

Doing Business in Brazil

When the conflict happens II: specific issues about Arbitration in Brazil



In an arbitration procedure under Brazilian jurisdiction, an award means the last, the final decision. In the following interview, the lawyers Mr. Eduardo Borges Leal and Mr. Rafael De Conti will discuss about this subject and also enumerate the three conditions that must be verified in order to identify an award. They also discuss about cases in which an interim measure or a preliminary injunction are applicable and speak about challenges and enforcement in award proceedings and orders.

Question 1: What constitutes an (interim) award or order in Brazilian jurisdiction? Is it in this respect relevant whether the measure taken by the arbitral tribunal is named "Award"? Or is there a substantive test to be applied?



Mr. Borges Leal: “According to the BAL, art. 22-B, the arbitrator or the Arbitral Tribunal is entitled to grant a preliminary injunction or an interim measure. The party must require this measure at the same moment when the request for arbitration is filed. It is not an interim award, but only a decision in face of an emergency situation, that do not solve the dispute and can be reverse (e.g. the part needs to hear a witness urgently due to his health conditions). Award in Brazil is a name used only for final decisions in the arbitration proceedings. And it is important, because there is no appeal for awards (art. 29 of art. 22-B of BAL). Furthermore, awards must fulfill some conditions, such as (i) a report of the arbitration procedures; (ii) an explanation of the law and the arguments used to solve the dispute; and (iii) the final decision (art. 30 of the BAL). In order to identify an award, it is necessary to verify these conditions. It is a substantive test to be applied.

The Arbitral Tribunal or the arbitrator can provide a partial award (art. 23 (1) of the BAL). It will occur when the arbitrator can definitely solve some aspects of the dispute, but not the whole dispute. The same conditions observed in art. 30 of the BAL must be fulfilled”.



Mr. De Conti: “I think that this is a good occasion to reproduce part of a paper called Arbitration in Brazil – Law, Economics and Politics. The mentioned part of the text was about the Structures of the Brazilian Arbitration Law and of the New York Convention. I said in the paper: 'The Brazilian Arbitration Law (Law 9.307/1996), ... initially establishes (i) the liberty of the parties to choose the rules that will rule their relation in case of conflict (Art. 2); express (ii) about the Convention of Arbitration and its Effects (by which the parties agree with the arbitration through a contractual clause, and by which the parties hire how this will occur, in Arts. 5-12); establishes rules on (iii) Arbitrators (such as choose of the arbitrator, his liability and ... power, in Arts. 13-18); establishes rules about (iv) the Arbitration Procedural (in which are listed the steps of the procedural and the principles of natural law such as equality principle, right to defense, neutrality of the arbitrator, and the principle of freedom of persuasion, in Arts. 19-22); establishes rules about (v) Arbitral awards (such as its constitutive elements and consequences, in Arts. 23-33); and, at the end, establishes rules on the Enforcement of the Arbitral Awards (including the Arbitral Awards produced in foreign jurisdiction, in Arts. 34-ss.). Concerning the New York Convention (of 06/1958, ratified by Brazil with the Decree 4.311/2002), this Convention, among other issues, (i) establishes the enforcement of the arbitral awards in countries which ratified the international convention (Art. I); (ii) establishes the necessity of

each State recognize the validity, in its own jurisdiction, of the clause of arbitration (Art. II); and (iii) respects the sovereign of each State, concerning the enforcement of the arbitral awards (Arts. III-VII). From a practical and theoretical perspective of Law, the Brazilian Law of Arbitration as well as the New York Convention were very well made; basically because on these norms exist the privilege of the natural law and of the proportional equality in a general sense, engendering the agreement of the efficiency with justice, according to the best juridical thought, and according to the Law & Economics”

Question 2: Are orders enforceable in Brazilian jurisdiction? Can procedural decisions (e.g. a decision to bifurcate proceedings) be challenged in Brazilian jurisdiction? How could an award/order as to the production of documents be enforced? Can (interim) awards, on jurisdiction or otherwise, be challenged/set-aside in your jurisdiction?

Mr. Borges Leal: “In Brazilian jurisdiction, only orders of State Court are enforceable. And only an award (partial or not) can be enforced by the State Court (art. 30 of BAL). Procedural decisions in Brazilian arbitration cannot be challenged, it means, the parties must accept all procedural decisions and all orders during the arbitration. The arbitrator or the Arbitral Tribunal will try to enforce their order/or procedural decisions such as the production of documents. If the party does not comply with the order, it will be presumed that the arguments of the contrary part are true and correct and it will be taken in consideration in the award (art. 22 (3) of BAL). So, it is not a good strategy not to observe orders and procedural decisions.

Only an award (final decision) can be challenged/set-aside in Brazilian State Court. The party must demonstrate that the award cannot be enforced according to art. 32 of BAL. Art. 32 of BAL sets up an exhaustive list of examples when awards are void, such as (i) the arbitration clause or the arbitration agreement was void; (ii) the arbitration procedures were not followed; (iii) the arbitrator was impartial; (iv) the award did not fulfill the conditions expressed in the art. 26 of the BAL for an award, etc”.

Mr. De Conti: “There are two Brazilian judicial decisions that I'd like to remember. *'The clause of arbitration previously contracted is cause of extinction of the lawsuit, without the examination of the central discussion, observing that the State jurisdiction is guaranteed in the hypothesis of lawsuit which aims nullify the arbitral award, or in the defense in a enforcement lawsuit, because the arbitral award is a juridical instrument enforceable in courts'* – (Court of Rio de Janeiro, Appeal 1.678-6/2003, 8 civil section of TJRJ, Adriano Celso Guimarães); the other decision is: *'How the parties had submitted the solution of their conflict to the Arbitration Judgment, according the articles of association of the company, there is no possibility to access the Judicial Power to solve the conflict engendered of their relation. Shall the parties submit themselves to the arbitral award which will be made by the Arbitrator, whose will be choose in the right moment. Preliminary argument approved, singular sentence extincted and extincted the lawsuit without resolution of the content issue (art. 267 VII of Brazilian Procedural Codex)'* – (Court of Minas Gerais, AI 471.292-1 – Com. O AI 472.088-1, 10 civil circuit of TJ-MG, Roberto Borges de Oliveira)”.



As it could be seen, the term “award”, under Brazilian jurisdiction, designates strictly the final decision in an arbitral procedure, in which appeals are not allowed. A partial award is allowed when arbitrators are not able to solve the whole dispute and, in cases of emergency situations, the arbitrators or the Arbitral Tribunal should grant a preliminary injunction or an interim measure. As arbitration procedures comprehend very complex issues like those previously mentioned, the legal advice from well-prepared lawyers or law offices is important and necessary. Also, an interesting phenomenon to observe, that is happening in Brazil due to the nature of the arbitration procedures is called third-party funding. The practice, already in use in countries like Australia, United Kingdom and United States, is growing fast in Brazilian lands and many investors are funding a party of an arbitral process in exchange for recovering a percentage of the investment whether the party wins. This is a typical win-win situation, a very a rich topic to be discussed.

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