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The 'Kanematsu Case' in Light of the Brazilian Superior Court of Justice's Precedents

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(a) Introduction

1. The Brazilian Superior Court of Justice ("STJ") was called, in September 2010, to decide on a compelling matter: the possibility (or not) of recognizing and enforcing a foreign award rendered devoid of grounds and whether this decision would violate public policy if it produced effects in the Brazilian territory.

2. The case was known as the "*Kanematsu Case*"[1] and its outcome was much awaited, mostly because the Brazilian company — against which the recognition of the award was requested — alleged that the arbitral award had been rendered devoid of any grounds, thus implying a violation of the principle that all decisions are to be justified (article 93, IX of the Brazilian Federal Constitution).[2]

3. The STJ decision did not end up discussions raised on the matter of unjustified arbitral decisions, but clearly demonstrates the important role that the STJ has played over the past years in offering safer grounds for arbitration. The case was decided almost two years ago, but it still provides an interesting idea of the complexity and importance of the cases the Brazilian courts have been deciding — and very well.

(b) The Case

4. Kanematsu USA Inc., a New York company, moved the STJ for recognition and enforcement of an arbitral award issued in August, 2000 under the Arbitration Rules of the International Centre for Dispute Resolution/American Arbitration Association ("ICDR/AAA"). Under such arbitral award, the arbitrators sentenced Brazilian company ATS – Advanced Telecommunications System do Brasil Ltda., with headquarters in the city of São Paulo, to redress the US company for losses incurred from breach of an international telecommunications equipment and products purchase agreement (approximately R$ 1,400).

5. Against the argument of lack of justification for the decision, the US company alleged, among others, that justification was unnecessary as provided for in article R-44 of the Arbitration Rules of the ICDR/AAA,[3] whose applicability had been agreed upon between the parties. Moreover, the

US company contended that only arbitral awards rendered in Brazil (domestic awards) should necessarily be motivated, and that Law 9,307 of 1996 ("Brazilian Arbitration Law") did not impose such condition on foreign arbitral awards.

6. The case therefore aroused enormous interest among arbitration scholars for dealing with a sensitive matter that had not yet been examined by Brazilian courts, and, it was hoped, would be resolved after a detailed analysis in relation to the principle of reasoned decisions and, moreover, article 26, II of Brazilian Arbitration Law, which establishes as mandatory "*the grounds substantiating the decision, where factual and legal issues will be analyzed, expressly stating whether the arbitrators ruled in equity.*"

7. Opposite stands supported by reputed jurists added more fuel to discussions,[4] especially taking into consideration the position apparently adopted by the Brazilian Federal Supreme Court (at a time when it had competence to hear requests for recognition of foreign awards) that unreasoned decisions were not to be acknowledged under Brazilian law,[5] reason why the motivation should essentially be present in the award so that it could be enforceable in the Brazilian territory.[6]

8. In particular, the respectability of the Brazilian STJ precedents on arbitration issues raised the bar of expectations over its stand in this case, which would hopefully become a real leading case in the area.

(c) The Ruling

9. The STJ eventually denied recognition, but without addressing the possibility (or not) of a non-reasoned award producing effects under the Brazilian legal system. Unfortunately, the relevant question of lack of grounds was not reviewed by Reporting Justice Francisco Falcão. The STJ decision was fully based on the opinion issued by the Federal Attorney-General's Office in the case, and denied recognition and enforcement for want of irrefutable evidence that an arbitration clause had been stipulated in the agreement between the parties (and, by extension, competence of the arbitral tribunal had allegedly not been evidenced as required in article 38, II of Brazilian Arbitration Law).

10. The STJ justices did not find relevant the fact that the Brazilian company had submitted itself to arbitration; produced evidence; and exercised its right of defense on it. The US company had put its best efforts to demonstrate that such conduct, according to the Brazilian Federal Supreme Court's precedents, should be viewed as a "*confirmation to the arbitration agreement*".[7]

11. Therefore, the Brazilian company's allegations that it had not validly submitted to arbitration because no agreement containing an arbitration clause in writing had been signed by the parties took prominence.[8]

12. Unfortunately, an interesting question remained unanswered as to ineffectiveness in the Brazilian territory of a foreign arbitral award that is rendered without grounds, as made possible by several rules of foreign arbitration chambers.

