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Libra v CODESP: Is Arbitration in the Brazilian Ports Sector Salvageable?

Gabriel Ferreira Labatut Simões (MVA Advogados) · Saturday, February 16th, 2019

A long-term dispute between Libra Terminais S.A., Libra Terminais Santos S.A., two companies belonging to one of the major port operating groups in Brazil ("***Libra***"), and the Dock Companies for the State of São Paulo ("***CODESP***") seems to have been concluded by a recent arbitral award. The dispute concerned a concession agreement of two terminals in the Port of Santos in São Paulo, Brazil. The historic award is the first decision based on controversial statutes regulating arbitration in the ports sector in Brazil. This decision can provide insights on the practical effects of these statutes and their contentious provisions.

Background

In 1995, Libra and CODESP signed a concession agreement for terminal T-37 ("***T-37***") and adjacent areas in the Port of Santos ("***T-37 Agreement***"). In exchange for the concession, Libra would pay CODESP a monthly fee and would be obligated to expand and improve T-37's infrastructure.

A few years later, in 1998, Libra and CODESP signed another concession agreement for terminal T-35 and adjacent areas ("***T-35 Agreement***", together with the T-37 Agreement, "***Concession Agreements***"). Similar to the first agreement, Libra would have to pay a monthly fee to CODESP and make investments to expand and improve the terminal.

Soon after the conclusion of the T-35 Agreement, still in 1998, Libra requested CODESP to suspend the collection of the fee owed by Libra. According to Libra, CODESP had not fulfilled its obligations to renovate terminal infrastructure and ensure minimum depth of the waterway access to the Santos Port, which supposedly allowed Libra to stay the payments. Meanwhile, CODESP was attempting to collect the amounts owed by Libra for the concessions. These discussions lasted decades in Brazilian courts. From 1998 to 2015, the parties initiated more than 10 lawsuits, resulting in different outcomes. While Libra was successful in some of the claims, CODESP was successful in others. However, the dispute had no prospect of ending soon.

In 2015, new legislation regarding dispute resolution mechanisms in the ports sector

enabled Libra and CODESP to opt for arbitration to resolve their dispute.

Ports sector dispute settlement legislation

The port concessions sector in Brazil is regulated by Statute No. 12.815 ("***Ports' Statute***"). The Ports' Statute was envisaged to modernise the port concessions sector in Brazil by amplifying private investment and improving competition and efficiency. In what was seen as a positive development at the time; the Ports' Statute established that – public and private – parties in concession contracts could resort to arbitration to resolve disputes regarding their financial obligations. The caveat was that the Statute did not specify how the arbitration should be conducted.

Therefore, in 2015, soon after the enactment of the changes to the Brazilian Arbitration Act (previously discussed in this Blog), the Federal Government enacted Decree No. 8.465 (Port Arbitration Decree, or "***PAD***"). PAD regulated and expanded the provision of the Ports' Statute that allowed use of arbitration to resolve contractual disputes in the sector.

In contrast with the Ports' Statute, the PAD was not well received (see here, here and here). It seemed that the PAD was a well-intended project but poorly executed. It was seen as an attempt by the Federal Government to manage and engage in new practices of dispute resolution. For example, among the most criticised provisions, the PAD **(i)** established that all information regarding the arbitration should be publicised; **(ii)** added time consuming bureaucracy to the process of initiating an arbitration; and **(iii)** provided that arbitration could only be used to settle disputes regarding the reestablishment of the financial-economic equilibrium of a contract; only if the arbitration was based on a submission agreement and not on an arbitration clause.

Nonetheless, despite criticisms, in 2015, Libra and CODESP signed a submission to arbitration agreement relying on the mechanism provided for in the PAD.

Arbitration and Partial Award

Pursuant to the submission agreement, the Tribunal had the mandate to decide **(i)** whether CODESP breached its obligations under the Concession Agreements; **(ii)** which of the parties (CODESP or Libra) was liable for the performance of the construction works on the public docks in front of T-37; **(iii)** whether the financial-economic equilibrium of the T-35 Agreement had been affected by CODESP's actions; **(iv)** whether Libra was liable to pay the fee originally agreed between the parties in the Concession Agreements; and **(v)** parties' liability regarding these issues.

