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Hold On To Your Seat! São Paulo Court of Appeals Declines to Adjudicate Annulment of NY-Seated Award

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May parties contractually dissociate the forum competent to adjudicate annulment proceedings from the seat of the arbitration? In other words, may they choose one city as the arbitral seat while designating the courts of another to entertain proceedings to set aside the arbitral award?

This question has been rarely tested in the Brazilian scene, but recently came before the São Paulo Court of Appeals. The Court concluded that party autonomy cannot displace the jurisdiction of the courts at the seat to annul the award, much less dodge the exclusive role of the Superior Court of Justice in dealing with foreign awards in the context of recognition proceedings.

The São Paulo Court of Appeals' Decision

The case arose from an ICC arbitration seated in New York and governed by Brazilian law (the scope of application of the Brazilian law in the case is an issue in itself, as discussed below). Although the arbitral seat was abroad – making the award foreign from a Brazilian perspective – the underlying contract elected the courts of São Paulo as competent to hear any annulment proceedings. As the arbitration progressed, the arbitral tribunal issued a partial award holding that a gross-up obligation set forth in the contract was not subject to a monetary cap. This prompted certain parties to seek annulment of said partial award before the São Paulo courts. They alleged that the arbitral tribunal had exceeded its mandate by deciding issues beyond the scope defined in the terms of reference. The lower court rejected the claim, and the losing parties filed an appeal to the São Paulo Court of Appeals.

At the heart of appellees' response was the argument that Brazilian courts were not competent to adjudicate an annulment action directed at a foreign arbitral award. A proper understanding of the court's reasoning requires a quick glance at the surrounding legislative framework and the two legal tensions it raises – one tackled by the decision, the other left in the background.

Analysis: Are Brazilian Courts Competent to Adjudicate an Annulment Action Directed at a Foreign Arbitral Award?

Under the New York Convention – which Brazil has ratified – only the courts of the country in which, or under the law of which, the award was made may presumably entertain an action to set it aside. This is extracted from Article V(1)(e), a provision that has become a cornerstone of the New York Convention's primarily territorial model of annulment control. In Brazil, this standard was transposed into domestic law through Article 38(VI) of the Brazilian Arbitration Act – but with a twist (more on that in a moment). On the other side of the ledger, Article 22(III) of the Brazilian Code of Civil Procedure provides that Brazilian courts are competent to adjudicate disputes where the parties have either expressly or implicitly submitted to their jurisdiction.

Here lies the first source of tension: can the freedom offered by Article 22(III) of the Code of Civil Procedure override the presumption that only the courts at the seat of the arbitration have jurisdiction to adjudicate an annulment action? Or is the connection between seat and annulment forum beyond the reach of party autonomy? This was the core issue addressed by the São Paulo Court of Appeals.

The reporting judge grounded his vote in the structure of Brazil's arbitration legislation and the way it handles foreign awards. He acknowledged that Article 22(III) of the Code of Civil Procedure confers jurisdiction on Brazilian courts where the parties have expressly submitted to it, and that, in this case, they had designated São Paulo as the forum for annulment proceedings. Nevertheless, he held that, under Brazilian law, a foreign arbitral award may only be subject to judicial control within the framework of the recognition process before the Superior Court of Justice. In his view, that constitutes the sole procedural avenue for challenging a foreign award under Brazilian law.

A concurring opinion rendered by another member of the appellate panel agreed with this outcome while expanding on its international dimensions. The opinion explained that the Superior Court of Justice's jurisdiction over the recognition of foreign arbitral awards plays a role in safeguarding domestic public order while honoring the jurisdiction of the state where the award was rendered. The Superior Court of Justice's recognition process, it noted, serves to filter out awards that do not comply with the requirements provided for in the New York Convention and in the Brazilian Arbitration Act (which mostly replicates those established in the treaty); once that filter is passed, deference to the foreign tribunal is required. In support of this interpretation, it cited Article 38(VI) of the Brazilian Arbitration Act and Article V(1)(e) of the New York Convention.

These two provisions bring us to a second point of tension – one that the São Paulo decision did not address. As mentioned, Article V(1)(e) refers to annulment in the country "in which, or under the law of which, that award was made". A broad reading of this provision could arguably suggest that Brazil might have jurisdiction to annul the award if the arbitration was conducted under its arbitration law, even if it was seated abroad. As the action runs under seal, we cannot know for certain whether this was the case here. The São Paulo decision notes that the contract "determined Brazilian law as applicable (§ 9.8), being that also the law of the arbitration (§ 12.6)" (unofficial translation). Even in its clear original phrasing in Portuguese, this description begs the question: does this mean that the contract is subject to Brazilian law, and that the arbitrators would apply Brazilian law in deciding any dispute? Or does it mean that Brazilian law governs both the merits and the procedural framework of the arbitration itself? The distinction is both unclear and critical. Had the parties indeed chosen Brazilian arbitration law as the *lex arbitri*, might that have changed the analysis entirely?

Earlier, we noted that in regard to the subject of the decision, the Brazilian Arbitration Act mirrors

the New York Convention, with a twist. Now is the time to reveal what that twist is. While Article V(1)(e) of the New York Convention ties annulment proceedings with the country "in which, *or under the law of which*, that award was made", Article 38(VI) of the Brazilian Arbitration Act omits any reference to the latter possibility. Does this omission signal a deliberate legislative choice to adopt a strictly territorial model, tying annulment jurisdiction solely to the seat of arbitration (which, we assumed for the purposes of this article, is the place where the award was rendered)? And even if so, would that approach hold up, given the New York Convention's hierarchical prevalence over domestic legislation for purposes of recognition and enforcement of foreign arbitral awards in Brazil (as established under Article 34 of the Brazilian Arbitration Act)?

Conclusion

In deference to the limitations inherent to the blog post format, these questions must remain unanswered here – or perhaps deferred for fuller treatment elsewhere (stay tuned!). What we can extract from the São Paulo Court of Appeals' decision, however, is Brazil's tendency to confine annulment jurisdiction to the courts of the arbitral seat. Whether a more nuanced view of "the law under which the award was made" hypothesis might one day gain traction in Brazilian case law remains to be seen. For now, the lesson is simple: to avoid jurisdictional headaches in setting aside an arbitral award, you better hold on to your seat.

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