Brazilian Courts and Arbitration: Injunction in Review

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Marcel Alberge Ribas (M.A. Ribas Law Firm)

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Less than two weeks before arbitration practitioners' eyes turned to Rio de Janeiro for the ICCA Congress 2010, a court from that same jurisdiction rendered a decision improving case law on important matters related to arbitration.

On May 12th, 2010, the Tribunal de Justiça do Estado de Rio de Janeiro (which is similar to a Court of Appeals) rendered a decision on the timing and admissibility of urgent measures before Brazilian courts. In Durval Biancalana da Silva e outros vs. DTP Participações e Investimentos S/A e outros the dispute arose from a quota purchase agreement containing an institutional arbitration clause providing for the administration by CCBC – Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canadá.

The court of first instance examined a request for injunctive relief based on arguments of an urgent need to prevent irreparable harm, considering contractual breaches and default committed by the respondents. The claimants argued that unless certain restraining orders were granted against the company's administration, its officers would have the opportunity to act contrary to the purchaser's interests, causing substantial damages to the business. However, the court decided to dismiss the request on the ground that only the arbitral tribunal should rule on any matter originated from the contract due to the presence of an arbitration clause, including a decision on injunctive remedies.

In the consideration of the appeal, the Tribunal de Justiça overturned the decision, partially granting the relief sought by the claimant. The Tribunal de Justiça first examined the language of the arbitration clause which included a provision on the possibility of requesting urgent measures to the judiciary before and after the arbitral proceedings, and concluded that until the arbitral tribunal had been constituted the parties were allowed to request such remedies.

The respondents, however, had filed a memorial with evidence contending that the arbitration proceedings were already initiated under the auspices of the CCBC. Despite this argument, the Tribunal de Justiça found that the constitution of the arbitral tribunal was still on its way and that only after that point would the judiciary lack jurisdiction. It also pointed out that the appointment of arbitrators, the acceptance of their duties and the signature of the term of independence would all together take enough time to justify the injunction issued by the judiciary with regard to the urgency.

In sum, the Tribunal de Justiça correctly reversed the decision from the court of first instance, interpreting the initiation of the arbitral proceedings as the constitution of the arbitral tribunal. This ruling complies with the competence-competence principle and the generally accepted moment of

the constitution of the arbitral tribunal and the rules enshrined in the national arbitration statute, which are applicable both to domestic and international arbitration.

This case reveals two relevant arbitration trends in vogue in Brazil. First, the decision from the court of first instance shows the recent eagerness of more engaged Brazilian judges to enforce arbitration agreements and respect the jurisdiction of arbitral tribunals. It is in essence a very good sign in favor of arbitration, from a country where the full understanding of the institute and its implications is yet to be widely consolidated.

Second, the position of the judiciary to review the matter from a supportive perspective also reveals a growing understanding of the limits and duties of every actor in the dispute resolution process through arbitration, including courts. A decision such as this ensures international observers that it is now much safer to set their arbitration seats in Brazil.