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Let's Remember: In Brazil, the Civil Procedure Code is Not Automatically Applicable to Arbitral Proceedings

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In the last fifteen years, the use of arbitration as an alternative dispute resolution method has grown in Brazil. Not only has the arbitration law been declared constitutional, but also parties have continuously provided arbitration clauses in their contracts, and national courts have issued rulings recognizing the jurisdiction of arbitrators and their power to "state" the law.

Although the number of arbitral proceedings has mainly increased domestically, many Brazilian party signatories to contracts are increasingly choosing the seat of their arbitrations outside the country.
However, the intensification of arbitration practice is not always followed by more technical awards and parties' memorials. In fact, remembering characteristics of arbitration is of great importance in a time in which the Brazilian Arbitration Law was amended in 2015 and a new Civil Procedure Code was enacted.

The new Civil Procedure Code has some provisions regarding arbitration, which may lead to an incorrect perception about the applicability of "all" its provisions to arbitration. The detailed analysis of the Civil Procedure Code reveals, however, that most provisions regarding arbitration aim to recognize the jurisdiction of arbitrators and to provide ways that the arbitral proceeding and the state courts may interact.

Taking a step back, the right to "state" the law, i.e. the jurisdictional power, is traditionally an attribute of the states' courts. The "jurisdictio", during the course of history, was a duty of the State, as judges had exclusive power to issue, enforce, and decide on the law.

Nonetheless, private parties have faced difficulties with the lack of specialisation and the lack of time of state judges to deal with complex conflicts and identified the possibility of using their autonomy to nominate specific persons to decide certain disputes. Arbitration was, therefore, developed as a system with its own peculiarities, rules and principles. Moreover, it is important to notice that arbitration is a contractual method created by the parties to solve their disputes, i.e., its scope is determined by party autonomy and shall be used for specific types of conflicts.

Therefore, arbitration is an autonomous system that may interact with other Law subsystems, such as the civil procedure one. As a system, in Brazil, there is a specific law to regulate it and to determine the principles and main rules that shall govern this alternative dispute resolution method (Law n. 9.307/1996).

The Brazilian Arbitration Law, when it was enacted, recognized the "jurisdictional" nature of arbitration and aligned its provisions with the most valuable characteristics of international arbitration, such as the freedom to choose the applicable law to the procedure. In this sense, it is important to stress that over the years, the surveys conducted by the School of International Arbitration of the Queen Mary University of London show that flexibility has been placed among the top three most valuable characteristics of international arbitration.

Accordingly, Article 21 of Law n. 9.307/1996 sets forth that arbitration shall observe the proceedings established by the parties in the arbitration convention that might refer to the rules of an arbitral institution, giving the parties the right to delegate to the sole arbitrator or to the arbitral tribunal the power to regulate the proceedings.

It is clear that the Brazilian Arbitration Law has recognized party autonomy in relation to the applicable rules regarding the proceedings, not establishing limitation to the use of rules provided by an arbitral institution, procedure laws of another country, or even the establishment of specific procedural rules for the conflict at hand.

For instance, an arbitration may be seated in Brazil with its proceedings regulated by the French Civil Procedure Code. Parties may even choose to have an arbitration under the UNCITRAL Model Law and additionally adopt common law evidence methods, such as discovery and cross-examination.
These scenarios would be perfectly possible in our system and we have seen more and more the interaction and use of common law and other legal systems' methods in arbitrations seated in Brazil. It is common, for example, to have tribunals asking parties to utilise Redfern schedules in order to decide on the exhibition of some documents.

The limits of the interaction with other systems and the party autonomy to determine the procedure applicable is found in the Arbitration Law – paragraph 2 of Article 21 establishes the fundamental principles that shall be observed in an arbitration seated in Brazil, which may not be derogated by the parties. They are: (i) the contradictory principle; (ii) the party equality; (iii) the arbitrator's impartiality; and (iv) the arbitrator's freedom to decide.

As it can be noticed, the Arbitration Law does not state that parties shall observe the Brazilian Civil Procedure Code nor that they are bound by its limitations or by its formal types of evidence.

It is worth mentioning that as parties have the right to choose the procedural rules of an arbitral institution or even the civil procedure code of another country, they could, certainly, choose the Brazilian Civil Procedure Code. Accordingly, it is very common to have terms of reference providing for the use of the arbitration institution rules and, in **a subsidiary way**, of the rules of the Brazilian Civil Procedure Code.[1)]

However, if the parties have not established in the arbitration convention nor in the terms of reference, and if the institutional rules chosen by the parties do not make any reference to, the Brazilian Civil Procedure Code, parties shall not use its rules in their memorial nor should arbitral tribunals reason their decisions on the basis of the provisions of the referred Code.

In fact, we have to keep in mind that (i) arbitration is designed for a specific field of conflicts; (ii) Law n. 9.307/1996 is the Brazilian Arbitration Act and shall therefore be applicable to arbitration proceedings; and (iii) arbitration is not the solution for all problems related to the Brazilian States'

Courts.

Tribunals and parties should also bear in mind that, in some cases, the lack of specific rules for the proceedings is important for the arbitrators to better direct the course of the arbitration. For instance, if the institutional rules do not expressly provide for the types of expert evidence that might be used or requested in a proceeding, this "lack" of rules give freedom to the arbitrator to decide what suits better: the use of expert written memorials, the oral presentation by experts, or even the possibility of an expert producing a report with the party's assistance.

Therefore, as long as the provisions of Law n. 9.307/1996 keep regulating arbitration in Brazil and the principle of party autonomy to determine the applicable procedural law is sheltered, we should not have a transposition of the formalistic and less flexible aspects of civil procedure to arbitration.

The views expressed in this article are those of the author alone and should not be regarded as representative of, or binding upon ArbitralWomen and/or the author's law firm.

References

?1 The author does not agree that this would be the best option to be adopted by the parties or the arbitral tribunal due to the formalistic and limitations of our national civil procedure.

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