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Amendments to the Brazilian Arbitration Law: Supplementary Arbitral Awards and Excess of Power

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On 27 July 2015 the Bill amending to the Brazilian Arbitration Law will come into force, introducing significant changes in the arbitration legal framework, which, according to the stated purpose of the amendments, aim at improving the original Brazilian Arbitration Law, enacted in 1996. The amendments attempt to consolidate established practices as well as settling other issues that were unclear the original Brazilian Arbitration Law, such as the authority of arbitrators to review provisional measures granted by courts and to possibility of arbitrating disputes with public entities.

But despite their stated purpose, the amendments bring several controversial issues to the Brazilian Arbitration Law. One of the most controversial issues relates to the new Article 33.4, which allows the parties to request from courts the rendering of a supplementary arbitral award if the arbitral tribunal fails to decide all claims submitted to arbitration (*“A parte interessada poderá ingressar em juízo para requerer a prolação de sentença arbitral complementar, se o árbitro não decidir todos os pedidos submetidos à arbitragem”*).

The main problem of Article 33.4 is the wording employed by the amendments. It is not clear whether the supplementary arbitral award will be rendered by courts or by an arbitral tribunal. At a first sight, Article 33.4 indicates that the supplementary arbitral award will be rendered by the court; it does not say that the case would be remitted back to the arbitral tribunal for the supplementary arbitral award to be rendered. Article 33.4 simply says that the affected party may go to court to request the rendering (*“prolação”*) of a supplementary arbitral award if the arbitrator does not decide all claims submitted to arbitration.

On the other hand, one may argue that the purpose behind the new Article 33.4 was to create an alternative for Article 32(V) of the original Brazilian Arbitration Law, which was revoked by the amendments, and not to confer on courts the authority to render arbitral awards. Under Article 32(V), an arbitral awards could be set aside by courts if the arbitral tribunal failed to decide the whole dispute (*“todo o litígio”*) submitted to arbitration. The case would be remitted back to the original arbitral tribunal for a new arbitral award to be rendered. With the new Article 33.4, the arbitral award would not be vacated, but the court would request the arbitral tribunal to render an additional award, which would decide the claims that remained undecided in the original arbitral award. The supplementary arbitral award would be equivalent to additional awards set forth in the UNCITRAL Arbitration Rules, rendered, however, upon a court order.

Due to the poor and inaccurate wording of Article 33.4, both interpretations could be sustained and it will be up to Brazilian courts to decide whether supplement arbitral awards should be rendered by courts or by arbitral tribunals.

But the possibility of courts rendering arbitral awards is not the only relevant change created by the revocation of Article 32(V) and the introduction of Article 33.4 in the Brazilian Arbitration Law. Once Article 33.4 is limited to arbitral awards in which the tribunal fails to decide all claims (“*pedidos*”) and not the whole dispute (“*todo o litígio*”) submitted to arbitration, as provided in Article 32(V), it became questionable whether under the Brazilian Arbitration Law an arbitral award may be set aside if the tribunal refuses to address certain issues based on a misjudgment of its own jurisdiction.

It is well settled in arbitration practice that excess of power, as a ground for setting aside an arbitral award, occurs not only when the arbitral tribunal goes beyond the mandate conferred on it by the disputing parties, but also when the arbitral tribunal fails to exercise its jurisdiction. For instance, an arbitral tribunal exceeds its power when it dismisses a claim or refuses to address an issue based on a misjudgment of its own jurisdiction.

In the original Brazilian Arbitration Law, there were two statutory grounds to set aside arbitral awards that could be construed as based on the idea of excess of power. Pursuant to Article 32(IV), an arbitral award may be vacated if it is rendered outside the limits of the arbitration agreement (“*É nula a sentença arbitral se [...] for proferida fora dos limites da convenção de arbitragem*”). In addition, Article 32(V), revoked by the amendments to the Brazilian arbitration law, provided that an arbitral award may be set aside if it does not decide the whole dispute submitted to arbitration (“*É nula a sentença arbitral se [...] não decidir todo o litígio submetido à arbitragem*”). While the original Brazilian Arbitration Law did not expressly provide for the annulment of arbitral awards when the arbitral tribunal fails to exercise its jurisdiction, the wording of Article 32(IV) and (V) were broad enough to be construed as comprising such ground. In fact, the term “*todo o litígio*” employed in Article 32(V) could be interpreted as to cover any issue in dispute.

Accordingly, based on the wording of Article 32(IV) and (V), it could be concluded that the original Brazilian arbitration law encompassed both meanings of excess of power as a ground for setting aside arbitral awards. And there would be no relevance if a court decided to set aside an arbitral award based on either Article 32(IV) or Article 32(V), given that in accordance with former Article 33.2(II), under both statutory grounds, the court had to remit the case back to the same arbitral tribunal to render a new arbitral award (“*A sentença que julgar procedente o pedido [...] determinará que o árbitro ou o tribunal arbitral profira novo laudo, nas demais hipóteses*”).

With amendments, a party will have to rely on Article 32(IV) of the Brazilian Arbitration Law in order to set aside an arbitral award because the arbitral tribunal failed to exercise its jurisdiction and refused to address certain issues (not claims). The problem, however, is that, according to the construction given to this provision in Brazil, Article 32(IV) would be limited to arbitral awards in which the arbitral tribunal decides on claims that are not covered by the arbitration agreement or beyond the request (*ultra* or *extra petita*).

Again it will be up to Brazilian courts to decide whether under the amended Brazilian Arbitration Law an arbitral award may be set aside if the arbitral tribunal failed to exercise its jurisdiction refusing to address certain issues.

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