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Why São Paulo's Yellow Subway Line Poses No Serious Threat

Dietmar W. Prager (Debevoise & Plimpton LLP) · Friday, July 2nd, 2010 · American Society of International Law (ASIL)

This year's ICCA Congress in Rio de Janeiro not only confirmed that nobody knows to party better than cariocas, but also served as an impressive reminder of the increasing pro-arbitration approach of Brazilian courts, the remarkable growth in the number of arbitration proceedings in Brazil and the high sophistication of the Brazilian arbitration bar.

Yet less than two weeks after the ICCA Congress concluded, a court in São Paulo issued an injunction ordering a sitting ICC arbitration tribunal to widen the scope of the expert evidence it was considering. The underlying dispute arose out of the construction of the "Yellow Line," a new subway line in the city of São Paulo. In order to timely complete the construction, the subway operator, Companhia do Metropolitano de São Paulo, known simply as "Metrô," and the consortium constructing the new subway line, Consórcio Via Amarela, agreed to change the tunneling method, which resulted in additional costs. A dispute arose as to which party had to cover these costs. After a Dispute Avoidance Board recommended that Metrô compensate Via Amarela for the additional costs, Metrô initiated an ICC arbitration. The three-member ICC tribunal, seated in São Paulo and chaired by Brazilian arbitrator Carlos Alberto Carmona, issued a partial award in June 2009 holding that Via Amarela was entitled to be compensated for the additional costs and that the quantum of compensation would be fixed in the second phase of the arbitration by an accountant.

Metrô subsequently requested that the quantum be determined by engineering experts. After the tribunal rejected the request, Metrô initiated proceedings before São Paulo courts to set aside the partial award. In addition, Metro sought a writ of mandamus ("mandado de segurança") ordering the tribunal to accept engineering evidence.

On 7 June 2010, the São Paulo Tribunal de Justiça issued a writ of mandamus ordering the ICC tribunal to consider the engineering expert evidence, which in the court's view was a more reliable means of establishing the compensation amount. At least two aspects of the court's order are worth noting here. First, the judge interfered in the ongoing arbitration proceedings by reviewing the tribunal's decision not to consider the engineering expert evidence and concluding that in doing so, the tribunal had violated the principles of "reasonableness" and public policy. In issuing the writ, the judge not only violated the Brazilian Arbitration Act and the New York Convention, but also ignored a number of strong precedents by Brazilian courts confirming the autonomy of arbitration proceedings. It goes without saying that due process and public policy arguments, whatever their

merits in this case, can only be raised in annulment proceedings.

Second, the use of a mandado de segurança as a procedural tool to interfere in arbitration proceedings is highly questionable and reminiscent of the use of amparos in some other Latin American jurisdictions. Under Brazilian law a court may issue such a writ to protect a "clear and perfect" ("liquido e certo") right, whenever the party responsible for the illegal actions or abuse of power is a public official or an agent of a corporate legal entity exercising Government functions. The judge reasoned that arbitrators should by analogy be regarded as public officials, and hence be subject to a writ of mandamus, because arbitration involved the "delegation of the jurisdiction by the State." However, to equate arbitrators with public officials not only appears to be mistaken, but would also open the floodgates for further judicial intervention in arbitration proceedings.

The decision is troubling to many because it was issued by a court in São Paulo, which, together with Rio de Janeiro, serves as seat for the great majority of arbitrations in Brazil and has been building a reputation as a seat for international arbitrations. It therefore does not surprise that the court's anti-arbitration injunction has caught international attention and has been reported in the Global Arbitration Review.

Yet the import of this decision should not be exaggerated. Since the adoption of the 1996 Arbitration Act and the Supreme Court's December 2001 decision confirming the constitutionality of the provision in the Arbitration Act regarding the specific performance of the arbitration clause, courts in Brazil have increasingly adopted a pro-arbitration approach. Anti-arbitration injunctions have remained the exception rather than the norm. At the same time, Brazilian courts have shown no reluctance to grant emergency conservatory measures in support of arbitration proceedings. As a result, the number of arbitrations in Brazil has increased drastically.

The attention raised by the occasional anomalous court decision, such as the writ of mandamus in Metrô v. Consórcio Via Amarela, is more likely to strengthen than weaken the pro-arbitration approach of Brazilian courts, because such decisions engender a healthy debate about important arbitration issues within the judicial community. Such anomalous decisions further provide higher courts with the opportunity to rule on appeal on important arbitration issues thereby adding to and strengthening their pro-arbitration jurisprudence. At the same time, they highlight the importance of the continued need to educate lower-level judges about arbitration.

On 30 June 2010 Via Amarelo obtained a suspension of the effect of the injunction pending a decision on the appeal. It is likely that the injunction will be overturned on appeal and that Brasil will have yet another important pro-arbitration precedent.

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