Kluwer Arbitration Blog

Interim Measures and Anti-Arbitration Injunctions in Brazil: Answering the Actual Question at Issue

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Recently, the Kluwer Arbitration Blog published a post regarding the ongoing saga between the The Clorox Company and the Petroplus Companies. That post sought to answer two general questions: 1) the power of international arbitrators to overturn interim measures granted by Brazilian courts, and 2) the power of Brazilian courts to stay international arbitrations. While both of those questions are interesting, neither of them is actually at issue in *Petroplus Sul Comércio Exterior S.A., et al. v. First Brands do Brasil Ltda., et al.* (the "Campo Grande Case"). In fact, as the article hints, the story has many more chapters that answer far more unique questions. Specifically, does a second arbitration tribunal have any authority over claims already brought in Brazilian courts?

The Petroplus Companies manufacture and sell after-market automobile products in Brazil. The Petroplus Companies acquired this right from the First Brands Corporation ("First Brands"), and The Clorox Company ("Clorox") later purchased First Brands. As part of the corporate structure of the Brazilian operations, First Brands created First Brands do Brasil ("FBDB") and STP do Brasil ("STPB"). Those two companies entered joint venture agreements ("JVAs") with the Petroplus Companies, and these JVAs contained the arbitration clause. When Clorox acquired First Brands, another company owned by Clorox, the Glad Products Company ("Glad"), entered into the business operations.

In early 2001, the Petroplus Companies filed an ICC Arbitration ("First Arbitration") against First Brands, FBDB, and STPB. Later, the Petroplus Companies sought to include Clorox as an additional respondent. During the course of the First Arbitration, Clorox declined to participate in this proceeding, and the ICC Court found it was not a party to this dispute. In addition, the Arbitral Tribunal found that First Brands should be dismissed as party to this proceeding. As a result, the Petroplus Companies could seek relief before Brazilian Courts against Clorox and First Brands. The Brazilian lawsuits show this is exactly what happened.

On December 16, 2002, the Petroplus Companies filed a compensation lawsuit before the 2nd District Civil Court of São Paulo against Clorox (*Ação de Indenização*, Case n. 02.223.386-5, available here) while the First Arbitration was pending. The Petroplus Companies won at the first and second instance courts (available here), and Clorox has appealed. The court found that the Petroplus Companies were the victims of harmful acts carried out by Clorox, and Clorox abused the corporate veil created by its many companies, including STPB and FBDB.

Strangely enough, Clorox and First Brands attempted to rely on the findings of fact in the First Arbitration to protect them from liability, arguing that the First Arbitration should resolve all disputes. Unsurprisingly, the Brazilian courts did not accept this position, which appears to be the correct and logical resolution. Clorox and First Brands decided not to participate in the First Arbitration, leaving the Petroplus Companies with little option other than seeking relief in the Brazilian courts.

The Petroplus Companies were unsuccessful in the First Arbitration, but instead of trying to enforce the award, other entities owned by Clorox filed lawsuits in Brazilian courts, seeking relief based on the terms of the JVAs that formed the basis for the First Arbitration.

For example, on March 3, 2005, Glad sued the Petroplus Companies before the 8th District Civil Court of São Paulo (*Ação Cominatória*, Case n. 0021361.94.2005.8.26.01.00, available here) seeking an injunction ordering cessation of all production, commercialization, and use of STP brands and products; search and confiscation of STP products from the Petroplus Companies; and attorneys' fees and costs. Glad lost, currently pending an appeal.

In another example, FBDB (*Ação Cautelar Inominada*, Case n. 0012551-43.2004.8.26.0011, available here) and STPB (*Ação Cautelar de Exibição de Documentos*, Case n. 0117017-19.2007.8.26.0000, available here), two of the parties to the First and Second Arbitrations, filed separate lawsuits in the São Paulo courts seeking documents from the Petroplus Companies—a right granted by the parties' agreements and enforceable through the arbitration clause.

In other words, to describe the Campo Grande Case without mentioning at least these four other litigations serves to conceal rather than reveal the deeper issues at play.