(d) Brazilian STJ practice in requests for recognition of foreign arbitral awards

13. Nevertheless, such decision may also be analyzed under a different viewpoint than the need (or not) of arbitrators to motivate their decisions. The Brazilian STJ practice can surely be considered a reason for Brazilian "arbitralists" to be proud of the work that has been done in favor of this

mechanism.

14. Under Brazilian law, a foreign award (i.e., rendered outside Brazil) is only enforceable in the Brazilian territory when recognized[9] by the STJ in response to a request for recognition of foreign arbitral award. In this proceeding, a circumstantial analysis of the procedural aspects of an arbitral award is carried out, and only then can an arbitral award be considered enforceable by local courts.

15. The main difficulties that might be faced in a recognition proceeding are related to the validity examination mentioned above, which does not address the merits of the arbitral award itself. More specifically, according to recent precedents on the matter, the STJ will only analyze the formal aspects of an award, verifying basically whether it violates any of the provisions of article 38 of the Brazilian Arbitration Law, namely:

> "Article 38. – The recognition or enforcement of a foreign arbitration award may only be denied when the defendant makes proper evidence that:
>
> I. – the parties to the arbitration agreement were incapacitated;
> II. – the arbitration agreement was invalid under the laws to which the parties submitted themselves or, in the absence of such indication, under the laws effective in the country where the arbitration award was handed down;
> III. – no notice was served on the defendant regarding the appointment of the arbitrator or the arbitration procedure, or that the due process of law was violated to the detriment of the defendant's right of full defense;
> IV. – the arbitration award was handed down beyond the scope set forth in the arbitration agreement, and the excessive portion could not be set aside from the dispute actually referred to arbitration;
> V. – the arbitration procedure was not in keeping with the arbitration commitment or the arbitration clause; and
> VI. – the arbitration award is still not binding on the parties; has been rendered null and void; or has been stayed by the courts sitting in the country where the arbitration award was handed down."

16. Therefore, the Brazilian Arbitration Law not only sets forth the specific grounds by which a foreign arbitral award should not be recognized by the STJ, but also imposes on the opposing party the duty of producing evidence on the occurrence of any these impeditive reasons. The merits of the arbitral award cannot be reviewed.

17. It is worth emphasizing that, although such system brought about by the Brazilian Arbitration Law is fully in line with article V of the New York Convention, the reference by STJ to said legal text (ratified by Brazil by means of Decree 4,311 of 2002) is minimal. There are still few past decisions where an express mention to any provision of the New York Convention can be found.[10]

18. Until 2004, ruling on requests for recognition of foreign awards was entrusted with the Brazilian Federal Supreme Court,[11] which had already built an important case law on the matter by then. In December, 2004, however, such competence was conferred on the STJ,[12] which has tackled this issue remarkably ever since.

19. And it is a unanimous opinion among Brazilian legal scholars and experts that the STJ has been acting out its role masterly. An the same conclusion can be inferred from the position taken by the Reporting Justice Francisco Falcão, who stressed and followed strictly the several STJ judgments that take the same stand,[13] followed unanimously by the other judges hearing the case.

20. Fortunately, one can affirm without a doubt that Brazil has regularly earned the right to be considered an arbitration-friendly jurisdiction. And the STJ, within this practice in the past years, has demonstrated through its role in the process of recognizing foreign arbitral awards before they are enforced in the Brazilian territory (such as in the review of the decisions rendered by the lower federal and state appeal courts). And this support is also shown by its careful examination of the cases, typical of a court that is the guidepost for case law in the country, and by the application and enforcement of international arbitration principles.[14]

(e) Conclusion

21. In brief, even though the relevant question of unreasoned arbitral decisions was not addressed in the Kanematsu Case, we can affirm that the decision not only follows strictly the well-settled court precedents on the matter, but also seems correct, since examination as to the existence of an arbitration agreement takes precedence over the other possible irregularities found in the proceedings.

