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Brazilian Superior Court of Justice (STJ) and the exceptions of the Competence-Competence Principle

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This article addresses the Brazilian Superior Court of Justice (STJ) 's precedents on the exceptions to the Competence-Competence principle due to pathological arbitration agreements present in contracts of adhesion. In addition, it approaches the Court's position on the enforcement of a pathological (empty) arbitration clause.

The decisions below are landmark precedents and clarify crucial points differentiating franchise contracts from consumer contracts (both contracts of adhesion) and establishing when state courts must decide about the existence and validity of an arbitration clause (exceptions to the Competence-Competence principle). The decisions discussed below are the foundations of recent jurisprudence created by the Brazilian Superior Court of Justice (STJ) (e.g. 1. [Special Appeal n° 1.854.483-RJ](#) – Third Panel – Minister Nancy Andrighi– SPE Orla 1 LTDA v. Maria Vilma Rodrigues de Lima – September 9, 2020 – 2. [Specific Appeal in Appeal in Special Appeal n° 1.809.792-SP](#) – Fourth Panel – Minister Raul Araújo – Regina Celia Matheus Crizza v. Franquia Show Assessoria em Negócios LTDA. – February 15, 2022 – 3. [Specific Appeal in Motion for Clarification in Appeal in Special Appeal](#) – Third Panel – Minister Marco Aurélio Bellizze – Missoni SPA v. MMR Investimentos e Participações S.A – March 14, 2022).

The Court's Analysis

Competence-Competence Principle – general rule, specific rule and more specific rule

On November 6, 2012, a decision rendered by the Third Panel of the Brazilian Superior Court of Justice in the [Special Appeal n° 1.169.841-RJ](#) (CZ6 Empreendimento Comerciais LTDA e Outros v. Davidson Roberto de Faria Meira Júnior) was published under the opinion of Minister Nancy Andrighi. The decision addressed the validity of an arbitration clause in a real estate purchase agreement held by CZ6 Comercial Entrepreneurs Ltda and Davidson Roberto de Faria Meira Júnior. The Court of Justice of Rio de Janeiro had confirmed the trial court's decision which considered the state's jurisdiction inescapable in consumer contracts even with an arbitration agreement.

The Superior Court of Justice sided with the consumer and the inescapability of state jurisdiction not because it is a contract of adhesion but because it is, specifically, a consumer contract. The

Court established the following guidelines differentiating generic contracts of adhesion and consumer contracts of adhesion:

In fact, with the enactment of the arbitration act, three rules came to coexist harmoniously with different degrees of specificity: (i) a general rule that binds the parties to follow the arbitration agreement; (ii) a specific rule, applicable to generic adhesion contracts, which restrains the effectiveness of the arbitration agreement; and (iii) an even more specific rule applicable to the contracts protected by the Brazilian Code of Consumer Protection, may they be adhesion contracts or not, that imposes invalidity to the mandatory arbitration agreement even if in perfect compliance with the requirements established by article 4º, §2º of the Brazilian Arbitration Act. (Translation by the author)

The rule established by article 4º §2º of the Brazilian Arbitration Act (Act ° 9.307/1996) states that

In adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to initiate an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or boldface type, with a signature or special approval for that clause.(translation by the author)

According to the decision, this rule applies to generic contracts of adhesion. Nevertheless, even if a consumer contract complies with this rule, the consumer can still tacitly renounce arbitration and seek the state courts' aid. The Court added that the Brazilian Code of Consumer Defense and Protection (Act n° 8.078/1990) forbids only the mandatory use of arbitration, leaving it at the consumer's discretion to waive arbitration and seek the judiciary.

Contracts of Adhesion, pathological arbitration agreement, and the Competence-Competence Principle

On November 15, 2016, another decision was rendered by the Third Panel of the Brazilian Superior Court of Justice in the [Special Appeal n° 1.602.076-SP](#) (Odontologia Rister de S. Lima v. GOU – Grupo Odontológico Unificado Franchising LTDA), published under the opinion of Minister Nancy Andrichi. The Court analyzed whether a franchise agreement should be considered a consumer contract or not and whether the judiciary had the competence to assess its arbitration clause's validity mitigating the Competence-Competence Principle, established in the Brazilian Arbitration Act's Article 8, sole paragraph.

