Recent Developments on Arbitration in Franchising Contracts: a Brazilian Perspective

Kluwer Arbitration Blog
December 8, 2018

Ricardo Aprigliano (Aprigliano Advogados)

Please refer to this post as: Ricardo Aprigliano, 'Recent Developments on Arbitration in Franchising Contracts: a Brazilian Perspective', Kluwer Arbitration Blog, December 8 2018, http://arbitrationblog.kluwerarbitration.com/2018/12/08/recent-developments-arbitration-franchising-contracts-brazilian-perspective/

I. Introduction

Despite the fact that commercial arbitration has experienced a huge development in Brazil in the last years and a general favorable approach by Brazilian courts, there are fields in which arbitration is still incipient, with complex discussions about its enforceability and to what extent consumer, labor or adhesion contracts can be discussed via arbitration.

Brazilian Courts have already decided some cases regarding adhesion contracts, with a restricted interpretation of the validity of arbitration agreements when related to asymmetrical relations, such as consumer contracts. Recently, the Appellate Court of São Paulo has ruled a case about a franchising contract, in which it dismisses the formal requirements of arbitration clauses inserted in adhesion contracts (Appellation no. 1047574-03.2017.8.26.0100), even though franchising agreements are generally classified as adhesion contracts.

It seems an important decision about the formal requirements of arbitration clauses in franchising contracts, with a new and more liberal approach in favor of the arbitration clauses.

II. Formal Requirements in International Arbitration Law

The New York Convention (1958) prescribes, under its Article II(2), that the "agreement in writing" must exist in written form to effectively bind the parties and must be either signed by all the parties or contained in an exchange of letters or telegrams (it is widely accepted that other means of exchange are also admissible). The enforceability of the agreement depends on the alternative fulfillment of one of the two requisites, in combination with the written form.

The UNCITRAL Model Law on International Arbitration, in which the Brazilian Arbitration Act was inspired, does not impose a specific way when it comes to the required form of the arbitration agreement in its Article 7, as it allows two possible options to the Contracting States: Option I, which requires that the arbitration agreement be made in a corporeal, non-ephemeral form (such as through writing or recording), or Option II, which institutes no formal requirements whatsoever.

III. Formal requirements in Brazilian arbitration law

The Brazilian Arbitration Act (Lei 9.307/1996, "BAA") has adopted the expression "arbitration convention" ("convenção de arbitragem") as a general term to refer to its two different species: arbitration clause ("cláusula compromissória") and arbitration agreement ("compromisso arbitral"). These two species do not coincide with those of international law. The second and less common option is to agree to arbitrate after the beginning of the conflict. Our law has provisions about its formal requirements, demanding that the arbitration agreement must exist in written form, signed by the Parties before two witnesses, among other requirements (Article 9 of the BAA).

The most common way to agree to arbitrate is through the arbitration clause, which is signed before the beginning of the conflict. It can be included in the contract or signed in a separate document. In fact, Article 4(1) of the BAA explicitly admits the possibility of an arbitration clause which exists independently of the contract itself, as long as it mentions unequivocally the contract affected by it. Based on those provisions, Brazilian courts have decided some cases regarding the formal requirements of the arbitration clauses.

It should also be noted that our Arbitration Act has a provision which states that the arbitration clause must not only be written, but also ***(i)*** inserted in boldface type, and ***(ii)*** signed in particular by the adherent. According to Article 4(2) of the

BAA, that is the case when the contract in question is classified as an adhesion contract:

> *Article 4(2): In adhesion contracts, the arbitration clause will be effective only if the adherent takes the initiative of instituting the arbitration or expressly agrees with its institution, as long as it is written in a separate document or in boldface type, with a signature or special approval for that clause.*

The Brazilian concept of adhesion contract mostly overlaps that of international law. An adhesion contract is the one in which one party has substantially more power to determine the essential aspects of the contract, in a "take it or leave it" fashion. When a contract is classified as an adhesion contract, any arbitration clause in it included automatically incurs in the two additional form requirements mentioned above.