22. The decision, after all, matches entirely the extremely positive attitude shown by the STJ, performing brilliantly its position as a role-model to all Brazilian law practitioners.

23. It is undisputable that the Brazilian courts have a long way to roam in their stand toward arbitration. However, it must be stressed that milestones have already passed along the way, and a lot of this development is due to the STJ performance in the past years.

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[1] SEC 885/US, Reporting Justice FRANCISCO FALCÃO, SPECIAL COURT, ruled on August 2, 2010, Court Gazette (DJ) September 10, 2010.

[2] "*IX – all judgments of the Judicial Branch are open and reasoned decisions under penalty of nullity (…)*".

[3] American Arbitration Association – Commercial Dispute Resolution Procedures (including Mediation e Arbitration), as amended and effective on September 1, 2000.

[4] Carlos Alberto Carmona, one of the harbingers of Brazilian Arbitration Law, strongly defends that the "reasoning requisite", in the Brazilian legal system, only applies to judicial decisions, not to those rendered in arbitration. Carmona also decries a small tendency from the Brazilian Superior Court of Justice in this sense. In: "*Arbitragem e Processo. Um comentário à Lei 9.307/96.*" 3rd edition. São Paulo: Atlas, 2009, pp. 476-479.

[5] SE 2766, Reporting Justice OSCAR CORREA, ruled on July 1, 1983, Court Gazette (DJ) September 23, 1983; SE 3977, Reporting Justice FRANCISCO REZEK, ruled on July 1, 1988, Court Gazette (DJ) August 26, 1988; SE 3976, Reporting Justice PAULO BROSSARD, ruled on June 14, 1989, Court Gazette (DJ) September 15, 1989.

[6] However, a different standing can be found in SEC 4590 (ruled on June 5, 1992, Court Gazette

(DJ) July 1, 1992, reported by Justice MARCO AURÉLIO, for whom the reasoning is not indispensable once (i) the award shall be covered by the required formalities in force where it was rendered, and not in Brazil; and (ii) in recognition proceedings, it is not possible to analyze whether the arbitrators have decided correctly or not.

[7] SEC 38978/290, Reporting Justice NERI DA SILVEIRA, ruled on March 9, 1995, Court Gazette (DJ) May 26, 1995; SEC 5.828-7, ruled on December, 6, 2000, Court Gazette (DJ) February, 23, 2001; SEC 3707, ruled on September, 21, 1988, Court Gazette (DJ) February, 17, 1989.

[8] In its reasons, the Brazilian company made perfectly clear that it should not be subject to arbitration, and that this impeditive fact had been timely raised throughout the arbitration.

[9] Since the enactment of the Brazilian Arbitration Law, foreign arbitral awards no longer have to be recognized by a judge in the country where they are rendered in order to produce effects in the Brazilian territory. The so-called need for double homologation no longer subsists in the Brazilian legal system.

[10] Recently, the STJ promoted a lecture with Professor Albert Jan van den Berg, who then stressed the importance for Brazilian case law of decisions based on articles of the New York Convention. According to Prof. van den Berg, the STJ judgments would be more robust if judges made more express reference to the New York Convention rather than to the enforcement provisions of the Brazilian Arbitration Law which are, in his own words, "remarkably *similar, but not the same, as the core provisions of the [convention].*" GAR Arbitration – March 28, 2012 – in "*In praise of Brazilian enforcement*".

[11] Article 102, I, "h" of the Brazilian Federal Constitution, enacted in October, 1988.

[12] The Constitutional Amendment 45-2005, dated as of December 8, 2004, changed this system and concentrated the competence for recognition of awards solely in the Superior Court of Justice.

