Interim Measures and Anti-Arbitration Injunctions in Brazil

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André de A. Cavalcanti Abbud (BMA Advogados) and Gustavo Santos Kulesza (Skadden, Arps, Slate, Meagher & Flom LLP)

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Do international arbitrators have the power to overturn interim measures granted by a Brazilian court? Do Brazilian courts have the power to stay international arbitrations? A recent decision rendered in the *Petroplus Sul Comércio Exterior S.A.* ("Petroplus") *et al. v. First Brands do Brasil Ltda. et al.* ("First Brands") dispute has just provided its answer to those questions. And the response was a bit alarming, at least from an arbitration perspective. The Court of Appeals of the Mato Grosso do Sul state recently upheld an anti-arbitration injunction requested by Petroplus ordering First Brands to adjourn recently initiated ICC proceedings (Interlocutory Appeal n. 1401116-61.2014.8.12.0000/50000; see here). That decision runs afoul of some fundamental international arbitration concepts and precedents of the Brazilian Superior Court of Justice ("STJ"). The STJ will soon have a chance to readdress those same questions hopefully with more promising answers.

The *Petroplus et al. v. First Brands et al.* dispute is not new in the Brazilian arbitration scenario. The conflict involves numerous parties who entered into joint venture and shareholders' agreements providing for the resolution of disputes by arbitration. For the sake of brevity, this post refers only to Petroplus and First Brands to designate each side of the dispute.

The first chapter of the conflict led to the rendering of an ICC arbitral award in

Miami. First Brands sought the recognition of the arbitral award before the STJ in Brazil while Petroplus tried to annul that same arbitral award before the São Paulo Courts. First Brands seems to have won here: the STJ recognized the award (Contested Foreign Judgment nº 611; see here and here) and the São Paulo Court of Appeals dismissed the proceeding to set aside the award (Appeal n. 0014578-23.2004.8.26.0100).

In the most recent chapter of their dispute, the parties filed new lawsuits before the São Paulo and Campo Grande Lower Civil Courts. A lawsuit brought by Petroplus before the 3rd Campo Grande Lower Civil Court (procedure n. 0822794-52.2012.8.12.0001) led to the decision that is the subject of this post. During those proceedings, the judge granted an interim measure requested by Petroplus to prevent First Brands from voting at shareholders' meetings of some of the companies involved in the dispute. First Brands appealed that decision, but the Mato Grosso do Sul Court of Appeals dismissed the appeal (Interlocutory Appeal nº 4005756-58.2013.8.12.0000; see here). First Brands has successfully taken the matter to the STJ (Special Appeal nº 1463780), which recently suspended the effects of the lower court's decision until the judgment of First Brands' special appeal (Provisional Measure nº 22575; see here).

In parallel, First Brands initiated new ICC arbitral proceedings requesting the arbitral tribunal to grant an interim measure overturning the judge's decision and allowing First Brands to vote at the shareholders' meetings. Petroplus reacted by requesting the judge to require First Brands immediately to dismiss the arbitration proceedings. The judge denied Petroplus' request on the ground that First Brands had the right to present its claims before the arbitral tribunal if First Brands considered that forum to be the appropriate forum for solving the parties' dispute. Petroplus appealed the decision at first instance to the Mato Grosso do Sul Court of Appeals, which granted the appeal by majority decision, ordering First Brands to suspend the arbitral proceedings, subject to a daily penalty.

The Mato Grosso Court of Appeals' decision was not unanimous. The reporting justice would have dismissed the appeal based on the wrong assumption that the arbitral tribunal did not have jurisdiction to interfere in judicial proceedings, e.g. by voiding the interim measure previously granted in the lower court. Therefore, according to his dissenting opinion, there was no reason to order the suspension of the arbitral proceedings.

The reporting justice's opinion did not prevail. The Court of Appeals granted the appeal: although the majority shared the reporting justice's incorrect assumption that the arbitral tribunal lacked jurisdiction to override judicial decisions, it decided to grant the appeal based on the contempt of court doctrine.

The Court referred to Article 14, V, of the Brazilian Code of Civil Procedure, which states that the parties must not impose obstacles to the efficacy of judicial decisions. According to the Court's reasoning, although the arbitral tribunal did not have powers to modify the decision previously granted in court, the mere risk that the arbitrators could grant First Brands' interim measure would present hindrances to the full effectiveness of the lower court judge's decision.

Additionally, according to the Court, the maintenance of the arbitral proceedings would violate Brazilian sovereignty, since the arbitration would continue under the assumption that an international arbitrator's decision, although subjected to the Brazilian Courts' approval to be enforced, could prevail over an earlier decision rendered by a judge in Brazil.

