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Brazilian Court Of Appeal Reverses Anti-Arbitration Injunction

Pedro Maciel (Veirano Advogados) · Wednesday, June 2nd, 2010 · American Society of International Law (ASIL)

The Court of Appeals for the state of Bahia in Brazil recently handed down an arbitration-friendly decision and vacated an injunction intended to stay an arbitration proceeding. In *FAT Ferroatlàntica S.L. vs. Zeus Mineração Ltda. and others* (see link to English translation below), the Court of Appeals addressed the issue of whether the existence of conflicting arbitration clauses in contracts pertaining to a single economic transaction justifies judicial intervention at the outset of the arbitration. The Court of Appeals held that, provided an arbitration agreement exists, such issue is to be dealt with by the arbitrators, not by the Courts.

Ferroatlàntica, on one hand, and Zeus and Zeus' individual owners (altogether "Zeus"), on the other, had entered into a joint venture agreement for the research and exploitation of minerals in Brazil. They had also formed a company incorporated in Brazil, FAT Brasil, to perform the research and the exploitation. Zeus had to contribute mining rights to FAT Brasil while Ferroatlàntica had to invest US$22 million in FAT Brasil. The joint venture agreement contained an arbitration clause, which referred to the International Chamber of Commerce (ICC) Rules of Arbitration, whereas the articles of incorporation of FAT Brasil provided for arbitration under the Rules of Arbitration of the Brazil-Canada Chamber of Commerce. The place of arbitration in both agreements was São Paulo, Brazil.

The joint venture agreement also granted Ferroatlàntica an exit option: in the event the research results did not meet certain targets, Ferroatlàntica had the right to exit the joint venture and be repaid the US$22 million invested minus FAT Brasil's research expenses.

Considering the research results targets had not been met, Ferroatlàntica exercised its exit rights and requested the reimbursement of the balance of its investment in the joint venture. After Zeus refused to pay, Ferroatlàntica initiated an ICC arbitration seeking payment of those sums. In response, Zeus filed a lawsuit before a court in Caetité, in the state of Bahia, Brazil, and obtained an ex parte injunction requesting a stay of the arbitration. Ferroatlántica thereafter filed an interlocutory appeal against the injunction before the Court of Appeals of the State of Bahia, which issued an order vacating the injunction.

When seeking a stay of the arbitration, Zeus had relied on the conflict between the two arbitration clauses and argued such conflict raised "doubts" as to which rules should govern the arbitration.

Since Brazilian law on arbitration provides for judicial assistance at the outset of the arbitration, the Court of Appeals of the State of Bahia had to determine whether the conflict between the

arbitration clauses justified such judicial intervention.

The Court of Appeals decided that the existence of conflicting arbitration agreements does not constitute a sufficient cause for a provisional stay of an arbitration. The court found that although conflicting arbitration agreements may raise difficulties for the resolution of a dispute, such difficulties did not justify judicial intervention to allow the arbitration to proceed.

Parallel arbitration proceedings pose a risk of insecurity regarding the outcome of the adjudication procedure. This risk derives from the likelihood that different arbitral tribunals will reach contradictory or incompatible decisions. In some cases, the two decisions may even out at the end. In others, the application of one or both becomes impossible. The most likely consequence is that one or both parties will continue to litigate in the available fora, making compliance with the award(s) unlikely and defeating what many consider to be the purpose of choosing arbitration in the first place: to have an effective and technical decision on the merits using a reasonable amount of resources.

Consolidation of proceedings would be advisable to avoid parallel proceedings. This can always be done in international commercial arbitration if the parties agree to it after the dispute arose. Such an agreement is not uncommon, because, as we have commented above, the prospect of parallel proceedings is a grim enough incentive to opt for consolidation.

In some cases, one of the parties, who is usually the party that has more to lose from the arbitration than the status quo, instead opts for dilatory tactics and litigation in court. More often than not, it is the respondent in the arbitration that takes this road, which is exactly what Zeus, in the possession of US$ 22 million, did.

The dispute that gave rise to the decision commented here was quite simple in practice because all the claims presented by Ferroatlàntica were related to the joint venture agreement. However, in other cases, the relation between the various agreements at issue or the nature of the claim may be such that it is more complex for the parties to determine which arbitration agreement governs their dispute. In those cases, the need for judicial intervention to determine which arbitration agreement prevails could arise. The rationale for such intervention would be similar to the arguments in favor of judicial intervention to support the enforcement of an arbitration agreement where (i) the terms of the agreement themselves are not sufficient to start the arbitration; (ii) one of the parties resists arbitration; or (iii) another obstacle to arbitration arises. The decision by the Court of Appeals of Bahia is an indication, however, that no such action is possible in case of conflicting arbitration

FAT Ferroatlàntica S.L. vs. Zeus Mineração Ltda.

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