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Brazilian Court Clarifies Jurisdiction for Interim Measures

Felipe Sperandio (Clyde & Co. LLP) · Friday, October 26th, 2012 · Clyde & Co.

A recent decision of the Brazilian Superior Court of Justice (“STJ”) has ruled, for the first time, on the issue of the concurrent jurisdiction of national courts and arbitral tribunals with respect to the making of interim measures (*Itarumã Participações S.A. v Participações em Complexos Bioenergéticos S.A. – PCBIOS*, Resp no. 1,297,974-RJ). The decision is significant in shedding light on a topic not addressed by the Brazilian Arbitration Act, and reassures the view that, where there is an arbitration agreement, the national courts may only intervene to support arbitration and in exceptional circumstances.

Facts

Itarumã Participações S.A. (“Itarumã”) entered into a joint venture agreement with Participações em Complexos Bioenergéticos S.A. (“PCBIOS”) to build and implement a fuel production project through a newly constituted company Complexo Bioenergético Itarumã (“CBIO”). The contract was subject to arbitration seated in Brazil, but also provided for the possibility to resort to national courts for urgent matters. PCBIOS requested an interim measure from a Brazilian lower court for suspending its own rights and obligations as a shareholder of CBIO, based on alleged breach of contract by Itarumã. PCBIOS argued that the measure was necessary to guarantee the effectiveness of a future award in arbitral proceedings yet to be commenced.

The lower court denied PCBIOS’s application. PCBIOS appealed that decision to the Rio de Janeiro Court of Appeal (“TJ-RJ”). In its reply to PCBIOS’s appeal, Itarumã informed the TJ-RJ that after the lower court’s ruling on the interim measure but before the judgement of the appeal, the parties had by that time signed the arbitration’s terms of reference and appointed the tribunal. Therefore, the arbitration had been commenced. Itarumã furthermore argued that the subject matter of the ongoing interim measure request was subject to the exclusive jurisdiction of the arbitral tribunal. Accordingly, the appeal should be dismissed.

However, the TJ-RJ found that it had jurisdiction to decide the issue and, in turn, overturned the lower court’s decision and granted the interim measure requested by PCBIOS. The TJ-RJ reasoned that the arbitration agreement does not prevent national courts from deciding urgent matters via interim measures. The TJ-RJ reckoned that the parties agreed to resort to national courts in case of urgent matters, and opined that, notwithstanding the arbitration agreement, the parties retain the faculty to apply to the court for any interim measures. The decision also affirmed that deciding otherwise would be to deny a party its right to access to justice. Itarumã appealed the TJ-RJ’s decision to the STJ.

Decision

The STJ granted leave to appeal, and presented the question for consideration as whether a national court has the jurisdiction to make interim measures after the constitution of the arbitral tribunal. Reversing the TJ-RJ's decision, the STJ determined that it is only in temporary circumstances, for example where the arbitral tribunal is unable to act or has not yet been constituted, that national courts may interfere with disputes subject to the jurisdiction of an arbitration tribunal. In addition, the STJ held that by the time those temporary circumstances cease to exist, the application for interim measure shall immediately be referred to the arbitral tribunal that is eventually constituted.

The STJ further ruled that any arbitral tribunal, upon receiving the application for interim measure from the national court, shall re-examine the interim measure granted (or denied), in order to decide whether to uphold, amend or revoke the national court's decision. Furthermore, the STJ's judgment suggested a "best approach" to be taken by the Brazilian court judges in deciding applications for interim measures of the sort concerned in this case. The recommended method includes that, at the time of referring the case to the arbitral tribunal, the court should highlight that a decision on interim measures is a preliminary ruling conditioned to the arbitral tribunal's ratification and, if not ratified, the decision becomes ineffective.

The Legal Position

This is the first instance where the STJ, Brazil's ultimate authority with respect to legal issues arising from arbitration, scrutinized the boundaries separating the jurisdiction of the Brazilian courts and of arbitral tribunals to rule on interim measures. It is significant that the STJ's reasoning results in the inexistence of a concurrent jurisdiction. Instead, the STJ emphasized that the national courts may only have jurisdiction to grant interim measures in exceptional and temporary circumstances, and this jurisdiction shall be neither extended nor concomitant with the arbitral tribunal's jurisdiction. The court's reasoning has already been followed in a more recent case (*Petróleo Brasileiro S.A. Petrobras v Tractebel Energia S.A.*, STJ, Ag Rg MC no. 19.266-MS)

Conclusion

The precedent set by the STJ has particular importance for international arbitrations conducted in Brazil. The authorisation (or express order) given to an arbitral tribunal to review a national courts' decision deals with the presumed hesitancy of foreign parties to arbitrate against Brazilian parties in proceedings seated in Brazil. The guarantee that, in due course, the tribunal shall have exclusive jurisdiction to rule on interim measures removes the concerns some may have had of the local courts favouring Brazilian parties.

In addition, depending on the relief sought, seeking the national courts directly for interim measures, before the constitution of the tribunal, may be more efficient than applying to the emergency arbitrator. Brazilian courts have the innate power to grant *ex parte* (and enforce) interim measures, while the emergency arbitrator provisions provide for the need to listen to the other party before granting the measure.

The Brazilian Arbitration Act, enacted in 1996, is vague with respect to interim measures.[1] Fortunately, the STJ has helped to overcome the legal uncertainty by rendering a series of decisions addressing the issue. This particular ruling confirms the STJ's pro-arbitration stance, and guarantees the exclusive jurisdiction of a duly appointed arbitral tribunal with respect to the grant of interim measures. The ruling seems to be the last missing brick in the framework for such

measures in Brazil, and is a significant step forward to encourage foreign parties to arbitrate in Brazil.

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[1] Brazilian Arbitration Act (Law no. 9.307/96).

Art. 22 The arbitrator or the arbitral tribunal may take the parties' deposition, hear witnesses and determine the production of expertises and other evidence deemed necessary, either *ex officio* or at the parties' request.

(...)

Fourth Paragraph: With the exception of the provisions of Paragraph 2, **if coercive or injunctive orders become necessary, the arbitrators may request them from the State Court** originally competent to decide the case.

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