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The Arbitrability of Oil & Gas Disputes under Brazilian Law

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There is no doubt that Brazil is recognized world-wide as one of the most pro-arbitration nations. Brazilian law regulating arbitration is quite innovative, especially after its reform in 2015, which instated clear provisions on relevant topics such as interim measures, the effects of arbitration agreements contained in a company's bylaws before its shareholders, and arbitration involving public entities. In addition, Brazilian courts have adopted an approach in favor of arbitration, such that there is practically no room for the disregard of valid arbitration agreements.

In that regard, past years have seen the formation of important case law that has certainly furthered the development of arbitration in Brazil, considering that it has provided more legal certainty in the system.

However, despite that the recent reform of Brazilian Arbitration Law allows the participation of public entities in arbitration procedures, the legislature has not dealt with some particularities: for example, the election of arbitral institutions to administer proceedings, the appointment of arbitrators, the allocation of costs, the seat of arbitration, language, and confidentiality, among others.

Although it is conceivable that some obstacles related to this subject have been overcome — such as, for instance, the argument that public interest would prevent the participation of public entities in arbitration procedures — there is still room for debate on other relevant issues, especially considering the important interplay between public and private entities.

In this sense, several interesting recent cases may prove useful to practitioners and academics in light of the hottest topics under discussion in the international arbitration community.

This article aims to provide information on a recent case in which the Superior Court of Justice ("**STJ**") dealt with the arbitrability of oil & gas disputes, the so-called Conflict of Competence nº 139.519/RJ ("**Case**"). The Case refers to the discussion of the power to decide the existence, validity, and effectiveness of an arbitration clause contained in a concession agreement executed between Petróleo Brasileiro S/A —Petrobrás ("**Petrobrás**") and the National Agency of Petroleum, Natural Gas and Biofuels ("**ANP**").

The dispute between the Parties, which amounted to approximately US $600 million, arose because the ANP attempted to collect financial compensation (*participação especial*) from Petrobrás due to its exploitation of oil & gas in a complex of offshore fields in the State of Espírito Santos called *Parque das Baleias*.

According to Brazilian legislation, which regulates the subject matter (Law nº 9.478/1997), the payment of financial compensation (*participação especial*) fundamentally depends on the localization of the extraction field, the number of years of production, and the volume of oil & gas produced quarterly.

In summary, the Parties disagreed as to whether the offshore fields should be considered separately or not, which would have substantially affected the obligation to pay the financial compensation under discussion.

Regarding the method of dispute resolution, Petrobrás alleged that the arbitration clause agreed upon by both Parties in the concession agreement was valid and effective, and that the dispute should be resolved through arbitration. On the contrary, ANP sustained that the Brazilian judiciary should have competence to rule on the matter, given that the subject matter would not refer to freely transferable property rights, which would imply a lack of arbitrability.

Therefore, Petrobrás requested the STJ to issue an injunction declaring that an arbitral tribunal constituted under the Rules of Arbitration of the International Chamber of Commerce ("**ICC**") should have jurisdiction to decide the issues in dispute between the Parties until the STJ provided a definitive decision concerning the conflict of competence.

On April 9, 2015, the STJ granted the injunction and decided that, before the Court reached a final decision on the matter, the arbitral tribunal to be constituted under the Rules of Arbitration of the ICC would have competence to rule on the matter, and that Petrobrás therefore had the right to commence an arbitration proceeding. In addition, the STJ ordered that any other lawsuits and administrative procedures filed by the ANP and the State of Espírito Santos should be suspended until the Court issues a final judgment on the conflict of competence.

To reach this conclusion, Justice Napoleão Nunes Maia Filho held that as the arbitration agreement under discussion was executed by the Parties many years ago, a sudden unilateral modification of its content would affect the activities performed by Petrobrás, and would also impact the credibility of the market in which Petrobrás acts. In addition, the Justice highlighted that the high number of international investments in the field of oil & gas should be considered, given that these are protected by the good faith principle.