The Campo Grande Case started on December 3, 2012, when the Petroplus Companies filed a declaration lawsuit against Clorox, Glad, First Brands, FBDB, and STPB, in addition to Armored Autogroup Parent, Armored Autogroup Intermediate, and Avista Capital Holding, LP, who have apparently acquired the Brazilian business from the Clorox Companies. Because the Brazilian city of Campo Grande is the location where the Petroplus Companies have manufacturing facilities, it is arguably the court with the appropriate jurisdiction. In the Campo Grande Case, the Petroplus Companies seek an interim measure before the 3rd Campo Grande Civil Court (*Ação Declaratória*, Case n. 0822794-52.2012.8.12.0001, available here and here) to order the defendants not to vote at shareholders' meetings. The Petroplus Companies won pending judgment of a special appeal to the Brazilian Superior Court of Justice ("STJ").[1)] These decisions were the subject-matter of the Kluwer Arbitration Blog post mentioned above.

Again unsuccessful, Clorox's subsidiaries, FBDB and STPB, filed another ICC Arbitration ("Second Arbitration") to revisit the same issues that the Brazilian courts have already decided. FBDB and STPB took this step despite an earlier finding that they are shell companies in the *Ação de Indenização*. Further, the Second Arbitration was initiated in spite of the Brazilian courts having considered the evidence and arguments and rendered decisions on the issues discussed in the various litigations started (or invited by) Clorox and its companies. Stated simply, the Second Arbitration is no ordinary case arising out of rather extraordinary circumstances.

The prior Kluwer Arbitration Blog post seeks to answer questions not at issue by applying case law to a factually distinct situation. There is no conflict between the Campo Grande courts and the

STJ's precedent in *Itarumã Participações S.A. v. Participaçoes em Complexos Bioenergéticos S.A. – PCBIOS*. This decision did not consider a second arbitration following a series of court decisions on the merits, including cases started by the parties to the second arbitration and entities controlled by the same holding company. *Itarumã Participações* can be quite compelling when the parties are contesting the first arbitration, but once there are multiple lawsuits in Brazilian courts on the merits of a second arbitration, the premises substantially change and involve other factors. Specifically, once there is a final decision by a court, the obligation to comply with such decision is paramount, which is exactly the position taken by the Campo Grande Courts and quoted in Kluwer Arbitration Blog post.

Moreover, the competence-competence principle does not go so far as to deprive Brazilian courts from requiring enforcement of their own decisions on the merits of a case. Decisions such as *Ferro Atlântica S.L. v. Zeus Mineração Ltda.* and *Samarco Mineração S.A. v. Jerson Valadares da Cruz* look at entirely different issues. This is not an issue of a "complete" versus an "incomplete" arbitration clause. This argument is nothing more than a red herring. And while competence-competence normally grants an arbitration tribunal the right to resolve any issue regarding the validity of an arbitration agreement, this right is not absolute. As is recognized in countries throughout the world, resorting to local courts can amount to a waiver of the right to go to arbitration. Few things can be more fundamental.

Not every decision that rules in favor of an arbitration tribunal is good, and in this situation, the courts in the Campo Grande Case are on the right track. Clorox and its companies have chosen litigation in court to get the relief they seek, not arbitration. Among other things, the Clorox/Petroplus saga should show that parties can waive their right to arbitrate. Moreover, Brazilian courts certainly have the discretion to stay international arbitrations that seek to overturn court rulings already reached—a rather unremarkable conclusion. While international arbitration can be fruitful, it cannot serve to replace the national court system that the parties chose to use. In fact, a decision by the STJ overturning the Campo Grande Case should be worrying; once international commercial arbitration becomes a tool to overturn decisions on the merits by competent courts, it will not be long before courts justifiably become hostile to arbitration.

References

?1 Under Brazilian Law, the Superior Court of Justice has the final word on federal law in domestic cases, and enjoys original jurisdiction to hear requests for recognition and enforcement of foreign judgments or arbitral awards since 2004.

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