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Brazilian Readings on Compétence-Compétence: Missing the Wood for the Trees?

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The facts

On January 9, 2008, in the middle of the Amazon Rainforest, the dam of a hydroelectric power plant ruptured liberating 3.1 billion liters of water and precipitating an environmental mishap. Brazilian authorities hastily cornered the electricity generation company. The electricity generation company hastily pointed the finger at the builder of the hydroelectric power plant. The construction contract between the company and the builder had an arbitration clause. While the necessary steps for the commencement of arbitration were taken, one of the parties applied for an interim measure of protection before a state court. In due time, the arbitral tribunal asserted its jurisdiction to settle the merits of the dispute. The state court, alas, did the same.

In a nutshell, this was the seed for conflict of jurisdiction no. 111.230 brought before the Superior Court of Justice (*Superior Tribunal de Justiça*), the highest Brazilian court for non-constitutional matters.

The controversy

As the saying goes, better the devil you know – than the one you don't. The familiar strife for jurisdiction between arbitrators and state courts notwithstanding, an intricate new question was raised: did the Superior Court of Justice have jurisdiction to settle the conflict of jurisdiction between the arbitral tribunal and the state court? According to the principle of *compétence-compétence*, isn't the arbitrator the single individual who can trace the boundaries of his own jurisdiction during the arbitration, the parties' agreements on the matter considered?

The Superior Court of Justice proceeded willingly to an analysis of these meta-jurisdictional issues under the scrutiny of the local arbitral community.

In one corner of the ring …

Part of the spectators denied that the Superior Court of Justice had the said jurisdiction. By virtue of Article 8 of the Brazilian Arbitration Act, the arbitrator has jurisdiction to decide, on his own initiative or at the parties' request, the issues concerning the existence, validity and effectiveness of the arbitration agreement. In the fact that only the arbitrator is authorized to do so lies the true meaning of *compétence-compétence*.

Though an arbitrator's jurisdiction may be denied by a state court that reviews his arbitral award, during the arbitral procedure the arbitrator is the one and only judge of his own jurisdiction and there is no exception to this rule. Otherwise, arbitrators would fare badly indeed when it came to ascertaining their authority before any challenger.

A small crowd pondered that, all things considered, the meddlesomeness of the Brazilian judiciary branch in arbitral matters had been very mild so far and it had best stay so.

In the three other corners of the ring …

Contrariwise, respectable voices were raised in favor of the jurisdiction of the Superior Court of Justice to rule on the conflict of jurisdiction between the arbitral tribunal and the state court. It was argued that Article 18 of the Brazilian Arbitration Act provides that the arbitrator is a judge in fact and in right, and accordingly his conflicts of jurisdiction should be settled as any other judge's. It was also reasoned that there was too great a hazard to have contradictory awards issued by the arbitral tribunal and the state court, and the Superior Court of Justice should prevent it.

Moreover, it was said that justice delayed would be justice denied: if a prompt answer by the Superior Court did not surmount the deadlock without further ado, the parties would suffer a long wait in case the matter was conveyed before a lower state court. All in all, the Superior Court of Justice had traditionally supported arbitration and would do so again this time by recognizing that the jurisdiction was the arbitral tribunal's by right. The same Court had already held that the jurisdiction of the state court ceased when the arbitral tribunal was constituted, and had asserted that provisional measures granted by courts could be reversed by arbitrators.

The ruling

To the dropping jaws of some and the approving nods of others, the Superior Court of Justice asserted its jurisdiction to rule on conflicts of jurisdiction between arbitrators and state courts. The Court held that the Constitution conferred to it the jurisdiction to rule on conflicts regarding not only tribunals of the judiciary branch, but also tribunals of an arbitral nature. This course of action was allegedly pursued in order to avoid an imminent vacuum of authorities empowered to overcome the dilemma, in which case there would be a twofold jurisdiction and the risk of contradictory decisions.

Eventually, the Court held that the arbitral tribunal, and not the state court, had jurisdiction to rule on the subject matter of the dispute.

Comment

This decision is viewed by some as a victory for arbitration, in accord with the Court's traditional pro-arbitration stance. However, it is in fact a Pyrrhic victory, one with such high a cost that it will ultimately lead to defeat. Whereas a particular arbitral tribunal has had its jurisdiction confirmed, the arbitrators of Brazilian proceedings elsewhere see a black cloud hovering over their *compétence-compétence* prerogative. The decision issued on conflict of jurisdiction no. 111.230 opens a small window towards insecurity as it antagonizes what Emmanuel Gaillard first named *the negative effect of compétence-compétence*.

The Court is alien to the idea that a conflict of jurisdiction between two *fora* may be solved by one of them. It clings to the rooted notion that only a third, uninvolved entity could settle such a

contention. However, the settlement of the conflict by one of its parties is in fact what the Brazilian Arbitration Act provides when it upholds the principle of *compétence-compétence* on its Article 8. At the same time, Article 32(II) of the Act confers upon the judiciary branch the authority to appreciate the arbitrator's jurisdiction if and when annulment proceedings are initiated.

It has been repeatedly said that the conflict of jurisdiction in question had to be quickly solved by the Court before the arbitral tribunal and the state court proffered contradictory decisions. Nevertheless, the anxiety to solve this particular case might reverberate negatively over future cases. The Superior Court of Justice might be seeing the trees and missing the wood. Whether this bitter pill will have blessed effects remains yet to be seen.

It is noteworthy that more than three years have elapsed since the conflict of jurisdiction was finally appreciated. It is true that the magistrates of the Superior Court of Justice have an overwhelming workload, but the fact remains that the appreciation of the matter by the Court is not timely enough for parties who have chosen arbitration precisely as an alternative to the judiciary branch.

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