

Superior Court of Justice rules on consequences of successful challenges to arbitral awards

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Introduction

In a recent decision,⁽¹⁾ the Superior Court of Justice, the highest appellate court in Brazil for non-constitutional matters, decided on the consequences of a successful application to set aside an arbitral award.

As will be shown below, the court's decision resulted from a declaration by the state courts that the nullity of arbitral awards is provided for in Article 33 of the Arbitration Act (9,307/96).

This provision was partially revised by Act 13,129/15, which amended several parts of the Arbitration Act, including Article 33(2).

Notably, this case was considered under the original version of the Arbitration Act (ie, before its 2015 amendment) due to the date on which the lawsuit had been filed.

Facts

The special appeal reviewed by the Superior Court of Justice was connected to two lawsuits brought before the Rio de Janeiro Court of Justice.

In the first lawsuit, the claimant applied to set aside an arbitral award rendered by an arbitral tribunal which had been constituted under the auspices of the Arbitration Chamber of the Fundação Getúlio Vargas (CA-FGV). The Rio de Janeiro court granted the plaintiffs' claim and declared the arbitral award null and void on the basis of Article 32(IV) of the Arbitration Act, which reads as follows: "The award is null and void if... [it] is issued outside the limits of the arbitration agreement."

In addition to the declaration of nullity of the arbitral award, the Rio de Janeiro court also stated that:

it is the responsibility of the parties and only of them to decide whether they intend that a new award be proffered by the arbitral tribunal or if they prefer to go to the judiciary to settle their disputes.

Neglecting that the parties had entered into a contract which contained an arbitration clause appointing the CA-FGV – and instead founding its claim on the excerpt abovementioned – one of the parties initiated the second lawsuit, whose subject was the same arbitral proceedings under which the award had been set aside.

However, considering that the arbitral agreement was mandatory and binding, the first-instance judge dismissed the case due to the presence of the arbitration agreement in the contract, stating that parties had to commence an arbitral proceeding. On appeal, the Rio de Janeiro court upheld this decision.

Following the Rio de Janeiro court's decision, the party filed a special appeal before the Superior Court of Justice.

Superior Court of Justice's decision

The Superior Court of Justice dismissed the special appeal and upheld the Rio de Janeiro Court of Justice's decision. In so doing, it confirmed that the parties had to commence a new arbitral proceeding before the CA-FGV to resolve their dispute, as the judiciary had no jurisdiction over the merits of the dispute.

As mentioned, due to the date on which the parties had initiated the second lawsuit, the applicable law was the original version of the Arbitration Act (ie, before the changes from Act 13,129/15 were introduced). The original version of Articles 32 and 33 of the Arbitration Act read as follows:

Article 32. The award is null and void if:

I – the submission to arbitrate is void;

II – emanated from those who is not able to act as an arbitrator;

III – does not contain the requirements of article 26 of this Act;

IV – is issued outside the limits of the arbitration agreement;

V – not to decide all the litigation submitted to arbitration;

VI – proven that it was pronounced for malfeasance, graft, or passive corruption;

VII – rendered out of time, respecting the provisions of article 12, item III, of this Act; and

VIII – the principles referred to in article 21, paragraph 2, of this Act.

Article 33. The interested party may submit to the State Court having jurisdiction an application for the setting aside of the arbitral award, in the cases foreseen in this Law...

Paragraph 2. The decision granting the setting aside motion shall:

I - declare the arbitral award null and void, in the cases foreseen in Article 32, items I, II, VI, VII and VIII;

II - order the sole arbitrator or the arbitral tribunal to make a new award, in the other cases.

On the other hand, the amended version of Articles 32 and 33 read as follows:

Article 32. The award is null and void if:

I – the arbitration agreement is void;

II – emanated from those who is not able to act as an arbitrator;

III – does not contain the requirements of article 26 of this Act;

IV – is issued outside the limits of the arbitration agreement;

VI – proven that it was pronounced for malfeasance, graft, or passive corruption;

VII – rendered out of time, respecting the provisions of article 12, item III, of this Act; and

VIII – the principles referred to in article 21, paragraph 2, of this Act.

