

Kluwer Arbitration Blog

Is a Party's Lack of Resources a Reasonable Procedural Defense to Render an Arbitration Clause Null and Void? A Brazilian Perspective

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Arbitration can be defined as a dispute resolution mechanism by which parties submit their case to a specifically chosen decision-maker to render a binding decision. Arbitration is a consensual procedure and can only be initiated if parties have agreed to do so.

As most arbitration laws, the [Brazilian Arbitration Act](#) (“BAA”) provides for the enforceability of an arbitration agreement if it is in writing (see BAA, Article 4). However, it has been held that an arbitration agreement generally does not have to be signed, if the consent of the parties is proven. Additional requirements arise when parties enter into standard form contracts where one party sets the terms of the contract (“adhesion contracts”) and the other one simply agrees to those terms. In this case, an arbitration clause is only valid either if the adherent initiates the arbitration proceedings or expressly agrees to the arbitration clause (see BAA, Article 4, second paragraph).

As a means of promoting legal certainty in these contracts, Brazilian courts have consistently upheld the enforceability of arbitration clauses, even when parties face subsequent financial hardship.

However, in a recent decision dated December 22, 2022, *Rosemar Gomes v. Rosstamp and VF Rossetti* (TJSP, Appeal n. 1006072-45.2021.8.26.0100, 22 December 2022 – “*Rosemar* case”), the São Paulo Court of Appeals (“TJSP”) ignored the current “state of the art” regarding this matter. In brief, the TJSP recognized that the supervening lack of resources of a franchisee in an adhesive franchise agreement rendered the arbitration clause null and void, thereby allowing the franchisee’s claims to proceed before the Brazilian state court.

Background

In the proceedings that led to the *Rosemar* case, claimant (the franchisee) sought the annulment of a franchise agreement and indemnification for damages, based on alleged abuse of economic dependence arising from the franchisor’s (respondent) failure to comply with its duty to inform.

In its statement of defense, respondent raised the existence of a valid arbitration clause and requested the case to be dismissed without prejudice.

The court of first instance accepted respondent's procedural defense and dismissed the case without prejudice pursuant to article 485 (VII) of the [Brazilian Code of Civil Procedure](#), which provides that a party may raise the existence of an arbitration agreement or the acceptance of competence by an arbitral tribunal as a ground to request the dismissal of the case without prejudice for lack of jurisdiction. Unwilling to accept this outcome, claimant filed an appeal against this decision.

Decision by the TJSP

Although the TJSP recognized that the arbitration clause concluded by the parties met the formal requirements under the BAA (particularly, the supplementary requirements for adhesion contracts), the court decided to declare it null and void due to claimant's financial hardship.

The presiding judge noted that claimant's lack of resources (confirmed by the fact that claimant was authorized to present its claims in *forma pauperis*) would render claimant incapable of bearing the costs of arbitration, thereby preventing its claim to be resolved either by litigation or through arbitration. It also noted that respondent did not inform claimant of the arbitration costs, upon the conclusion of the agreement.

Accordingly, because the arbitration clause violated claimant's fundamental right of access to justice, the TJSP considered the arbitration clause materially pathological and therefore null and void.

Violation of *Nemo Potest Venire Contra Factum Proprium*, Good-Faith, and *Kompetenz-Kompetenz* Principles

Access to justice is an object of greatest importance to the welfare state on the other side of the *laissez-faire*'s rules that held sway in the 19th century. As a matter of fact, the [Brazilian Constitution](#) confirms this principle by guaranteeing access to justice for any injury or threat a citizen may suffer (Brazilian Constitution, Article 5, XXXV). Nonetheless, the Brazilian Supreme Court in *M.B.V Comercial v. Resil Indústria e Comércio Ltda.* (Brazilian Supreme Court, Homologation of foreign arbitration award n. SE 5206, 8 May 1997) also established that alternative dispute resolution mechanisms do not violate the right of access to justice.

In the *Rosemar* case, it was beyond discussion that the arbitration clause inserted in the franchise agreement respected all the requirements imposed by the BAA. Claimant expressly agreed to the arbitral jurisdiction and, as such, supervening financial hardship should not have led the arbitration clause to be considered null and void. The Brazilian Superior Court of Justice ("SCJ") and the TJSP's previous decisions expressly rejected similar claims in the past (see SCJ, [Conflict of jurisdiction proceedings no. 186.210-SP](#), 10 March 2023; STJ, [Injunction no. 14.295](#), 13 June 2008; TJSP, [Appeal no. 1033464-73.2021.8.26.0224](#), 6 June 2023; TJSP, [Appeal no. 1002077-20.2021.8.26.0457](#), 29 March 2022; TJSP, [Appeal no. 0029502-72.2012.8.26.0451](#), 19 May 2014), which should have also been the outcome of the *Rosemar* case (fortunately, this

decision can still be overruled by the SCJ).

Deciding otherwise represents a violation of *nemo potest venire contra factum proprium* and *good-faith* principles by frustrating parties' legitimate expectations and mutual expectations that a validly concluded arbitration clause would be enforceable in Brazil.

Rosemar also disregards the internationally recognized *Kompetenz-Kompetenz* principle (see BAA, Article 8) under which parties must resort to arbitration when discussing the validity of an arbitration clause, so the arbitral tribunal itself can decide whether the arbitration clause is null and void.¹⁾

Conclusion

The *Rosemar* case sets a concerning precedent that financial hardship can be used as a procedural defense to invalidate the arbitration clause, casting doubt on the overall legal certainty related to Brazilian arbitration disputes. By allowing the case to proceed in state court, the TJSP contradicted its previous rulings and established a troubling precedent that undermines the stability of arbitration proceedings in Brazil. Because this decision is still subject to review, the SCJ will have a final say on whether the arbitral tribunal's jurisdiction to decide on its own competence is upheld under the circumstances of the *Rosemar* case.

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References

As reported [here](#), the SCJ established exceptions to the *Kompetenz-Kompetenz* principle in disputes arising from contracts of adhesion. On November 15, 2016, the SCJ in *Odontologia Rister de S. Lima v. GOU – Grupo Odontológico Unificado Franchising Ltda.* (SCJ, [Special appeal n° 1.602.076-SP](#), 15 September 2016) ruled that franchise contracts ought to be considered adhesion contracts. Accordingly, arbitration clause inserted therein must comply with supplementary requirements established under article 4, paragraph 2 of the BAA. In case the arbitration agreement does not *prima facie* meet these requirements, the SCJ held that Brazilian courts are entitled to examine the validity of the arbitration clause.

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