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Brazilian Superior Court of Justice on challenges to arbitrators and relevance of foreign proceedings challenging to award

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Jurisdiction: **Brazil**

The Brazilian Superior Court of Justice (STJ) has recognised a foreign arbitral award despite allegations that:

- The award was invalid because it had been handed down by arbitrators who were not
- It was impossible to grant exequatur due to alleged violations of Brazilian public policy.
- The recognition proceedings should be stayed pending an application to annul the award in a foreign court.

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Background

The Brazilian Arbitration Act 1996 (*Law No. 9,307/1996*) provides as follows:

- Article 38 (VI):

"The request for recognition or enforcement of a foreign arbitral award may be denied only if the defendant furnishes proof that: VI - the arbitral award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which the arbitral award has been made."

- Article 39 (II):

"The request for recognition or enforcement of a foreign arbitral award shall be denied if the Federal Supreme Court [After the Constitutional Amendment n.

45 from 2004, the competence to recognize foreign awards was shifted from Supreme Federal Court to the STJ], ascertains that: II - the recognition or enforcement of the award is contrary to Brazilian public policy."

The *ICC Arbitration Rules 1998* (ICC Rules 1998) provide as follows:

- Article 11.3:

"1. A challenge of an arbitrator, whether for an alleged lack of independence otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based."

- Article 28.6:

"6. Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

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Facts

A dispute between YPFB Andina S/A (Andina) and Univen Petroquímica Ltda (Univen) arose sales and purchase agreement. After about two years, Andina sought to terminate the agreement and Univen initiated ICC arbitration proceedings. Univen argued that there was no *force majeure* event or impediment beyond Andina's control to justify Andina's failure to perform its contractual obligations. Further, Univen claimed that Andina had attempted to terminate the agreement in order to profit from the soaring prices of natural gas in the international market. However, the ICC arbitral tribunal held in its award that Andina had validly terminated the agreement and Andina moved for its recognition before the Brazilian Superior Court of Justice (STJ) in order to enforce it against Univen in Brazil.

In the recognition proceedings, Univen claimed that the award was unenforceable because it had been rendered by arbitrators who were not impartial. Univen alleged that the arbitrators had hidden facts which demonstrated their partiality and that this rendered the award null and void. Andina on the other hand, argued that Univen had not raised any questions regarding the arbitrators'

impartiality at any time during the course of the arbitration proceedings and were, thus, from making such an argument.

Univen also argued that the basis of the tribunal's decision (that a resolution passed by the government was a supervening or *force majeure* event that entitled Andina to terminate the agreement) meant that the recognition of the arbitral award would infringe Brazilian public policy. In response, Andina claimed that the STJ was prevented from re-opening the subject matter of the dispute.

Finally, it was also claimed that the recognition proceedings should be suspended pending the determination of a motion before the Uruguayan courts seeking to vacate the award.

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Decision

In a unanimous decision dated 15 August 2012, the STJ recognised the award handed down by ICC arbitral tribunal. The court ruled that Univen was estopped from challenging the arbitrators' impartiality at such a late stage when, according to the ICC Rules 1998, it should have done so as early as possible in the arbitration proceedings. The STJ found that the parties were duly notified of the appointment of arbitrators and no challenges were made at that time. Moreover, Univen was estopped from challenging the impartiality of the arbitrator that it had itself appointed.

With regard to the suggestion that recognition of the award would offend against Brazilian public policy, the court ruled that it was prevented from re-opening the merits of the dispute, including the reasons which led to a valid or invalid termination of the agreement between the parties. According to Articles 38 and 39 of the Brazilian Arbitration Act 1996, no court is allowed to re-analyse the merits of a dispute submitted to arbitration. As a consequence, the court rejected Univen's requests for orders declaring the contract valid and holding Andina responsible for loss and damage.

Finally, the court rejected the argument that recognition should be stayed because there was an application for annulment of the award before the Uruguayan Court of Appeals. Univen had not provided any proof of the current status of the parallel proceedings in Uruguay, and the court held that the mere existence of the Uruguayan proceedings was not enough to justify a stay of the recognition proceedings. In this connection, the STJ also referred to the fact that Article 28.6 of the ICC Rules 1998 clearly states that by agreeing to submit a dispute to ICC Arbitration Rules, the parties waive any form of appeal.

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Comment

The decision is one of the first to consider the ICC Arbitration Rules in connection with arbitrators' lack of impartiality. The importance of this judgment relates to the fact that Brazilian case law on the standards of arbitrators' independence and impartiality is still developing. By holding that the parties were estopped from arguing partiality at such a late stage, when they ought to have presented a challenge as soon as possible, the STJ sheds light on parties' expected conduct in arbitration, namely, that they should raise any challenges to arbitrators as soon as possible.

Furthermore, by recognising the award despite the existence of parallel proceedings in Uruguay set aside the award, the STJ gave an important indication of the standard of proof that will apply when the court is called on to assess the relevance of parallel proceedings and their effect on recognition proceedings in Brazil. Although no express reference was made to Article 38(6) of the Brazilian Arbitration Act 1996 or Article V(e) of the *New York Convention*, the court found that the defendant had not provided evidence on the status of the annulment of the award in Uruguay to ground its suspension. This suggests that, where a party wishes to argue that recognition proceedings should be suspended on the grounds of parallel proceedings in a foreign court, it will be important to put forward evidence of the nature and status of the foreign court proceedings. It is not enough merely to prove their existence.

Finally, in refraining from analysing the merits of the arbitral award, the decision is consistent established arbitration jurisprudence in Brazil.

Case

YPFB Andina S/A v Univen Petroquímica Ltda, Reporting Justice Francisco Falcão (STJ, SEC n. (15 August 2012), published on 30 August 2012.

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