rather unpredictable. For instance, it seemed that Brazil no longer required a *compromisso* if there was a 'full' arbitration clause.[13] Nevertheless, in 2008, the Court of Appeal of Panamá issued a decision that went against the generally accepted principles of arbitration and the case law in Brazil, in *Itiquira Energética S/A v Inepar Indústria e Construções,*[14] the Court of Appeal of Paraná decided that because the parties did not conclude a submission agreement (*compromisso arbitral*) the arbitration agreement was not valid. This is a regrettable decision because it represents an 'isolated pathology' and goes against the prevailing case law and internationally accepted principles of arbitration.[15]

From the above, one can see that the legal framework for international commercial arbitration in Brazil is changing in order to provide a better environment for arbitration. Brazilian courts, in general, have been very pro arbitration and most of the decisions respect the general principles of arbitration and reflect the internationally accepted standards of international commercial arbitration.

Nevertheless, there are still challenges in arbitration in Brazil, which could be attributed to lack of practice and experience of Brazilian judges in the context of international commercial arbitration.[16] It is also important to emphasize that the case law that is being developed in the country relates mainly to domestic arbitration and, therefore, Brazil still needs to develop a culture of international arbitration. Unarguably, developing a culture of international arbitration would take time and significant effort from the Brazilian government and legal community.

In summary, the legal framework for arbitration in Brazil has undergone a remarkable change over the last few years. Brazil can now be regarded as an arbitration-friendly country, the case law that is developing in this country is in line with the internationally accepted standards of international arbitration and, for all the reasons discussed above, the future of international commercial arbitration in Brazil looks much brighter than it did a few years ago.

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[10] *See, e.g.*, T.J.R.S., Ag.I. 70027212455, Relator: Des. Niwton Carpes da Silva, 02.11.2008, T.J.R.S.J. [referred to as *Unibanco União de Bancos Brasileiros S/A (Brazil) v Dailby S.A. (Brazil)*] when the Court of Appeal of Rio Grande do Sul decided that the Court was not competent to trial the case because there was an arbitration clause. *See also* T.J.S.P., Ap. C. Rev No.1117830-0/7, Relator: Des. Antonio Benedito Ribeiro Pinto, 26.02.2008, T.J.S.P.J. [referred to as *Carlos Alberto de Oliveira Andrade v Renault do Brasil Comércio e Participações Ltda*] when the Court of Appeal of São Paulo emphasized the existence of a valid arbitration clause is sufficient to compel the court to dismiss the action. *See also* SEC 1.210/GB, Relator: Min. Fernando Goncalvez, 20.06.2007, D.J. 06.08.2007, S.T.J.J., [referred to as *International Cotton Trading Limited ICT v Odil Pereira Campos Filho*]. *See also* S.T.J. Recurso Especial No. 954.065, Relator: Min. Ari Pargendler, 13.05.2008, S.T.J.J. [referred to as *Tractebel Energia S/A v Petróleo Brasieliro S/A Petrobrás*] when the Superior Court of Justice emphasized that, the courts must always make reference to the arbitration clause concluded by the parties and should refer the parties to arbitration whenever there is an arbitration clause.

[11] See, *e.g.* S.T.J. SEC 349/JP, Relator: Min.Eliana Calmon, 21.03.2007, D.J. 21.05.2007, p.528, S.T.J.J [referred to as *Mitsubish Electric Corporation v Evadin Indústrias Amazônia S.A*] and S.T.J., SEC 831/FR, Relator: Min Arnaldo Esteves Lima, 03.10.2007, D.J. 19.11.2007, 396 REVFOR 333, S.T.J.J. [referred to as *Spie Enertrans S/A v Inepar S/A Indústria e Construções*].

[12] *See e.g.*, S.T.J., SEC 1.210/EX, Relator: Min. Fernando Goncalves, 20.06.2007, S.T.J.J. [*referred to as International Cotton Trading Limited v Odil Pereira Campos Filho*] and S.T.J., SEC 839/FR, Relator: Min. Cesar Asfor Rocha, 16.05.2007, D.J. 13.08.2009, S.T.J.J. [referred to as *Bouvery International S/A v Valex Exportadora de Café Ltda*]. *See also*, S.T.J., SEC 349/IT, Relator: Min. Gilson Dipp, 18.10.2006, D.J. 13.11.2006, S.T.J.J., [referred to as *Grain Partners v Coopergrao*], when the STJ also dismissed a claim to interfere with the merits of an award.

[13] *See, e.g.*, T.J.S.P., Ap. C. Rev No.1117830-0/7, Relator: Des. Antonio Benedito Ribeiro Pinto, 26.02.2008, T.J.S.P.J.[referred to as *Carlos Alberto de Oliveira Andrade v Renault do Brasil Comércio e Participações Ltd*] and S.T.J. Recurso Especial No. 954.065, Relator: Min. Ari Pargendler, 13.05.2008, S.T.J.J. [referred to as *Tractebel Energia S/A v Petróleo Brasieliro S/A Petrobrás*].

[14] T.J.P.R., Ag. I. 428.067-1, Relator: Des. Carlos Mansur Arida, 30.01.2008, 7563 D.J.P.R. 29.02.2008, 79.

[15] For a full discussion on *Carlos Alberto de Oliveira Andrade v Renault do Brasil Comércio e Participações Ltd* and T.J.P., Civ. No. 428.067-1, Relator: Des Carlos Mansur Árida, 19.01.2008, T.J.P. [referred to as *Itiquira Energética S/A v Inepar Indústria e Construções*], see Mauricio Gomm-Santos, *Brazil's Conflicting International Arbitration Case Law: The Inepar and Renault Decisions*, 64 Disp. Resol. J. 1 (2009).

[16] For example, one area that is still problematic is whether the Brazilian Law allows for State participation in arbitration. Although some national laws in Latin America explicitly allow the State to submit to international arbitration, the Brazilian Arbitration Law is silent on that matter, which can bring some uncertainty. Another peculiar aspect of arbitration in Brazil is that the law on public-private partnerships (PPP), which does not exclude the possibility to submit disputes in PPP to international arbitration but requires arbitration to be conducted in Brazil, in Portuguese and according to the Brazilian Arbitration Law and those requirements are not in conformity with the internationally accepted standards of international arbitration (Art.11 (III) of Law 11079 of Dec 30, 2004).