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São Paulo Court of Appeals Annuls Arbitral Award for Failure to Issue a Dissenting Vote

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The São Paulo Court of Appeals (“TJSP or “Court”) recently annulled a quantum arbitral award and referred the case back to the arbitral tribunal because one of the three arbitrators had failed to issue a dissenting opinion. The Court held that the co-arbitrator’s abstention amounted to a failure in the part of the arbitral tribunal to fulfill its duty, in violation of due process’ safeguards under Brazilian law (TJSP, AC nº 1094661-81.2019.8.26.0100, 24 May 2023 – “TJSP Judgment”).

The chair and one of the co-arbitrators had previously agreed on the merits, but reached a deadlock on quantum. The other co-arbitrator dissented on the merits, but abstained from voting on quantum. The chairman then cast his prevailing vote to issue the quantum award.

As a result, the TJSP Judgment dealt with an interesting question: do arbitrators have a right to abstain, or, applying the same logic conversely, do arbitrators have a duty to dissent? If so, under what circumstances? We address this decision below.

TJSP Holds That Arbitrators Are Not Entitled to Abstain

The arbitration underlying the TJSP Judgment arose out of three marketing and publicity agreements by which the Claimants ¹⁾ purchased media publicity via radio and television from the Respondents. The arbitral tribunal ²⁾ issued a Partial Arbitral Award by a majority comprised of Ms. Sampaio and Mr. Carmona, holding that the Claimants were liable to the Respondents for payments due under the contracts and that the Respondents were liable to the Claimants for damages and loss of profits. The remaining arbitrator, Mr. Guerreiro, dissented in the Respondents’ favor and ruled that the Respondents were not liable for damages for lack of causation.

On quantum, Ms. Sampaio voted for an independent expert opinion on the Claimants’ damages, Mr. Carmona voted to confirm the parties’ experts’ damages calculations, and Mr. Guerreiro did not vote on the grounds that in his opinion, the Respondents were not liable for damages at all. Mr. Guerreiro simply restated his opinion that the Respondents were not liable for damages for a lack of causation. On account of Mr. Guerreiro’s refusal to vote and the deadlock between Ms. Sampaio and Mr. Carmona, the latter exercised the prerogative of issuing a prevailing vote, as conferred upon the president of arbitral tribunals by Article 24, §1, of the [Brazilian Arbitration Act](#) (*see* Law

No. 13.129/2015 – Brazilian Arbitration Law – “BAL”, Art. 24, §1: “*When there are several arbitrators, the decision will be taken by majority vote. If there is no majority agreement, the vote of the president of the arbitral tribunal shall prevail.*”). The arbitration rules chosen by the parties conferred similar powers upon the president of the tribunal (*see* Ciesp/Fiesp Chamber of Conciliation, Mediation and Arbitration (“FIESP”), Article 15.2).

According to Mr. Carmona’s vote, the Claimants were liable to the Respondents for approximately 4.9 million Reais for unpaid amounts due under the contracts and that the Respondents were liable to the Claimants for approximately 1.7 million Reais in damages, which resulted in a net recovery to the Respondents of approximately 3.2 million Reais. The extent of the arbitrators’ disagreement was, therefore, limited to the damages that the Respondents owed the Claimants, if any.

The Claimants filed an annulment action seeking to annul the quantum award on the grounds that Mr. Guerreiro’s failure to vote violated the arbitration agreement and due process under Brazilian law. The trial court held that none of the causes for annulment as provided in the BAL had been established and, therefore, denied the annulment action.

The Claimants appealed and on 24 May 2023, the TJSP reversed the trial court’s decision to annul the arbitral award due to the failure of Mr. Guerreiro to concur with the majority opinion or otherwise issue a dissenting opinion. Consequently, the TJSP remanded the case back to the arbitral tribunal for a decision by all three arbitrators. In addition, in the event that Mr. Guerreiro again refuses to vote, the TJSP further held that another arbitrator is to be appointed in his place.

The TJSP found a lacuna in the BAL, pursuant to the *non liquet* principle, in that nothing in the BAL addresses an arbitrator’s right to abstain. The TJSP filled the gap with Brazilian civil procedure principles³⁾, and concluded that Mr. Guerreiro’s refusal to vote on quantum constitutes an abstention in violation of the Brazilian constitutional guarantees of access to justice and due process. In short, the TJSP held that (i) arbitral tribunals have a duty to resolve the disputes for which they are empowered, (ii) arbitrators are not entitled to omit themselves from exercising this authority, and, therefore, (iii) Mr. Guerreiro did not have the right to abstain on quantum, regardless of his previous dissent on the merits.

