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How Far Goes the Deadline for Vacating an Arbitral Award? A Brazilian Perspective

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As most arbitration laws, the Brazilian Arbitration Act (Law n. 9307/1996; "BAL") establishes a short deadline for any interested party to seek annulment of an arbitral award in court. The interested party has a 90-day period as from (i) notice of the partial or final arbitral award or (ii) the *decision on a motion for clarification* to file an annulment request before Brazilian courts (BAL, Article 33, 1st Paragraph). In 2015, Federal Law No. 13,129 amended certain provisions of the BAL, which included adding the second trigging event (i.e., a decision on a motion for clarification) to its original text. Said rule begs the question: if the losing party wishes to submit successive motions for clarification to the arbitral award, does that mean that the 90-days deadline is indefinitely extended? The answer is intuitively negative, but what is the legal limit applicable in this case? And how can said guerilla tactic be restrained?

A recent decision rendered by the São Paulo Court of Appeals in Brazil dealt with these issues (*see*, **Appeal n. 1048961-82.2019.8.26.0100, March 10, 2021, LRM Serviços et al. v. Vyttra Diagnósticos Importação e Exportação Ltda. et al.; "Vyttra Case"**).

In this post, we discuss the position taken by Brazilian courts in the Vyttra Case and others that involved the issue of multiple motions for clarification against arbitral awards. As we will see, there have been different views on whether motions for clarification that were deemed inadmissible by arbitral tribunals could still extend the 90-day legal limitations period for seeking annulment. We hope this post steers the debate into the right direction.

Background

In the arbitral proceedings that led to the Vyttra Case, the tribunal rendered an award against respondents (plaintiffs in the set aside proceedings) in April 2018. In May 2018, respondents filed their first motion for clarification, which was unanimously rejected in June 2018 ("First Decision"). Subsequently, respondents filed a *second* motion for clarification – which appeared to be but a replication of the first – and raised accusations against the arbitrators' impartiality and independence. Soon thereafter, all three arbitrators withdrew and a new tribunal was constituted.

Later, in May 2019, the new tribunal rendered a majority decision dismissing the second motion

for clarification and imposing a fine against respondents for deliberately postponing the proceedings' closure. Because the first motion was rejected in full and no amendments to the award were needed, the majority understood that respondents were not entitled to file a second motion for clarification in the first place ("Second Decision"). The minority arbitrator, however, issued a dissenting opinion, which not only admitted but also granted respondents' motion.

The set aside proceedings

Almost a year elapsed from the First Decision (June 2018) to the Second Decision (May 2019). Nevertheless, in May 2019, respondents filed a motion to vacate the arbitral award, alleging in sum that the award (i) violated due process by dealing with matters beyond the scope of the submission to arbitration; (ii) was rendered by partial arbitrators, who allegedly had dubious relationships with claimants' counsel; and (iii) violated public policy by failing to apply the *restitutio in integrum* principle provided for under Article 944 of the Brazilian Civil Code. Among other defenses, claimants argued that the claim was time-barred under Brazilian law.

On August 11, 2020, a Brazilian lower court issued a decision refusing to set aside the award. According to the lower court: (i) the arbitral award did not decide on matters falling outside the arbitrators' jurisdiction; (ii) respondents failed to produce evidence of the alleged partiality of the arbitrators; and (iii) the application of a certain legal rule pertains to the merits of the award, which cannot be reviewed by the Judiciary. As to claimants' statute of limitations defense, the lower court considered however that the claim was not time-barred under Brazilian law, since the second motion for clarification filed in the arbitration extended the 90-day limitation period. Although this motion was dismissed by the majority of the arbitral tribunal, the Brazilian lower court understood that the merits of the application were analyzed and, as a result, the Second Decision – and not the First – should be the one considered as initial term for the 90-days limitation period. Respondents then appealed to the São Paulo Court of Appeals.

The São Paulo Court of Appeals also denied claimants' time-bar argument but overturned the lower court's judgment, annulling the award based on lack of legal reasoning and breach of due process in the arbitrators' ruling on quantum. In what concerns claimants' time-bar defense, the São Paulo Court of Appeals considered irrelevant whether a long period of time had elapsed between the First Decision and Second Decision. According to the Court, the delay was due to the need to constitute a new tribunal, which could not be attributed to any of the parties. The Court also reasoned that, as respondents could not be sure whether their second motion would be granted by the newly-formed tribunal, the 90-day period should be counted from the Second Decision. The Court also pointed out that neither the BAL nor the applicable arbitration rules disallowed multiple motions for clarification. Lastly, the Court noted that the Second Decision was not unanimous and thus there was reasonable doubt as to whether the second motion for clarification should have been admitted. Claimants then appealed to the Superior Court of Justice, which has not rendered a decision on the case yet.

Analysis

The São Paulo Court of Appeals' decision in the Vyttra Case may have set a concerning precedent. Based on its reasoning, an opportunistic losing party may file multiples motions for clarification

aiming at simply postponing the 90-day deadline to initiate set aside proceedings. But, what is the limit for such tactic? How many motions for clarification may an opportunistic losing party file before arbitral tribunals to widen the limitation period fixed by the BAL?

The Vyttra Case seems, however, to be an isolated position. For instance, the São Paulo Court of Appeals took a different approach on this same issue not so long ago. In 2012, the Court had to deal with the same peremption argument and reached an opposite conclusion (*see*, **Appeal n. 0177130-22.2010.8.26.0100, December 3, 2012, Companhia do Metropolitano de São Paulo v. Consórcio Via Amarela; "Metro Case"**).

In the Metro Case, the São Paulo Court of Appeals recognized that the 90-day limitation period could be extended by filing a motion for clarification as long as such motion complied with the admissibility requirements set forth in the BAL and in the applicable arbitration rules – in that case, the ICC Arbitration Rules. However, the Court concluded that the second motion for clarification filed in the arbitration was not able to extend the 90-day term, as it had been dismissed by the arbitral tribunal (because in the arbitrators' eyes the request failed to demonstrate any need for correction or interpretation and was filed after the ICC Arbitration Rules deadline). Thus, the Court dismissed the set aside proceedings.

The same reasoning appeared in *obiter dictum* in a more recent decision rendered by another Brazilian State Court of Appeals (*see*, **Minas Gerais Court of Appeals, Interlocutory Appeal n. 1.0024.09.516036-2/003, March 12, 2015, Kelsey Daivis de Oliveira v. Ricardo Arlindo Nunes**).

Conclusion

The São Paulo Court of Appeals' opinion in the Metro Case seems more reasonable than the one taken in the Vyttra Case.

If a party did not meet the deadline established by the applicable arbitration rules to file a motion for clarification, should said motion extend the term for vacating the award? The answer is – or should be – a resounding no. The same reasoning should apply to *any* motion that fails to meet the admissibility threshold and is dismissed by the arbitral tribunal (either unanimously or by the majority vote). As a matter of principle, if a party fails to comply with the admissibility requirements when filing its motion for clarification – specially a second motion that is a mere replica of the first –, such party should not benefit from the extension of the deadline to seek the annulment of the award.

By deciding to file a motion for clarification, a party accepts to run the risk of said motion being considered inadmissible. It is true that in most instances the arbitral tribunal decides the motion in advance of the deadline for setting aside the award, in which case this issue becomes moot. However, whenever the tribunal takes longer than that to decide (especially when said delay is caused by the moving party itself – *e.g.* by raising allegations against the arbitrators' impartiality) and the moving party decides to wait on the arbitrators' ruling, there should be little such party could do if the motion is deemed inadmissible, except for accepting the arbitral award and complying with the arbitrators' orders.

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