[13] "*The absence of signature in the clause electing arbitration, contained in the purchase and sale agreement in its first addendum, and in appointment of the arbitrator on behalf of the respondent, rules out the request for recognition and enforcement as it violates article 4, paragraph 2 of Law 9,307 of 1996, the principle of free will and Brazilian public policy. 3. Request for recognition and enforcement of a foreign arbitral award denied.*" (SEC 978/GB, Reporting Justice HAMILTON CARVALHIDO, SPECIAL COURT, ruled on December 17, 2008, Court Gazette (DJe) March 5, 2009) "*3. The unfounded evidence of the expression of a party's will to adhere to and constitute arbitration violates public policy, considering that it affronts the principle inscribed in our legal system that requires express acceptance of the parties to submit to arbitration for resolution of disputes that arise in private contractual legal business. 4. In the case in question, no express statement was made by the respondent in relation to election of arbitration, which impedes use of this jurisdictional channel in this dispute. 5. Request for recognition and enforcement is denied."* (SEC 967/GB, Reporting Justice JOSÉ DELGADO, SPECIAL ASSEMBLY, ruled on February 15, 2006, DJ March 20, 2006 p. 175)

[14] According to Prof. Albert Jan van den Berg, "*Brazil was 'a late arrival to the arbitration ball', which ratified the 1958 New York Convention as recently as 2002, (…) borrowing imagery from a recent GAR article. It quickly became the belle of the ball", gaining on other countries that had signed the convention decades before*". GAR Arbitration – March 28, 2012 – in "*In praise of*

Brazilian enforcement".

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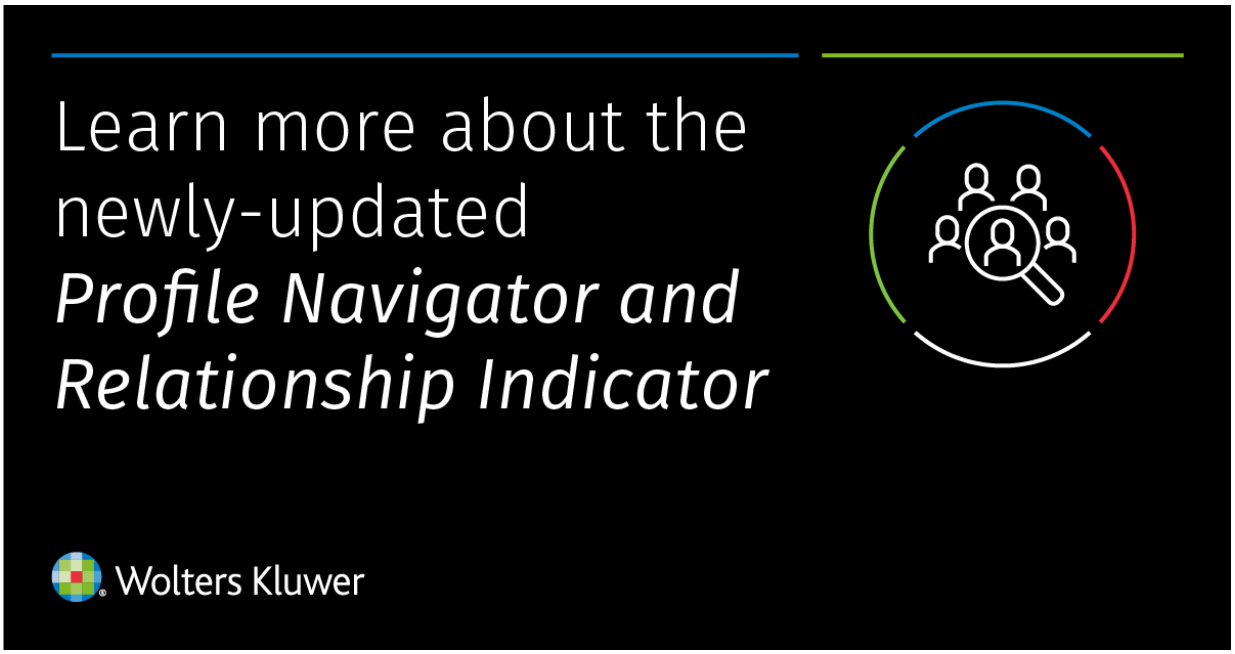

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