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# Arbitrating in Brazil: Arbitration and Binding Precedents

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This post covers the main topics broached in my lecture given in Oxford, in the Conference "II Oxford Symposium on Comparative International Commercial Arbitration", which took place on November 20, 2017.

The question is: are arbitrators bound by precedents or by a clear line of case law, when parties have decided, in the arbitration agreement, that *Brazilian law* should be the basis of the final award.

To solve this problem, firstly, something has to be said about arbitration and, secondly, something has to be said about the law, which is much more difficult.

1). A quick look at the several theories on the nature of arbitration is useful here.

There are at least four theories which have been created to explain the legal nature of arbitration. They are known as the jurisdictional, contractual, mixed (or hybrid) and autonomous theories.

According to the first theory – jurisdictional – the arbitrator's award is comparable to a judgment rendered by official courts.

Arbitrators, say those who adopt this theory, draw their powers from national law – exactly like judges do. The only difference is that arbitrators are appointed by the parties. But both make final and binding decisions.

According to the *contractual theory*, the arbitration agreement is the most important element of arbitration. The submission to the agreement and the award are two phases of the same contract.

The mixed theory, it seems to me, is the one that explains arbitration in the best way possible. It is highly accepted, and recognizes both worlds in arbitration: elements of *public* and *private* law.

On the one hand, what happens during arbitration proceedings and to the award has to stick necessarily and perfectly to the arbitration agreement.

On the other hand, the main principles of procedural law have to be given consideration.

Arbitrators undoubtedly exercise a *public function*, as some legal writers say, a *quasi-judicial* role, because they solve disputes and make binding decisions (on the parties).

The fourth and last theory is the autonomous theory. It considers that arbitration is a phenomenon which can operate outside the constraints of positive law or national legal systems. This approach is intimately linked to the idea that arbitration is something that "floats", having no connection with any national law.

In my point of view, this theory makes arbitration rather unattractive. In a country like Brazil, the possibility of judicial control, even if very rare, inspires trust and encourages its use.

In fact, parties shall exercise control over the arbitrator's conduct. If arbitration stems from an agreement where parties delegate power to a third person in order to make binding decisions in a specific dispute in a certain prescribed way, this power is naturally not absolute. Arbitration proceedings are obviously bound by the arbitration agreement.

So, even if there is a clear tendency to consider the judicial review of arbitral awards undesirable, it cannot be taken to extremes.

Well, as I said, the approach that recognizes elements of public and of private law in arbitration is, in my view, the correct one.

It stems from a contract, so it must be respected.

If arbitrators do not comply with the agreement, this should be considered grounds for the award to be challenged before the courts.

2). On the other hand, what does a clause saying that "**Brazilian law** must be applied" effectively mean? What is law?

Currently, most law philosophers or people who just reflect about the law, not in a technical way, have perceived that law (in *civil law* jurisdictions) cannot be identified with statutory law.

The complexity of modern societies has already shown that statutory law is not enough to completely regulate human conduct.

If law is the rule that individuals have to obey, it is evident that *legal writing* and *case law* play a very important role in its formation.

Statutory law must be interpreted and its final "design" is given by courts according to legal scholarship.

As we know, in civil law jurisdictions, legal writings are a very prestigious source of law.

The last version – the one that really counts – of the rule is given by the Courts – normally the Supreme or Superior Courts.

In sum, when a potential client asks us 'is the law on my side?', 'Am I going to win?', We have to do more than just read the statutes to give them a reliable answer. We do have to consult case law and legal literature.

Even in civil law jurisdictions, where precedents are ordinarily not binding, there are cases where there is a clear set of precedents along the same lines, where courts have been firmly adopting the same position for years.

Furthermore, in Brazil we have now binding precedents, in a small number of cases. For instance, the decisions made in proceedings joined as a result of what is very similar to a group litigation order are binding on other future cases where the dispute revolves around the same *quaestio iuris*.

Binding precedents should be considered as *law*. They are conceived and regulated by statutes as MANDATORY. A clear and predictable line of precedents in the same direction, in some cases, as well. They are law in the sense that they are benchmarks or rules of conduct which have to be respected by individuals in their day-to-day conduct, in planning their business, in distinguishing the licit from the illicit.

To a certain extent, *judges* create law, even in civil law countries. In civil law jurisdictions, it normally happens in the interpretation of statutes or in solving disputes not expressly solved by the statutes.

3). So, if arbitrators are judges (for the parties), they have to decide *according to the law* chosen by them. They cannot interpret statutes in their own way, independently of binding precedents or established case law. **These elements are part of the law**.

Arbitrators are in many ways comparable to judges: they analyze facts, assess them and then, in the light of the law chosen by the parties in the arbitration agreement, make their decision. But in my view, they cannot be creative, for example, solving the dispute departing from all possible interpretations already given by official courts, from a clear line of case law or – even worse – from binding precedents (so considered *by statutes*). And this, because it could be considered that they could create law, as judges do.

So, in fact, lawyers should refer to binding precedents as grounds of their pleading, as well as to establish case law. In the former case, if a precedent applies, that is, if the facts are the same or similar to those underpinning the precedent, the arbitrator cannot refuse to respect it. Unless, a distinction can be made. In the latter case, there is a duty, from which the arbitrator can depart only if there are powerful arguments.

In any case, even if the binding precedent is not referred to, *iura novit curia* applies.

So, binding precedents have to be respected by the arbitrators.

In some exceptional cases, even stablished case law.

Why? For several reasons:

i. Because not to respect them would be a breach of contract – the parties having said in the arbitration agreement that they want Brazilian law to be applied;

ii. If this were possible, there would be *substantive law of arbitration* and *substantive law of courts*. Arbitrators have to apply the same law that courts do: and the latter have the last word on what *law is*;

iii. If this were possible, arbitration would be a world apart, in terms of predictability. Even the possibility of the creation of specific case law in the world of arbitration would not justify this possibility.

Arbitration is a choice of *method*; of *path*. It is just a choice of the road, but parties want to arrive at the same place, as if they had chosen to have their dispute solved by courts. So much so that in the arbitration agreement *Brazilian law* has been chosen to be the basis of the arbitrator's award; arbitrators lack legitimacy to innovate in law.

iv. If Brazilian law is not applied, parties may be surprised. Law cannot surprise. Predictability is inextricably linked to the idea of law.

This breach of contract can be grounds for challenging the arbitral award before the Judiciary. The power delegated to the arbitrator is limited: so, these limits must be controlled by someone, otherwise they would be putative limits. This "someone" is the judge.

Despite the trend of suppressing judicial control of the arbitrator's award, in my view, there is a small group of grounds which cannot be deprived of judicial appreciation. Disrespect of the arbitral agreement is certainly one of them.

If the possibility of controlling the award did not exist at all, the limits created by the parties in the agreement would be nothing but an illusion.

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