Article 33. The interested party may request to the competent Judicial Authority to declare the arbitral award null in the cases set forth in this law...

Paragraph 2. If the request is granted, it will set the arbitral award aside, and in the cases of Article 32, it will rule, if applicable, that the arbitrator or the arbitral tribunal issues a new ruling.

Justice Nancy Andrighi, judge-rapporteur, stated in her decision that under the original version of the Arbitration Act, the effects of a declaration of nullity of an arbitral award differed based on the nature of the defects. In particular, if an award is declared null

under Article 32(IV) under the original version of the act, the arbitral tribunal must issue a new award. As such, the Superior Court of Justice dismissed the special appeal and determined that the parties had to start a new arbitral proceeding before the CA-FGV.

Current Arbitration Act

The original version of Article 32(2) is arguably open to criticism, both because of the lack of accuracy regarding its terms and due to the absence of proper treatment for some of the consequences of declaring an arbitral award null.

Regarding the systematic approach adopted by Brazilian legislation on the mechanism of challenging an arbitral award, two further aspects must be considered.

The first refers to the principle adopted by the legislature when elaborating on Article 33 and its 2015 amendment. According to Carlos Alberto Carmona,⁽²⁾ whereas in some countries (eg, Italy) the state court responsible for the nullity of the arbitral award may render a new decision on the merits of the dispute in certain circumstances, this is not the case in Brazil.

However, this does not necessarily mean that the parties should initiate a new arbitral procedure. An award may be declared null for three different reasons – namely if:

- the arbitration agreement itself is null (Article 32(I));
- the defect affects the arbitral proceedings (Article 32(II), (VI), (VII) and (VIII));
or
- the defect affects only the arbitral award (Article 32(III) and (IV)).

In the first case (ie, the arbitral award is declared null as a result of the nullity of the arbitration agreement itself (Article 32(I))), the logical consequence is that the parties are no longer bound by the arbitration and thus the interested party can make a claim before the judiciary.

In the second case (ie, where the defect in the award affects the regularity of the arbitration proceeding – in other words, where the independence and impartiality of the arbitrators is in question (Article 32(II)), the arbitrators' have committed a crime (Article 32(VI)), the award was rendered after the deadline (Article 32(VII)) or there has been a violation of due process (Article 32(VIII))), a new arbitration must be initiated from the beginning, starting with the appointment arbitrators.

In the third case (ie, if the defect is inherent only to the arbitral award, its form or content), it is possible that the only consequence will be that the same arbitral tribunal must issue a new decision, without the need for a new arbitration to take place.

Finally, the Arbitration Act also provides the parties with the possibility of requesting that the judiciary issue:

- a supplementary arbitral award, in cases where the arbitral tribunal has not decided all of the requests submitted to arbitration (Article 33(4)); and

- a partial annulment of the arbitral award, through the analogical application of Article 38(IV) relating to the recognition of foreign arbitral awards, where it is possible to split the award into valid and invalid parts.

Comment

The Superior Court of Justice's decision is arguably correct based on a literal reading of Article 33(2)(II) of the Arbitration Act, which states that the judiciary should require the arbitral tribunal to render a new arbitral award where the original sentence has been issued outside the limits of the arbitration agreement.

With the enactment of Act 13,129/15, the legislature has given judges declaring the arbitral award null the power to decide whether, according to the specific facts of the case, the arbitrator or court should render a new award.

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Endnotes

(1) Resp 1736646/RJ, Rel Ministra Nancy Andrihgi, terceira turma, julgado em 05/06/2018, DJe 07/06/2018.

(2) Carmona, Carlos Alberto. *Arbitragem e Processo: um comentário à lei 9.307/96*. 3 ed Sao Paulo, Atlas, 2009, p 424.

Marcelo Richter, LLM student, assisted in the preparation of this article.

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