International Approach to “Truncated Tribunals”

National courts and arbitral tribunals often face “*circumstances in which a three-person tribunal continues an arbitration with either only two members or with three members, one of whom does not participate in the tribunal’s actions.*” (G. Born, ‘Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration’, *International Commercial Arbitration*, Third Edition, referred herein as “Born”, at p. 2097). These “truncated tribunals” are said to be “*in principle, pathological, and the issues arising from them can be difficult*” (Born, at p. 2097) and “[i]t very occasionally occurs that one co-arbitrator on a three-person tribunal either refuses to participate in deliberations or other activities of the tribunal, resigns at a critical juncture, or is similarly obstructive.” (Born, at pp. 2097-2098).

National courts are divided in their treatment of awards made by truncated tribunals. As an example, the Paris Cour d’Appel:

“annulled an arbitral award made by a truncated tribunal, where a co-arbitrator resigned immediately after receiving a draft award (prepared by the presiding arbitrator) that held against the party that had nominated him. The court held that the parties’ arbitration agreement provided for a three-person tribunal, not a two-person truncated tribunal, and that an award made by a truncated tribunal was invalid, regardless of the abusive or dilatory nature of the obstructive arbitrator.” (Born, at p. 2101).

The Paris Cour d’Appel (Judgment of 1 July 1997, *Agence Transcongolaise des Communications – Chemin de Fer Congo Océan v. Compagnie Minière de l’Ogooue*, XXIV Y.B. Comm. Arb. 281, 286, Paris Cour d’Appel, 1999) held that:

“contrary to the hypothesis advanced by [the party prevailing in the arbitration], according to which the award remains valid because it is rendered by the tribunal chosen by the parties even if one of the arbitrators does not participate in the deliberation or refuses to sign the award, since by continuing to accept his mission he still may exercise his prerogatives, the award at issue has been rendered by an arbitral tribunal lacking one of its members and the composition of which no longer conformed to the agreement on which its jurisdictional power was based.”

In any case, the Paris Cour d’Appel’s rationale appears not to extend to cases where institutional rules (and, hence, the parties’ agreement) provide for a truncated tribunal.

The Swiss Federal Tribunal adopted a similar rationale during the 1990s. The Federal Tribunal reversed a decision to uphold an award made by two arbitrators, where the third, party-appointed arbitrator had refused to participate in further arbitral proceedings. The Federal Tribunal reasoned that the award was not made in accordance with the parties’ arbitration agreement, which contemplated participation of a three-person tribunal, and that an:

“unjustified withdrawal does not simply lead to continuation of the proceedings in the absence of the withdrawing arbitrator and without appointing a new one. This could be argued only if the arbitration agreement so provides. Absent such a provision, the arbitral tribunal will again be properly composed either when the withdrawing arbitrator ... reconsiders his withdrawal or when he has been replaced. The result of the illegitimate withdrawal is limited to the arbitrator’s possible liability for damages and disciplinary measures. If the remaining members of the arbitral tribunal continue with the proceedings despite the withdrawal of the arbitrator, without having been authorized to do so by the parties, then the arbitral tribunal is not properly composed.” (see also: Judgment of 21 May 2008, 2008 SchiedsVZ 195, 196, German Bundesgerichtshof – denying recognition where the award was made by two rather than three arbitrators: Judgment of 27 February 2008, XXXV Y.B Comm. Arb. 349, Fujian High Ct., – same).)

The French and Swiss decisions are in line with the TJSP Judgment’s guidance regarding situations in which one of the arbitrators abstains. And even though other national courts have adopted more

sympathetic approaches to awards by truncated tribunals, when there is no express or implied agreement by the parties on the issue, the better approach seems to be:

“that an obstructive arbitrator must be replaced and that a truncated tribunal is not permissible. Where successive resignations threaten to obstruct the arbitral process, an arbitral institution or national court may appoint a replacement arbitrator (on the theory that the right to unilaterally nominate an arbitrator has been waived or forfeited). Any other approach ignores the parties’ agreement (to arbitrate before three arbitrators).” (Born, at p. 2102)

Other commentators list exceptions to this approach, such as “*in cases in which a quick conclusion to the arbitration is essential, the only sensible course may be for the two remaining arbitrators to continue with the proceedings and to render an award without the participation of the third arbitrator.*” (N. Blackaby ‘Chapter 4. Establishment and Organisation of an Arbitral Tribunal’, Constantine Partasides, et al., Redfern and Hunter on International Arbitration, Sixth Edition, “Redfern and Hunter”, at pp. 229 – 304, ¶4.155). But they also argue that “*if the case is one in which the interests of justice do not require a quick decision, a replacement may be appointed.*” (Redfern and Hunter, at pp. 229 – 304, ¶4.154). However, this approach provides little guidance to national courts on the enforcement of the resulting awards and, consequently, opens the door for *ex post* interpretation by the courts to whether such an award was in fact urgent or not, which can lead to further uncertainty about the award’s enforceability.