On October 11, 2017, the STJ ruled in favor of Petrobrás, ruling that the arbitral tribunal to be constituted under Rules of Arbitration of the ICC had jurisdiction to decide the issues in dispute related to the concession agreement executed between Petrobrás and ANP.

Initially, the STJ emphasized that arbitration has a jurisdiction nature, which shall be understood as taking into account important principles, such as *Kompetenz-Kompetenz*, party autonomy, and the severability of arbitration agreements. In addition, the Court pointed out that the new Brazilian Code of Civil Procedure promotes in its article 3º, section 2, the use of alternative (or adequate) dispute resolution methods (mediation, conciliation, and arbitration).

Following this introduction, the STJ stressed that Brazilian law contains a considerable set of rules providing for arbitration to resolve disputes involving public entities (Law nº 8.987/95, *Lei de Concessões*; Law nº 9.478/97, *Lei do Petróleo*), which indicates the pro arbitration approach of the national legal system.

Next, the Court analysed whether the subject matter of concession agreements could be deemed

"freely transferable property rights", a requirement for parties to make use of arbitration to resolve conflicts under article 1 of the Brazilian Arbitration Law.

In that regard, the Court clarified that the public interest could not be freely transferred. However, the Court explained that whenever a public entity executes a contract with a private party, the subject matter of the agreement is a freely transferable property right, and that this fact does not imply any disregard of the public interest. On the contrary, by making use of arbitration to resolve conflicts involving concession agreements, public entities promote the relevance of the public interest.

After the issuance of the decision, Petrobrás stated that "*The decision reaffirms the validity of arbitration clauses contained in concession agreements, which shall increase the legal certainty in the field of oil & gas in Brazil.*" Moreover, Petrobrás also asserted that it would immediately commence arbitration proceedings to resolve the dispute with ANP.

It shall be noted that this decision is in line with the global trend to resort to arbitration to resolve cross-border disputes, as indicated by research recently published by Queen Mary University of London (QMUL) in partnership with White & Case (*2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*).

Furthermore, as Professor Carmen Tiburcio and Suzana Medeiros demonstrate [1. Carmen Tiburcio and Suzana Domingues Medeiros. Arbitragem na indústria do petróleo no direito brasileiro. Revista do Direito da Energia, São Paulo, v. 3, 2006, pp. 54-57], there are many advantages to the use of arbitration as a dispute resolution method to resolve conflicts related to concession agreements for the exploitation of oil & gas.

These include: (i) increase of legal certainty among foreign investors; (ii) more celerity; (iii) arbitral tribunals consisting of specialists in the field; (iv) freedom of both parties to agree on laws applicable to substantive issues; (v) flexibility to determine procedural rules; and (vi) higher effectiveness of arbitral awards issued in the context of international arbitrations, as most states have ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

As to the autonomy of the parties related to the applicable substantive law, it is important to bear in mind that the oil & gas market has so many particularities that some authors have suggested the institution of a *lex petrolea* in the international context, which would codify a set of rules specifically applicable to parties facing disputes in this field.

In any case, disputes related to oil & gas tend to be complex and involve large quantities of resources. It is necessary that all players be prepared to render a valid proceeding and a good decision. Arbitration is the natural and most appropriate method for disputes related to specific industries and complex matters. Parties need specialized lawyers, consultants, and arbitrators on whom they can rely on from the very beginning. The Brazilian Superior Court of Justice has sent a very good signal that arbitration agreements in these contracts are acceptable and will be enforced.

In conclusion, it is important to highlight that the increase of international transactions involving Latin American countries inevitably has led economic actors to observe the growth of arbitration in Brazil. Although in recent years there has been considerable development of the subject in the country, there is still room for debate on relevant subjects, as demonstrated in the case analysed above, which illustrates that Brazil has come to play an increasingly important role in current

debates on arbitration.

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