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The Possibility to Request a Supplemental Arbitral Award Under the Brazilian Arbitration Act

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Five years ago, the Brazilian Arbitration Act (Law No. 9,307/96 or BAA) was amended by the Law No. 13,129/2015.

Law No. 13,129/2015 repealed the item V of Article 32 of the BAA which provided for the annulment of an arbitral award when it does not address the entire dispute submitted to arbitration (*infra petita* award).

Infra petita awards then started to be covered by the paragraph 4 of Article 33 of the BAA, which was also included by Law No. 13,129/2015. The provision sets forth that "*The interested party may file a request for the rendering of a supplemental arbitral award if the arbitrator fails to rule on all matters submitted to arbitration*".

The legislative innovation aimed at safeguarding as much as possible the acts practiced by the arbitral tribunal (Article 5º, LXXVIII, Brazilian Constitution; Articles 277 and 281, Brazilian Code of Civil Procedure); however, there have been only a few requests for supplemental arbitral awards since then.

Recent case ruled by the Court of Appeals of the State of São Paulo

The recourses against arbitral awards are usually under confidentiality in Brazilian courts. Thus, it is not possible to ascertain how frequently such remedy has been used since the Law No. 13,129/2015 became effective. In a recent event of Fundação Arcadas, during the 2020 São Paulo Arbitration Week, Appellate Court Judge Manoel de Queiroz Pereira Calças and Court Judge Andrea Palma mentioned that they had never judged any request for supplemental arbitral award.

Nevertheless, an interlocutory appeal was recently ruled by the Second Panel of Corporate Law of the Court of Appeals of the State of São Paulo (TJSP, Interlocutory Appeal No. 2170826-30.2020.8.26.0000). The claimant sought an emergency relief to suspend the ongoing arbitral proceeding before the CAM-CCBC until the state court decided if the supplemental award was necessary. The lawsuit is not under confidentiality.

The emergency relief was rejected by the First Corporate and Arbitration Conflicts Court. The

Court concluded that the requirements of Article 300 of the Brazilian Code of Civil Procedure were not met (relevance of claimant's reasoning and possibility of serious harm). The arbitration is currently ongoing.

The suspension of arbitral proceedings by state courts is not uncommon; however, the relevance of claimants reasoning, and the possibility of serious harm must be supported by strong evidence. In the case mentioned above, the First Corporate and Arbitration Conflicts Court understood in a *prima facie* analysis that there would not be any harm resulting from the continuity of the arbitration.

The claimant appealed but the decision was maintained by majority. Appeals Court Judge Sérgio Shimura dissented from the reporter, Appeals Court Judge Grava Brazil. He understood that the interlocutory appeal should be granted once there was evidence that the partial arbitral award did not entirely addressed claimant's requests.

Now the lawsuit has returned to the lower court to have its merit analyzed extensively (i.e., to decide whether a supplemental award is necessary). The final decision can take years depending on the extension and complexity of the production of evidence requested by the parties.

This dispute can contribute to the judicial interpretation of paragraph 4 of Article 33 of the BAA; however, it may take some time to find out how the judiciary will overcome the complexities of its application.

In international practice, for example, Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) holds an exhaustive list of grounds for setting aside an arbitral award but there is no explicit reference to *infra petita* decisions.

Article 33(3) of the Model Law, nonetheless, mentions that the parties "*may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award*". It suggests that *infra petita* awards are never meant to be set aside.

In Brazilian practice, the omission correction request is well-known (and maybe overused) as "*motion for clarifications*". This possibility is foreseen in Article 30(I) of the BAA. If the omissions remain, then the provision set forth in paragraph 4 of Article 33 can – and should – be applied.

Some might say that the legal provision of paragraph 4 is not technical since Brazilian courts are committed to the minimal intervention rule. The wording of this paragraph might give the idea that the state court could decide about the merits of the arbitral proceeding, which is not the case. Given the existence of a valid and binding arbitration agreement, the state court has no jurisdiction to judge the merits of the case. It should only set aside or order the arbitration tribunal to issue a supplemental award when absolutely necessary.

Another issue is that the jurisdiction of the arbitral tribunal might have already been terminated when the state court finally decides upon the request for a supplemental arbitral award. It may result in the necessity to initiate a new arbitral proceeding.

Conclusion

The author understands that Law No. 13,129/2015 should only have repealed item V of Article 32 of the BAA, but not included paragraph 4 in Article 33. This legislative amendment instead of bringing more legal certainty brought doubts that discouraged lawyers from applying it.

In this sense, the comprehensiveness and completeness of the award cannot be overstated. The arbitral tribunal must be careful in setting out the decision issue by issue (see guidelines of the Chartered Institute of Arbitrators – CIARB). It would avoid the allegation of arbitrators' failure to address claims submitted by the parties.

The same goes for lawyers, who must be careful in formulating precise requests in the terms of reference or the initial allegations; an *infra petita* decisions is not desirable in any circumstance or jurisdiction.

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This entry was posted on Wednesday, February 24th, 2021 at 4:08 am and is filed under Brazil, Brazilian Arbitration Act, Clarifications, Emergency Measure, Infra petita, Supplementary Award
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