

Kluwer Arbitration Blog

“Arbitration Observatory”: Decisions Involving Arbitration Issued by the State Court of São Paulo in Numbers

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On 22 November 2023, the Brazilian Arbitration Committee (“CBAr”) and the Brazilian Association of Jurimetrics (“ABJ”) officially launched the final report on the Arbitration Observatory project (“Report”), in an in-person event at the Attorney’s Association of São Paulo that attracted many law students, lawyers, and arbitrators (see [here](#) for further details).

The Report aims at producing empirical research of the judicial decisions involving arbitration issued by the State Court of São Paulo (“TJSP”), based on statistical and inferential methods, to foster and democratize the access to arbitration in Brazil (see [here](#)). CBAr has promoted other initiatives to foster arbitration, such as the recently published “Basic Foundations of Arbitration,” which is a comprehensive guide with the main concepts and practical insights of arbitration in Brazil.

The event was divided into two panels: (i) in the first one, [Marcelo Guedes](#), [Júlio Trecenti](#) and [André Abbud](#) (CBAr) explained the scope and foundations of the research as well as presented its main conclusions; and (ii) in the second, lawyers [André Seabra](#), [Bernardo Pires](#), [Gabriela Ristow](#), [Guilherme Zilio](#) and [Leticia Abdalla](#) discussed hot topics of the research results.

We discuss below the scope and main premises of the Report, and point out its most relevant conclusions.

Scope and Premises of the Report

The scope of the Report is quite specific. It covers: decisions (i) rendered by the TJSP’s specialized chambers on corporate law and arbitration, (ii) from March 2018 to November 2022, (iii) related to five particular actions, namely (iii.1) action to annul arbitral awards, (iii.2) action to seek interim measures before the constitution of arbitral tribunals, (iii.3) action to enforce arbitral awards, (iii.4) action to compel arbitration and (iii.5) action to challenge arbitration agreements.

Moreover, the Report did not encompass the totality of all the on-going cases before TJSP. The Report only analysed proceedings in which a final award (in the first instance) and/or a final judgement (in the second instance) was rendered. The research also did not include confidential proceedings, which case records are not publicly available.

Overall, the Report checked into 289 proceedings, in which 132 of them contained decisions rendered by the TJSP. By means of organization, the research divided such proceedings in two categories. In the first one, proceedings were divided by the type of actions:

- actions in support of arbitration – including actions to seek interim measures before the constitution of arbitral tribunals, actions to enforce arbitral awards and actions to compel arbitration; and
- actions to supervise the arbitral jurisdiction, such as actions to annul arbitral awards and actions to challenge arbitration agreements.

In the second category, the proceedings under study were divided by the type of contract in which the action was based on:

- standard form contracts – considered the ones that are “standardized and enjoy a relationship of economic dependence,” such as “franchise, cooperatives and dealerships”; and
- contracts in general, meaning all other types of contracts.

Such divisions were considered important for the research as they helped detect tendencies as to the judicialization of arbitral proceedings. According to the Report, the first layer attempted at distinguishing two different purposes to resort to state courts, whereas the second layer’s goal was to demonstrate that the purposes outlined in the first layer also depend on the nature of the agreements. In particular, the Report showed that standard form contracts are more commonly disputed in actions to supervise the arbitral jurisdiction and demonstrated that contracts in general are usually taken to state courts in actions in support of arbitration.

Main Conclusions of the Report

In light of the scope mentioned above, the Report reached the following relevant conclusions:

- **Types of actions.** Out of the 289 proceedings subject of the Report, 95 were actions to annul arbitral awards, 75 comprised actions to enforce arbitral awards, 63 concerned actions to seek interim measures before arbitration, 46 were actions to challenge arbitration agreements and 10 encompassed actions to compel arbitration. Thus, according to the Report, 51.2% of them were actions in support of arbitration, whereas 48.8% represented actions to supervise arbitration. This shows that the TJSP has slightly supported more than undermined arbitration, notably examining interim measures, preserving parties’ rights to initiate arbitral proceedings and enforcing arbitral awards;
- **Actions to annul arbitral awards.** ¹⁾ Regarding actions to annul arbitral awards based on standard form contracts, their success rate reached 59.3%. However, as to actions to annul arbitral awards based on contracts in general, this number dropped to 17.7%. According to the Report, the 59.3% rate of arbitral awards’ annulment based on standard form contracts results from a “greater asymmetry between the parties and certain structural deficiencies in the formation of arbitral tribunals and the administration of arbitral proceedings.” It is important to note that “success rate” in the Report encompassed actions that were totally upheld, partially upheld, as well as excluded cases in which parties agreed to settle the dispute. Another caveat is that the Report does not cover actions under judicial secrecy;
- **Success rate should not mean “annulment rate.”** According to the Report, success rate does

not automatically constitute an “annulment rate,” since this analysis depends on the challenge rate of arbitral awards, meaning how many arbitral awards were object to annulment proceedings, out of the ones that were complied with spontaneously by the parties. In the very words of the Report, “the success rate must be combined with the rate of challenges to arbitral awards to, in the end, result in what would be the likelihood of an arbitral award to be invalidated by the Judiciary”;

- **Amounts in dispute.** The Report concluded that there is a high asymmetry rate on the amount in dispute regarding the actions examined, which varied from BRL 10,000.00 (USD 2,000.00) to more than BRL 10,000,000.00 (USD 2,000.00). For instance, with regards to annulment actions of arbitral awards based on contracts in general, more than 50% of these proceedings were set up to BRL 100,000.00 (USD 20,000.00), while in standard form contracts most cases go from BRL 100,000.00 (USD 20,000.00) to BRL 1,000,000.00 (USD 200,000.00); and
- **Length of the proceedings.** The Report showed that actions challenging the validity or enforceability of arbitration agreements were the ones that lasted the most, approximately one year. In turn, the most expedite proceedings were actions to annul arbitral awards, which generally take nearly six months, followed by actions to seek interim measures before arbitration. Such statistics include appeals, although the Report excluded actions that were subject of more than one appeal from its scope.

Conclusion

The task force conducted by CBAr and ABJ has proved to be fruitful, as the Report has landed an important contribution to the Brazilian arbitration community. The data gathered by the research is absolutely key to students, lawyers, judges, and arbitrators as it intends to build open communication channels between state courts and arbitration. The Report also aims at future expanding to other state courts around the country and consequently tends to inspire other scientific research initiatives to join forces with new technologies and methods, particularly in the field of arbitration and private law.

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References

- ?1 As explored in recent articles (see [here](#) and [here](#)), such subject remains quite active in Brazilian case law.

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