To complete this legal framework, we shall also mention the Brazilian Consumer Defense Code, a Federal Act from 1990 that contains, in this particular regard, a provision that invalidates arbitration clauses inserted in consumer contracts (Lei 8.078/1990, article 51, VII).

IV. Adhesion Contracts: a Restricted Approach from Brazilian Courts

The highest Brazilian court in charge of interpretation of federal law is the Superior Tribunal of Justice (STJ). In recent years, STJ has issued decisions stating that consumers are not bound by arbitration agreements inserted in consumer contracts, whether they are classified as adhesion contracts or not, and are authorized to argue that invalidity of the clause directly before a state court. Not even the competence-competence rule applies in those cases.

In 2016, the Court has decided that franchising contracts are to be presumed adhesion contracts (as already discussed in this blog), which means that their arbitration agreements are only valid if the signature is followed by the two additional formal requirements: boldface typing and specific signature. More recently, another decision has asserted that a consumer is not bound by an arbitration agreement inserted in a contract regarding the buying of real estate from a construction company (REsp no. 1.753.041).

V. A New Decision From a Lower Court Proposes a More Flexible View on Franchise Agreements

Despite those decisions, the São Paulo Court of Appeal, which is one degree below the STJ in hierarchy, has ruled a decision on opposite terms: an arbitration clause inserted in a franchising contract is in principle valid, even if the formal requirements are not fulfilled.

The appellant (*"Brumaria Comércio de Bolos"*) was the franchisee of a franchising contract between itself and the appellee (*"Vó, Quero Bolo! Franchising."*), which contained an arbitration clause. Despite of it, the appellant decided to initiate state court procedures in order to terminate the contract.

Initially, the single judge dismissed its request on the basis of the sole Paragraph of Article 8 of the BAA, which essentially incorporates the competence-competence doctrine, according to which only the arbitrator has the competence to decide whether the arbitration clause is enforceable.

At the Appellate Court of São Paulo, the decision was maintained, with the following additional arguments:

1. The function of the formal requirements of Article 4(2) of the BAA is to warn the "vulnerable part" in an asymmetric relation, which means that the existence of asymmetry between the parties must be verified, in conjunction with the adhesion nature of the contract, in order to justify the formal requirements of Article 4(2);
2. Entrepreneurial contracts are to be presumed symmetrical, which means that the burden of proof of asymmetry in the relation falls upon the "vulnerable part". A franchise contract is of entrepreneurial nature, so it falls upon the appellant (who allegedly was in a vulnerable situation) to prove the existence of asymmetry between the parties;
3. The appellant did not prove the asymmetry in the relation between the parties, and the fact that the contract had pre-defined clauses by the franchiser is not sufficient to prove otherwise. Therefore, the formal requirements of Article 4(2) are unnecessary for the validity of the arbitration clause in question.

The sentence also reaffirms the applicability of the competence-competence principle expressed in the Article 8 of the BAA, denying its competence to decide

about the enforceability of an arbitration clause. The apparent contradiction of this statement with the aforementioned argument of the decision has not been subject of further scrutiny.

VI. Is There a New Standard on the Validity of Arbitration Agreements Related to Franchise Contracts in Brazil?

The recent decision of an important Court of Appeal in Brazil might lead us to the conclusion that the rules regarding adhesion contracts will, from now on, be interpreted by an initial distinction between commercial or entrepreneurial relations and non-entrepreneurial ones, and their influence on the enforceability of the arbitration agreement.

The São Paulo State Court of Appeal has established an important distinction. In contracts of entrepreneurial nature, the parties must be presumed on equal footing, even in adhesion contracts, leading to an interpretation that the formal requirements of Article 4(2) of the BAA are, in principle, unnecessary. It is up to the franchisee to argue and prove the asymmetry between the parties and the consequent need of the additional formal requirements.

The question is whether the Superior Court of Justice will follow that distinction and evolve its interpretation of the Brazilian Arbitration Act, not only regarding franchising contracts, but also other types of contracts where, despite the adhesion nature, the relation between parties might be considered equal and fair.

The end of the story is yet to be told, since the losing Party has appealed. The question will be, in the future months, once again decided by the Superior Tribunal of Justice.