Issues Not Addressed by the TJSP

The TJSP did not address two points that the authors consider relevant:

First, the TJSP decision does not address the Claimants’ standing for the annulment action or a potential dilatory motivation behind the annulment action. Because Mr. Guerreiro concluded that Respondents owed no damages to Claimants, had Mr. Guerreiro voted in the quantum phase of the arbitration he would likely have voted against the Claimants’ interest. More specifically, if Mr. Guerreiro had written a dissent, he likely would have opined that the Claimants’ damages were “zero” for lack of causation, in accordance with his previous vote on the merits. Despite having little to gain from Mr. Guerreiro’s opinion, it is the Claimants who sought the annulment of the quantum award on account of Mr. Guerreiro’s abstention.

Second, the TJSP decision does not address Mr. Carmona’s certification of Mr. Guerreiro’s abstention, which could be construed as an actual vote. Pursuant to Article 15.2 of the FIESP Rules, Mr. Carmona certified that Mr. Guerreiro restated his understanding that Respondents were not liable for damages for lack of causation. Even though the TJSP interpreted this to amount to an abstention, another possible interpretation was that indeed Mr. Guerreiro “voted” in the quantum phase of the arbitration and that his “vote” was that Respondents owed no damages to Claimants. If this interpretation had prevailed, then Mr. Carmona would likely have been permitted to issue a third, deciding vote.

Conclusion

This post does not address the highly factual considerations in the TJSP Judgment, as the authors have not reviewed the case records and comment solely on the basis of the TJSP Judgment. As such, the authors do not opine on whether Mr. Guerreiro's reference to his prior vote on the merits, as certified by Mr. Carmona in the quantum award, actually amounted to a vote and constituted a "1x1x1" situation or amounted to a failure to discharge himself of his jurisdictional authority and constituted a "1x1x0" situation. For the purposes of this post, the guidance the TJSP provides for "1x1x0" situations (regardless of whether they actually classified that case correctly as a proper "1x1x0" situation) is that when an arbitrator has failed to issue his vote and otherwise failed to file a dissenting opinion, that award should be annulled and referred back to the arbitral tribunal for a complete decision — and if the dissenting arbitrator continues to refuse to opine, then a new arbitrator should be appointed in his place.

In view of this guidance, the authors opine that whether dissents ought to be mandatory is something to be determined on a case-by-case basis. In an abstract sense, dissents in arbitration have several merits and demerits, similarly to dissenting or concurring opinions in courts. The authors can conceive of several arguments against making dissenting votes mandatory—including their cost, delay, potential lack of utility in a "2x1" situation, and risk that dissents may be used by disgruntled losers as a basis for frivolous annulment actions. However, the authors can also conceive of several arguments in favor of dissents—such as the greater respect for the parties' agreement, the right to a reasoned award, and that dissents can be short and sweet to minimize concerns regarding time and costs, and focus on the merits, which are typically not reviewable by a court of law.

While there may be situations in which a dissent will be futile (i.e., such as transforming a "2x0" situation into a "2x1" situation), there may be situations in which the dissent will have a meaningful impact on the outcome of the case (i.e., such as transforming a "1x1x0" situation into a "1x1x1" situation). This, in the authors' view, is consistent with the institutional rules that provide for the replacement of an arbitrator who has died or become incapacitated during the course of the arbitration (i.e., a "1x1x0" situation), but which may not be necessary subsequent to the closing of the proceedings if the remaining two arbitrators have reached a majority opinion (i.e., a "2x0" situation).

While the TJSP has not yet provided guidance on a "2x0" situation, the authors take guidance from the *pas de nullité sans grief* principle and the experience of "truncated tribunals" (J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC Publication 729, Paris, 2012, at 3-649) subsequently to the closing of the proceedings to suggest that in those instances the award should not be annulled or referred back to the Tribunal because the remaining two arbitrators did reach a majority and any further work would be wasteful, unnecessary, and futile.⁴⁾


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References

¹ S17 Participações Eireli, Skytrack Comércio de Equipamentos Eletrônicos Ltda., Valquíria Aparecida Barbosa Ladeira and Luciano Ladeira (collectively, “Claimants”).

The arbitral tribunal was comprised of Gisela Sampaio da Cruz Guedes (“Ms. Sampaio”), José Alexandre Tavares Guerreiro (“Mr. Guerreiro”), and chairman Carlos Alberto Carmona (“Mr. Carmona”).

² While the TJSP held that the Brazilian Code of Civil Procedure (“BCPC”) does not apply to arbitral proceedings directly, the Court did conclude that the BCPC may be used by analogy under the guidance of the Brazilian Constitution to find binding principles of due process. Through this analogy, and because the BCPC requires judges to decide the cases before them, the TJSP concluded that arbitrators are equally so required under Brazilian law’s due process requirements.

³ For the avoidance of doubt, while arbitrators should also be permitted to write a dissent if they so desire when the two remaining arbitrators have reached a majority (i.e., thereby transforming a “2×0” situation into a “2×1” situation), in the authors’ view, those dissents should not be mandatory because the tribunal has indeed reached a majority decision.

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