The Terms of Reference were signed in September 2017 and, a year later, the Tribunal issued an Award. The Award dismissed all of Libra's claims, accepted CODESP's claims, and ordered Libra to pay the fee originally agreed by the parties, as well as penalties for breach of contract. The Tribunal decided the case through the strict application of the contractual terms and the relevant statutes. However, the true contribution of the *Libra v CODESP* arbitration award is that it provides valuable insight as to whether initial criticism regarding application of the PAD was justified.

Time consuming bureaucracy?

One of the main criticisms to the PAD is that, in theory, it increases bureaucracy for execution of submissions to arbitrate. PAD requests a case by case preliminary government assessment regarding the benefits of using arbitration in each particular dispute. The PAD also establishes that arbitrators and arbitral institutions should be contracted by direct negotiation, as opposed to public biddings. Although the former is swifter than the latter, it still entails a number of time-consuming administrative burdens.On the other hand, a positive aspect of the PAD is the time requirement to issue an arbitration award within 24 months, which seems to offset, at least partially, the additional bureaucracy.

In *Libra v CODESP*, the time requirements for issuance of the award seemed to balance out the additional bureaucracy imposed by the PAD. While CODESP had to go through the preliminary government assessment; submission to arbitration was signed by the parties in less than three months from the day that the PAD entered into force. In fact, the dispute was adjudicated in record time, as the Tribunal decided on the liability issues in no more than 16 months from the signing of the Terms of Reference, which is less than the average period of time for an arbitration to be decided in Brazil, and substantially faster than obtaining a final decision in court.

Publicity issues?

Another point of contention regarding the PAD is the protection of sensitive information (*e.g.* price formation, production methods, formulas) *vis à vis* the requirement that all information regarding the arbitration must be publicized.

Again, this did not seem to be an issue in *Libra v. CODESP*. Even though the Federal Government divulged most of the proceedings through a specific website, no sensitive information was published. This is especially important considering that the Tribunal granted Libra's request to keep confidential certain documents containing information on its commercial practices. Therefore, it seems that the publicity requirement of the PAD is not incompatible with, and can accommodate, existing judicial protection to sensitive information.

Abuse of privileged condition?

The most glaring issue with the PAD is that it grants to the Public Administration the power to decide whether disputes regarding the financial-economic equilibrium of contracts can be submitted to arbitration. According to the PAD, these disputes can only be submitted to arbitration via submission agreements. This means that public parties can decide, after the dispute has arisen, whether the dispute should be submitted to arbitration or referred to a national court, which clearly puts the Administration in a privileged position as a disputing party and can hinder the *"parity of arms"* principle.

Nonetheless, there is some reason for optimism; *Libra v CODESP* has pinned down better arbitration practices for public authorities as disputing parties. For example, it is all very common for state parties in Brazil to challenge the legitimacy of arbitration. However, in *Libra v CODESP*, the Administration refrained from these unnecessary (and generally unsuccessful) challenges, demonstrating willingness to submit to

arbitration even when there was no contractual obligation to do so.

In fact, the Federal Government Attorney's Office, for the first time in history, has created a department to deal exclusively with arbitration. The department will represent the Federal Government in arbitration proceedings and will be responsible for gathering and managing expertise in the area, which indicates that the government intends to continue to use arbitration to resolve disputes with private parties in the future.

Conclusion

Prior authors in this blog (see here and here) have correctly described Brazil as an arbitration-friendly jurisdiction. Indeed, it does not appear that the PAD, despite accurate and relevant criticism, can challenge that description.

Libra v CODESP has provided strong indications that the Public Administration in Brazil, despite resistance and poorly drafted legislation, is walking steadily towards fully embracing arbitration as an efficient (and legitimate) dispute resolution mechanism.

Nonetheless, one should not let excessive optimism be a blindfold, as *Libra v CODESP* does not answer all the problems with the PAD. One question that remains unanswered is whether the prerogatives granted to the Public Administration by the PAD will be abused, especially in cases where future prospects of prevailing on the merits of the dispute might not be so positive.

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