Doing Business in Brazil

When the conflict happens: general issues about Arbitration in Brazil

Arbitration, a consensual procedure to end a dispute between two parties, is widely used around the world. Instead of going to a Court, one or more arbitrators take place to resolve the conflicts and set agreements that are favorable for both parties. In Brazil, there are some important issues to be highlighted concerning the arbitration practice. The Brazilian Lawyers Mr. Eduardo Borges Leal and Mr. Rafael De Conti will talk about some perspectives and possible situations of arbitration under the Brazilian jurisdiction such as conditional claims, non commencing agreed settlement negotiations, non commencing mediations and specific situations in which the State Court can be accessed in order to mediate a dispute between arbitrators.

Question 1: Would it be possible to make a conditional claim in arbitration under Brazilian jurisdiction? Which are the difficulties such claim could bring?

Mr. Borges Leal: “In the Brazilian jurisdiction, a claim cannot be conditional. It must be clear, precise and not based on conditional situations (Brazilian Civil Procedure Code - Brazilian Federal Law n. 5.869/73- art. 324 - (hereinafter referred to as “the BCPC”).

There is no provision in Brazilian Arbitration Law regarding claims or conditional claims (Brazilian Federal Law n. 9307/96 - hereinafter referred to as “the BAL”). For this reason, the arbitrator or the Arbitral Tribunal must follow the civil procedure rules. This is based on a general principle recognized by the Brazilian State Courts.

Conditional claims depend on possible future aspects/facts or hypothetical circumstances and these events may not happen. On a Law Procedure perspective, it is not good for either party (they will work with future possibilities), for arbitrators (who will not have a sufficient overview of the dispute) and for the arbitration itself (a mechanism of solution that will lead with a possible dispute). In fact, the dispute has not materialized yet and it is very difficult to work with possibilities”.

Mr. De Conti: “What Eduardo says, and I agree, is that as a rule, a lawsuit cannot be based on generic demands, on a generic claim. The mentioned Article 324 says that 'the request shall be determined'. Let's understand that the claim, as a rule, shall be specific. But, of course, every rule has exceptions. The request can be generic according to the incise II of the Article 324: 'when it is not possible determine, as soon as possible, the consequences of the act or fact it is allowed generic request'. (As conditional claims are based on future considerations, it is usual find difficulties, what will reflect in more work hours).

When I talk about difficulties, I mean we need to study and understand the details of the agreements under dispute, understand each mechanism in every clause to, finally, have a technical judgement on the possibilities of a damage generated by a not good draft of a clause in an agreement. If the parties do not resolve the conflicts between them, and if the parties agree to hire an arbitration procedural, so a conditional claim based on the conflict about an agreement mechanism is possible”.

Question 2: Could non commencing agreed settlement negotiations lead to a lack of jurisdiction for arbitrators in Brazilian jurisdiction?

Mr. Borges Leal: “According to the BAL art. 8 (1) and the BCPC art. 1.105, IV, the existence of an arbitration clause or an arbitration agreement does not permit the parties to submit any dispute or issue arising from the contract to a State Court. Arbitration has its own jurisdiction and only the Arbitral Tribunal or the arbitrators may decide on any issue regarding the arbitration. In simple words, only if there is no arbitration clause or arbitration agreement, the State Courts have jurisdiction.

If Brazil is the seat of the arbitration, the Brazilian arbitrator would be competent to solve the dispute, since there is an arbitration clause. The arbitrator would observe if the procedure in the arbitration clause has been followed strictly by the parties. If the parties did not commence a settlement procedure, as agreed upon, before the arbitration, the arbitration procedure would be suspended until a settlement procedure has taken place. If they do not reach a settlement, the arbitration procedure will then be initiated, with the same arbitrator. In conclusion, the "non commencing of agreed settlement negotiation" or not having started negotiations to reach a settlement as a first step does not mean that arbitration cannot take place in Brazil, this merely suspends the arbitration procedure”.

Mr. De Conti: “As a friend of mine says: arbitration is similar to the Private Brazilian Health System, while the State Courts are similar to the Public Brazilian Health System, observing, for whom is a foreigner, that in Brazil the Public Health System is not so efficient as the Private... I hope the judges do not hear me...but this is the true...I have some friends that are judges and they are great professionals, but for some corporate disputes I prefer arbitrators. And, of course, there are necessary steps to be followed for an arbitration procedure to get started”.

Question 3: Could non commencing mediation lead to a lack of jurisdiction for arbitrators in Brazilian jurisdiction?

Mr. Borges Leal: “As it was explained in the last question, only the absence of an arbitration clause or an arbitration agreement leads to a lack of arbitration jurisdiction in Brazil (BAL, art. 8 (1)) and the BCPC art. 1.105, IV). If the parties decided to submit their dispute before an Arbitral Tribunal or an arbitrator, they cannot present a claim before the State Court. The arbitrator or the Arbitral Tribunal analyzes all issues regarding to the dispute and the arbitration procedures, including the validity of the arbitration clause. So, a "non commencing mediation" does not lead to a lack of arbitration jurisdiction in Brazil, but it can suspend the arbitration procedures”.

Mr. De Conti: “And I remind that a difference among mediation and arbitration is that the last one solves the conflict by an arbitrator (a judge chosen by the parties) while in the mediation the conflict is solved directly by the parties, without a third one”

Question 4: Is it possible, in Brazilian jurisdiction, to file for an order for joinder of arbitral proceedings at a State Court?

Mr. Borges Legal: “There is no provision in the BCPC regarding this situation. However, it is clear that any issue regarding the dispute or the arbitration procedure will be solved by the arbitrator or by the Arbitral Tribunal. And it is also clear that the arbitrator must follow the civil procedure rules (BCPC, art. 109). So, in this specific case, the party who wants to join two different arbitral proceedings must request it for the arbitrator(s) of its case. If the arbitrators decide that the arbitral proceedings must be joined (only if there are the same object, the same parties and same arguments), they will inform the other Arbitral Tribunal. The

arbitrator or the Arbitral Tribunal where the arbitration was requested first will be competent to solve the both cases. If there is a dispute between arbitrators or the Arbitral Tribunal to known who is competent to solve the two arbitrations, the arbitrators can file a motion to State Court in order to decide the competence in this situation".

Mr. De Conti: "What has to be decided into the Arbitration is up to the Arbitrator.The State Court can be accessed to decide if there is a problem or not, related to the use of arbitration in this specific situation"

Based on all the information provided on the interview, it can be inferred that the arbitration procedure has its own jurisdiction and, as it does not depend on a Court, only the arbitrators are competent to take decisions regarding to the mentioned process. Except for some specific cases, the State Court must come into play in order to decide the competence in this situation. To conclude, for many types of conflicts, arbitration is the more recommended and more efficient solution to settle agreements and end a dispute in a softer and faster way.

_____*October 2016*

Press Assistance:

Mrs. **Denise Fortes**