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Brazilian Superior Court of Justice (STJ) Reaffirms Brazil as an Arbitration Friendly Jurisdiction

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On November 3, 2021, a decision rendered by the Third Panel of the Brazilian Superior Court of Justice in the Special Appeal No. 1.953.212-RJ (OSX Construção Naval v. AGF Engenharia) was published under the opinion of Minister Nancy Andrighi. The decision addresses relevant issues for arbitration in Brazil and demonstrates the support given by Brazilian courts to arbitration.

Background

OSX Construção Naval S.A., OSX Brasil S.A., and OSX Serviços Operacionais Ltda. pleaded for judicial reorganization in the State Court of Rio de Janeiro on November 11, 2013. The reorganization proceedings ended successfully on November 23, 2020, when the reorganization plan was finally approved by the court.

The arbitration claimant, AGF Engenharia, filed a claim against OSX Construção Naval S.A. requesting the payment of R$ 7,585.009.12 to the arbitral tribunal for extra-bankruptcy credits, that is, credit related to services provided after the request for judicial reorganization. The tribunal issued a partial award asserting its competence to determine the existence and the amount of the credit, and therefore to decide issues with regard to the *an debeatur* as well as to the *quantum debeatur*. The arbitral tribunal established its competence in terms of arbitration to assess only extra-bankruptcy credits?.

OSX Construção Naval S.A. challenged the partial award. It argued that, by hearing and deciding extra-bankruptcy claims, the arbitration tribunal acted outside the limits of the arbitration agreement, and in detriment of the jurisdiction of the Judicial Reorganization Court.

The Court's Analysis

Competence-Competence & Objective Arbitrability

The Superior Court of Justice sided with AGF Engenharia? and endorsed the competence-competence principle under the terms of article 8, sole paragraph, and article 20, both of the

Brazilian Arbitration Act. In her opinion, Justice Nancy Andrighi stated that only “the practice or control of acts of enforcement of individual credits against bankrupt companies or against companies under judicial reorganization” is within the exclusive jurisdiction of the Judicial Reorganization Court. In consequence, the court concluded that the arbitral tribunal’s decision on the credit’s existence and amount? did not violate said exclusive jurisdiction.

Article 6º § 1º of the Brazilian Bankruptcy Act (Law 11.101/2005) claims that the declaration of bankruptcy or judicial reorganization implies the continuation of the court proceedings that deal with gross values (illiquid). Therefore, under these terms, it would be the arbitral tribunal’s competence to assess any credit-related dispute under the arbitration agreement, except for any enforcement action (the judicial reorganization state court exclusively performs these acts). Thus, it all comes down to a discussion of objective arbitrability of the bankruptcy and extra-bankruptcy credits.

The same Justice ruled similarly in a 2014 decision, stating in that occasion that:

> Nevertheless, the necessary strengthening of arbitration led to effect from the promulgation of the Arbitration Act of 1996 makes it essential to preserve the arbitrator’s authority as much as possible for she is the judge in fact and law for issues related to the merit of the cause. [Disrespect of] such a [principle] would empty the content of the Arbitration Act, allowing, simultaneously, the same question to be assessed, although in perfunctory cognition, by the state judge and the arbitrator, often with severe possibilities of conflicting interpretations for the same facts.

The Superior Court of Justice dealt in this case, as it did several times before, with the concept of objective arbitrability. Article 1 of the Brazilian Arbitration Law specifically addresses the subject. Only issues regarding transferable property rights can be solved by arbitration in Brazil. The Court’s decision correctly understood that granting the request for judicial reorganization does not change the nature of the credit, as transferable property rights, and therefore does not modify the competence of the arbitral tribunal. It is noteworthy that the Brazilian Bankruptcy Act (Law 11.101/2005) and its recent amendment of 2020 (Law 14.112/2020) states that neither the claim for judicial reorganization nor the declaration of bankruptcy invalidates the arbitration agreement or impedes the initiation of the arbitration procedure (Article 6º, § 9º).

