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Franchising Arbitration in Brazil: What to Expect from the New Franchising Legislation?

Caio de Faro Nunes (Salusse, Marangoni, Parente e Jabur Advogados) and Victoria Romero (CAM-CCBC) · Sunday, October 4th, 2020 · Young ICCA

Brazil's new Franchising Law (Law No. 13.966/19) was published on December 27th, 2019 and became effective as of March 27th, 2020. One of the innovations (more of a confirmation) set forth by the new legislation is the provision contained in article 7, paragraph 1, which states that "*the parties may resort to arbitration to resolve any disputes related to the franchise agreement*" (free translation).

At first glance, such disposition does not seem to bring any relevant impact on Brazilian Law, considering that article 1 of the Brazilian Arbitration Act (Law No. 9.307/96) already clearly states that "*those who are capable of entering into contracts may resort to arbitration to solve conflicts related to freely transferable property rights*" (free translation). Additionally, no notable challenge has been brought against the arbitrability of franchising disputes in Brazil, but rather, the use of arbitration to solve such disputes has been on the rise in the country over the past few years (the authors, for instance, have acted both as counsel and as case manager in arbitral proceedings arising out of franchise agreements under the auspices of ARBITAC – Arbitration and Mediation Chamber of the Paraná State Commercial Association and CAM-CCBC – Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada).

In this regard, Brazilian practitioners such as Thiago Marinho Nunes and Gilberto Giusti have deemed the addition of article 7, paragraph 1 of the Brazilian Franchising Law to be "unnecessary". Gilberto Giusti has even gone further, stating that the new provision could result in a "backfire effect" to Brazilian arbitration as a whole, in the sense that "*the current and valid legal text of the Brazilian Arbitration Act does not need and should not be ratified at all times in subsequent statutes, at the risk of giving rise to absurd interpretations, such as that the use of arbitration to resolve certain disputes would only be valid when allowed by the respective legal statute*" (free translation).

Irrespective of this discussion, it is worth discussing a different consequence which may be triggered by this new legal framework: a potential revival of the debate over the validity of arbitration clauses inserted in franchise agreements without an express and specific form of consent from the franchisee.

Article 4 of the Brazilian Arbitration Act states that in adhesion contracts (those in which the

adhering party did not get to negotiate the contractual terms and conditions), "*an arbitration clause will only be valid if the adhering party takes action to initiate an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or in boldface type, with a signature or special approval for that clause*" (free translation, emphasis added).

In light of this provision, the Brazilian Superior Court of Justice rendered a leading precedent in 2016 holding that: (i) franchise agreements are undoubtedly adhesion contracts; and (ii) consequently, arbitration clauses inserted in such agreements without an express consent from the franchisee (in an attached written document or in boldface writing) shall be deemed invalid. This holding disregards the *kompetenz-kompetenz* principle.

Paula Mena Barreto, Vinícius Pereira, Felipe Hermanny and Kate Brown de Vejar analyzed the possible impacts of the new Franchising Law over the aforementioned precedent. They suggest that "*with the new Brazilian Franchising Law expressly permitting arbitration clauses in franchising agreements, we will likely see the Superior Court of Justice recognize the validity of such clauses, even if the franchise agreement is considered an adhesion contract.*" On the other hand, Gilberto Giusti refutes this possibility, by emphasizing that "*if* [article 7, paragraph 1] *were to assure that franchising agreements should not be considered adhesion contracts, such provision would not be necessary or useful, since it is not the permission of the contracting parties to enter into arbitration that will alter the courts' understanding that franchise contracts are adhesion contracts*" (free translation).

Indeed, this simple addition to the Franchising Law does not seem sufficient to entail a shift in the Superior Court of Justice's view, nor can one presume that it was the lawmaker's intention to do so. In our view, the legislator is not in a position to regulate such matter, due to its subjectivity, since franchisees may have the opportunity to negotiate the terms of franchise agreements in certain circumstances, depending on (i) the peculiarities of the case and (ii) the parties involved therein. Hence, it seems that the sole purpose of drafting a clean and broad provision was to give discretion to judges to determine whether franchise agreements should be classified as adhesion contracts, on a case-by-case basis.

This issue, although already intensely discussed in Brazilian commentary and case law, is still unsolved and should remain as it is. In effect, to maintain certain theoretic concepts undetermined is healthy for the contract system in its entirety, especially for the efficiency of contractual relations in practice.

This rationale runs in accordance with a recently enacted legislation in Brazil, commonly known as the "Economic Freedom Act" (Law No. 13.874/19). Article 7 of the said statute altered the drafting of article 421-A of the Brazilian Civil Code (Law No. 10.406/02), which reinforced the paradigm that "*civil and corporate contracts are presumed to be even and symmetric until the presence of concrete elements justifies the dispel of this presumption*". In other words, we understand that judges and arbitrators should not address private contracts with skepticism, but rather prioritize its validity and effectiveness. Only in exceptional circumstances should these contracts be deemed asymmetric, and therefore abusive.

The diffidence of the matter is also consistent with the principle of *atipicidade* (atypical), which governs Brazilian Contract Law and stands for the fact that private contracts are, in general, "not typical", in a sense that, as a rule, they may not comply with a specific legal regime, but rather simply express the will of the parties (regardless of any given form). The era of globalization has

structured a hyper complex society, which has made it almost impossible for written laws to keep up with the latest trends in contract design.[1)] Each agreement is now, more than ever, expected to have its own particularities, and not be entirely subjected to the rules governing only one type of contract.

Although the Economic Freedom Act was enacted to make things clearer, for the past few years, Brazilian case law has already been adopting a more unorthodox view. The Appellate Courts of the State of São Paulo, for example, rendered many paradigmatic decisions on the matter.[2)] The common ground of these decisions was that, while the arbitration clauses contained in the franchise agreements did not comply with the specific form of consent required for adhesion contracts, the said clauses were deemed valid all the same, because (i) the contractual relationship between the parties was not of vulnerability – which shall be presumed in a business context; and (ii) the franchisees had some sort of freedom to effectively negotiate its terms and conditions.

In line with this case law, the authors understand that franchise agreements cannot always be put into the category of adhesion contracts. We stress the importance of leaving these conclusions to the judges, on a case-by-case basis. Hopefully, the Superior Court of Justice will also share this view in the near future, paving the way for a more uniform jurisprudence.

References

?1 FERNANDES, WANDERLEY. “Contrato Preliminar: segurança de contratar”. In: *Fundamentos e Princípios dos Contratos Empresariais*. 2. Ed. São Paulo: Saraiva, 2017.)

?2 São Paulo State Appellate Court (TJSP), Appeal No. 0022434-04.2011.8.26.0032, 34th Chamber of Private Law, Reporting Judge Soares Levanda, rendered in 06.01.2016; São Paulo State Appellate Court (TJSP), Appeal No. 4010691-72.2013.8.26.0576, 2nd Reserved Chamber of Commercial Law, Reporting Judge Fabio Tabosa, rendered in 11.28.2016; São Paulo State Appellate Court (TJSP), Appeal No. 1025048-47.2014.8.26.0100, 1st Reserved Chamber of Commercial Law, Reporting Judge Alexandre Lazzarini, rendered in 07.27.2017; São Paulo State Appellate Court (TJSP), Appeal No. 1047574-03.2017.8.26.0100, 1st Reserved Chamber of Commercial Law, Reporting Judge Alexandre Lazzarini, rendered in 03.23.2018.)

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