The claimant (Odotonlogia Noroeste LTDA) requested the annulment of the franchise agreement and the refund of the franchise and royalties' fees paid to the defendant (GOU – Grupo Odontológico Unificado Franchising LTDA). In addition, the claimant pleaded for the invalidation of the arbitration agreement, alleging that the franchise contract was, in fact, a consumer contract of adhesion that did not comply with the requirements set out in Article 4º, § 2º of the Brazilian Arbitration Act.

The Court ruled that the franchise contract should not be considered a consumer contract “since there is no consumption relationship but a simple economic fostering goal. That means a contract to stimulate the entrepreneurial activities of the franchisee”. However, the Court decided, franchise agreements ought to be considered generic contracts of adhesion.

In this case, the arbitration clause did not comply with Article 4º, §2º of the Brazilian Arbitration Act (in adhesion contracts an arbitration clause must be “an attached written document or in boldface type, with a signature or special approval for that clause”) and, therefore, was regarded as a pathological arbitration clause. Thus, the judiciary was entitled to examine the validity of this clause if, on its face, it seemed invalid. Moreover, because it was a contract of adhesion, the Competence-Competence Principle had to be disregarded in the case. Therefore, although the general rule is to always favor the arbitral tribunal’s power, the empty arbitration clause stipulated in a contract of adhesion would be an exception to this rule and allows the judiciary assessment of its validity.

In the same direction, on June 11, 2019, in the [Internal Appeal in the Special Appeal nº 1.431.391-SP](#) (Alex César Rodrigues Alves v. Companhia de Bebidas das Américas – AMBEV), Minister Antonio Carlos Ferreira overruled a previous decision that claimed that only the arbitral tribunal had the power to assess an arbitration agreement in a franchise contract. Under said decision, courts were only entitled to an eventful and future (after the arbitral award) analysis. In this case, the Court reconsidered and declared void the arbitration agreement of a franchise contract, concluding that the latter was considered a contract of adhesion that must comply with Article 4º, § 2º of the Brazilian Arbitration Act. Therefore, such a clause is pathological, and the Competence-Competence principle does not apply to the case.

Enforcement of a pathological arbitration agreement

On November 20, 2012, a decision was rendered by the Fourth Panel under the opinion of Minister Luis Felipe Solomão in the [Special Appeal nº 1.082.498-MT](#), addressing the enforcement of a pathological arbitration agreement that failed to specify an arbitral institution. The appellee Antônia da Silva Barbosa requested that the arbitration proceeding be administered in her arbitration chamber of choice (Mediation, Conciliation and Arbitration Tribunal of Cuiabá). However, the Appellant, Condomínio Civil do Cuiabá Plaza Shopping, did not agree with the appellee’s choice.

In the case, two hearings were held before the arbitral institution. In the first hearing, the parties were unable to reach an agreement, and in the second hearing, the appellant declared its opposition to the arbitration center chosen by the appellee.

The Court considered that:

The agreement of the parties concerning the arbitrator or institution is an essential requirement. If that is not possible, the State Court should solve the matter. The Court must necessarily accept such a job to help commence the arbitration proceedings. In this case, although I recognize the competence of the arbitral tribunal, the appellant refused to sign an arbitration commitment for finding the arbitral tribunal chosen by the other party biased.

Therefore, the Brazilian Superior Court of Justice considered that the judiciary is entitled to render a decision to fill in the gaps of an empty arbitration clause according to Article 7 of the Brazilian Arbitration Act. In short, the judiciary shall be responsible for establishing the elements necessary for the commencement of the arbitration proceedings.

Conclusion

The Superior Court of Justice favors the Competence-Competence principle as a general rule. However, as noted, the pathological clauses in consumer adhesion contracts or generic contracts of adhesion (such as the franchise agreement) mitigate this principle and allow for the judiciary assessment of the arbitration agreement validity.

In the case of a pathological clause that makes it impossible to commence the arbitration proceedings, the interested party shall plead to the judiciary so that the state judge renders a decision. This decision's role (an arbitration commitment per se) is to fulfill all the arbitration's agreement gaps and contradictions.

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