Challenge of Arbitration Awards

Moreover, the decision addressed the possibility of challenging arbitration awards, on the grounds of item IV of article 32 of the Brazilian Arbitration Act. Such article establishes that an arbitration award rendered outside the limits of the arbitration agreement is null and void. In an investigation carried out in two main Brazilian state courts (Court of Justice of São Paulo, and Court of Justice of Rio de Janeiro), between 2015 (January) and 2019 (December), considering challenges against arbitration awards, Euclides Filho and Daniel Ferreira concluded that the previously mentioned provision is the most used ground to attempt to set aside an arbitration award. In cases before the Court of Justice of São Paulo, the main arbitration seat in the country, parties seeking to vacate an arbitration award (partially or totally) succeeded in 17.32% of the cases).[1)] In the Court of Justice of Rio de Janeiro, the percentage was 14.28%. It is essential to point out that this percentage only

represents the successful challenges and has no relation to the total number of arbitration awards rendered within that period in Rio de Janeiro and São Paulo. On the contrary, if the parameter to be considered were the total number of arbitration awards, the percentage of successful cases would drop radically, since the majority of arbitral awards are not challenged in Brazilian Courts.

Malicious Prosecution

Finally, it is worth addressing the issue of malicious prosecution. Malicious prosecution in Brazil is regulated by articles 79 to 81 of the Brazilian Civil Procedure Code (Law 13.105/2015). It occurs when a plaintiff, defendant or even third party litigates in bad faith. A malicious litigant is one who: I – files a claim or defense contrary to the express provisions of the law or an indisputable fact; II – alters the truth of the facts; III – uses the proceedings to achieve illegal aims; IV – unjustifiably resists the prosecution of the lawsuit; V – acts frivolously in any procedural act; VI – institutes unfounded proceedings; VII – files a frivolous appeal. As a general rule, parties found guilty of malicious prosecution are ordered to pay a fine for their misconduct.

During the arbitration, OSX requested the tribunal to include in the arbitral award its rationale and conclusion about its competence on extra-bankruptcy credits?. OSX did this in order to later challenge the award on the arguing that the assessment of extra-bankruptcy credits should be exclusive of the judicial reorganization state court and that the arbitral tribunal had, therefore, exceeded its powers under the arbitration agreement. Justice Andrighi ? expressly rejected OSX's argument. However, she did not order OSX to pay a malicious prosecution fine as requested by ? AGF Engenharia?. The decision is consistent with the Court's jurisprudence. In a decision of 2012, the same Justice already stated that "the mere filing of the appropriate appeal, even with arguments repeatedly rejected by the original Court or without the allegation of any new ground able to refute the contested decision, does not reflect malicious prosecution nor justifies the imposition of a fine."

Conclusion

In the present case, according to the Brazilian Superior Court of Justice, the arbitral tribunal exercised its power within the limits of the arbitration clause and without practicing any enforcement measure, avoiding any issue whatsoever that might be of exclusive jurisdiction of the Judiciary.

In short, we might say that, once again, the Superior Court of Justice reaffirmed its deference to arbitration rulings, interpreting article 32 (arbitral awards challenging hypothesis) of the Brazilian Arbitration Act formally and narrowly. The Court considered that the situations that allow the Judiciary to declare an arbitration award void and null are those exhaustively mentioned in article 32. Furthermore, it demonstrated that the nature of the disputed claim does not detract from the arbitral tribunal's competence to decide whether the amount is due and how much is owed. The ruling is an important decision that honors arbitration and demonstrates that Brazil is an arbitration-friendly country.

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References

?1 (See FILHO, Euclides; FERREIRA, Daniel B.. Ação anulatória de sentença arbitral: uma análise doutrinária ?e empírica da jurisprudência dos Tribunais de Justiça dos estados de Santa Catarina, Rio de Janeiro e ?São Paulo, entre 2015 e 2019. Revista Brasileira de Alternative Dispute Resolution, vol. 2, n. 3, pp. 195-??214, 2020. Available at: https://rbadr.emnuvens.com.br/?

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