The Court stated that First Brands should have first complied with the judge's interim decision and then requested the dismissal of Petroplus' action based on the existence of the arbitration agreement, as provided for in Articles 267, VII, and 301, IX, of the Brazilian Code of Civil Procedure (whose effects are similar to that of Article II.3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards). By initiating arbitral proceedings before the judge had decided whether to dismiss the action, First Brands allegedly hindered the effectiveness of the judge's interim decision. In the Court of Appeals' view, First Brands' conduct constituted contempt of court (our translation):

> *The commencement of international arbitration, with requests that contradict what has been expressly decided by this Court, and by the judges of other suits involving the same parties or related entities and involving the same facts that permeate the action brought before the ordinary courts, prior to a decision on whether the Courts' jurisdiction prevails or, if that is the case, on whether it is possible to invoke international arbitration for the matter at issue in the action in course before the 3rd Campo Grande Lower Civil Court, represents the contempt of court provided for in Article 14, V, of the Brazilian Code of Civil Procedure and violates item II of the same procedural rule. (p. 18, our translation).*

For those reasons, the Court of Appeals (i) decided to order First Brands to adjourn the arbitration proceedings until the lower court judge decided whether to extinguish the lawsuit due to the existence of the arbitration agreement; and (ii) imposed a penalty of approximately USD 500,000 plus a daily penalty of USD 200,000 for failure to comply with the order. Moreover, the Court (iii) authorized Petroplus not to comply with any arbitral tribunal's decision, which would violate the sovereignty of the Brazilian Courts.

The Mato Grosso do Sul Court of Appeals' decision is an *exceptional case that swims against the arbitration-friendly tide* generated by cases decided by the STJ, Brazil's highest court on non-constitutional issues.

First, the Court of Appeals' view that the arbitrators do not have the authority to overturn an interim measure granted by the ordinary courts contradicts the STJ's precedents on the same subject. In the *Itarumã Participações S.A. v Participações em Complexos Bioenergéticos S.A. – PCBIOS case* (Special Appeal nº 1.297.974; see here and here), the STJ confirmed that, whenever the parties have entered into an arbitration agreement, the ordinary courts have jurisdiction to render interim measures only in exceptional circumstances, e.g. before the constitution of the arbitral tribunal. Once the arbitral tribunal is constituted, the arbitrators' immediately have power to grant provisional measures and the arbitrators can maintain, modify or even terminate measures granted by the ordinary courts. Indeed, according to the STJ, any decision rendered by the ordinary courts is provisional and *must be confirmed* by the arbitrators in order to remain valid. Therefore, the Court of Appeals' position that the arbitral tribunal cannot terminate the interim measure granted in favour of Petroplus seems to be ill-founded and most likely will not prevail when taken to the STJ.

Second, the Court of Appeals' anti-arbitration injunction also goes against the pro-arbitration stance adopted by the STJ. In *Ferro Atlântica S.L. v. Zeus Mineração Ltda.* (Provisional Measure nº 17868; see here), the STJ decided that the ordinary courts' intervention in an ICC arbitral proceeding would violate the parties' freedom of contract in submitting their dispute to arbitration. Also, in accordance to the competence-competence principle, recognized by the Brazilian Arbitration Act (Law nº 9307/1996, Article 8, sole paragraph), the STJ decided that the arbitrators have jurisdiction to resolve any issue regarding the validity of the arbitration agreement. Moreover, in *Samarco Mineração S.A. v. Jerson Valadares da Cruz* (Special Appeal n. 1.278.852; see here), the STJ stated that when the parties

have entered into a "complete" arbitration agreement ("*cláusula arbitral cheia*"), the arbitrators have priority over the ordinary courts in deciding on the validity of the arbitration clause.

In the case at hand, not only the arbitration clauses are "complete", but also Petroplus itself confirmed the existence of valid arbitration agreements between the parties when Petroplus started the first ICC arbitration. The Court of Appeals therefore seems to have made a mistaken decision in ordering First Brands to wait until the lower court judge decides whether to extinguish the action before putting the arbitral proceedings back on track. First Brands is now trying to take the case to the STJ. It remains to be seen what will be the STJ's reaction to the Court of Appeal's anti-arbitration injunction, especially in light of the fact that the arbitration seat is outside Brazil. Hopefully the STJ will embrace the opportunity to make another dent in favour of arbitration.

The *Petroplus et al. v. First Brands et al.* dispute is far from an end. Those who follow the development of Brazilian arbitration law should watch the next chapters of this dispute closely.