

Is the Competence-Competence Principle Threatened in Brazil?

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The Competence-Competence Principle is a fundamental principle of international arbitration. It is recognized in article 8 of Brazilian Arbitration Law. However, in *Companhia de Geração Térmica de Energia Elétrica - CGTEE v. Kreditanstalt Fur Wiederaufbau Bankengruppe*, the Rio Grande do Sul Court of Appeals raised some doubts about its applicability in Brazil. (Rio Grande do Sul Court of Appeals. Appeal N. 70053386595. *Companhia de Geração Térmica de Energia Elétrica - CGTEE v. Kreditanstalt Fur Wiederaufbau Bankengruppe*. June 12, 2013)

The Companhia de Geração Térmica de Energia Elétrica (Claimant) filed a suit against Kreditanstalt Fur Wiederaufbau Bankengruppe (Respondent) in order to declare the nullity of a contract and other documents that were supposedly modified or created by the Respondent. As there was already an investigation regarding the forgery, the Claimant attached to the suit the police reports, which attested the adulterations. In accordance with the Brazilian case law, the Court of first instance dismissed the proceedings, on the grounds that the Brazilian Arbitration Law, in its Article 8, embraces the competence-competence and the autonomy of the arbitration clause principles, both of which permit the arbitrator to decide about the existence and the validity of the arbitration clause.

The Court of Appeals overturned the first instance decision finding that, although the competence-competence principle and the autonomy of the arbitration clause should be considered, the police investigation report attached as proof of the contract forgery provided enough grounds to annul the arbitration clause. The Court held that as there was evidence of lack of agreement of the parties regarding the arbitration, the State Court has grounds to annul the arbitration clause and proceed with the judgment without the necessity of further investigation. The Court also referred to article II.3 of the 1958 New York Convention.

This decision should be considered a very exceptional case. First, because the Brazilian case law, especially the decisions issued by the *Superior Tribunal de Justiça*, has consistently decided that the arbitral tribunal has the preference to rule in its own competence, according to competence-competence principle.

Moreover, article II.3 of the New York Convention should be applied on a very limited basis, when the invalidity or non-existence of the arbitral agreement is evident. In the present case, the Court of Appeal made a very deep analysis of the merit of the dispute, researching the power of the representation of the Claimant. Therefore, the Court has gone beyond the limits provided by the New York Convention, violating article 8 of the Brazilian Arbitration Law.

In conclusion, this case should not be considered as a change of the Brazilian case law position regarding the application of competence-competence principle. It is just an accident that likely will not imply the destruction of a solid path built by the Brazilian courts, which considers that the arbitrators are competent to analyze their competence.