The Arbitration Review of the Americas

2022

Arbitrability of Disputes Involving the Public Administration in Brazil

The Arbitration Review of the Americas

2022

The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.

Other nuggets include:

• helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
• an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
• a similarly helpful summary of recent Canadian court decisions;
• another on Mexican court decisions that showed a rather mixed year; and
• the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.

Arbitrability of Disputes Involving the Public Administration in Brazil

Andre de Luizi Correia

Correia, Fleury, Gama e Silva Advogados

Summary

IN SUMMARY

This article provides an overview of the key topics relating to the arbitrability of disputes involving the public administration in Brazil. Starting with a summary of the evolution of court precedents and legislation, this article deals with issues of subjective arbitrability, objective arbitrability and some peculiar features concerning government contracts procured by corruption, leniency agreements, contracts resulting from public tenders and contracts providing for corruption.

DISCUSSION POINTS

- Contacts entered by the public administration
- Subjective and objective arbitrability
- Transferable and disposable property rights
- Contracts procured by corruption
- Leniency agreements
- Contracts preceded by public tenders
- Doctrine of separability
- Contracts providing for corruption

REFERENCED IN THIS ARTICLE

- Arbitration Act (Law No. 9,307/96)
- Public Bid Act (Law No. 8,666/93)
- Anti-Corruption Act (the Clean Company Act) (Law No. 12,846/13)
- Improbity Act (Law No. 8,429/92)
- Civil Code
- *Lage* case
- *AES v CEEE*
- *TMC Terminal v MPF*
- *Compagás v Consórcio Carioca Passarelli*
- *Centrad v GDF*
- *ANP v Petrobras*

INTRODUCTION

Brazil is an arbitration-friendly jurisdiction. The business community embraced arbitration vigorously after the enactment of the Brazilian Arbitration Act (Law No. 9,307/96) (BAA) in 1996, and in 2001 the Supreme Court recognised the constitutionality of arbitration. Since then, Brazilian jurisprudence has adopted a pro-arbitration approach, including in cases involving the public administration.

The debate on the use of arbitration by the public administration started even before the enactment of the BAA, when Brazil's Supreme Court ruled the notorious ***Lage*** case[1] in 1973, confirming and validating an arbitration procedure in which the federal government was sentenced to pay a certain indemnification for the expropriation of rights and assets of a private company, the Lage Corporation.

The original wording of article 1 of the BAA already prescribed that any person 'capable of entering into contracts' was entitled to make use of arbitration to resolve conflicts regarding 'freely transferable property rights'. It was well accepted by scholars that by referring to any person capable of entering into contracts, article 1 of the BAA allowed the use of arbitration by entities from the public administration (eg, the federal, state and city governments and government-owned companies), which are capable of entering contracts relating to freely transferable property rights, as provided by article 175(sole paragraph)(I) and article 37(XXI) of the Constitution, as well as other sets of rules, such as the Concessions Act (Law No. 8,987/95).

Court precedents changed drastically over the years. After unfavourable rulings by state courts in 2002 (***AES v CEEE***, State Court of Appeals of Rio Grande do Sul)[2] and 2003 (-***Guggenheim Case***, State Court of Appeals of Rio de Janeiro),[3] the Superior Court of Justice-[4] overturned the decision rendered by the State Court of Rio Grande do Sul in ***AES v CEEE***, finding that the arbitration clause included in the contract between a private company (in this case, AES) and a government-controlled entity (in this case, CEEE) is mandatory.

This precedent, issued in 2005, set the path for many others, encouraging legislators to pass specific laws allowing the use of arbitration by the public administration, such as:

- article 11(III) of Law No. 11,079/04 (modified by Law No. 12.766/2012, regarding public-private partnerships);
- article 23-A of Law No. 11,196/05 (which altered the Concessions Law); and
- articles 15(III) and 31 of Law No. 13,448/2017 (concerning tender for biddings and prorogation of biddings in specific fields).

However, the lack of express provisions in the BAA concerning the use of arbitration by the public administration still raised several questions and concerns, especially regarding the nature of disputes that could be resorted to arbitration.

In 2015, a bill reforming the BAA was approved, making important amendments to clarify controversial issues and deal with matters not previously regulated. The amendment confirmed that state entities can submit disputes to arbitration, restating what had already been authorised by several specific laws.

Following the amendment of the BAA, many Brazilian states have enacted their own laws concerning the inclusion of arbitration agreements in contracts entered into by the state government and its entities, its representation during the procedure, the appointment and independence of arbitrators and standards of publicity and transparency of the arbitration proceedings and arbitration awards. Examples include Decree No. 46,245/18 issued by the State of Rio de Janeiro in 2018 and Decree No. 64,356/19 enacted by the State of São Paulo in 2019. The State of Minas Gerais, in a pioneer initiative, had already enacted a similar law (Law No. 19,477/11), providing for the use of arbitration by the state government.

Despite the major evolution of Brazilian legislation and court precedents, some questions still concern arbitrators and counsel in arbitration proceedings involving the public administration. This article addresses some of those questions.

SUBJECTIVE ARBITRABILITY V OBJECTIVE ARBITRABILITY

The amendment of the BAA in 2015 put an end to the debate on subjective arbitrability in cases involving the public administration. Federal Law No. 13,129/15 added paragraphs 1 and 2 to article 1 of the BAA, expressly prescribing that 'direct and indirect public administration may use arbitration to resolve conflicts regarding transferable public property rights' and '[t]he competent authority or direct public administration entity that enters into arbitration agreements is the same entity that enters into agreements or transactions.'

Direct and indirect public administration is a broad concept that encompasses a wide range of government entities and government bodies, from government-held companies to regulatory agencies, government-controlled semi-public companies and government agents, in all levels of the public administration (federal, state and city levels).

The subjective capacity of a government entity to validly conclude a binding arbitration agreement (and to be a party to arbitration proceedings) is dependent only on the laws and regulations applicable to the capacity to validly enter into contracts. If the person representing the government in the agreement that contains the arbitration clause is vested with powers and authority to execute the contract and bind the government to its terms and conditions, the same person shall also be considered to be authorised to bind the government to the arbitration clause.

Certain pieces of legislation, however, have added specific requirements to arbitration agreements, for example:

- article 4 of Decree No. 64,356/2019 enacted by the State of São Paulo requires that the arbitration clause be drafted by the attorney general;
- article 2 of Decree No. 46,245/2018 enacted by the State of Rio de Janeiro prevents the use of ad hoc arbitrations, and article 4(I) requires that the City of Rio de Janeiro be the mandatory seat of the arbitration; and
- article 6 of Law No. 19,477/2011 enacted by the State of Minas Gerais forbids arbitration in equity awards.

There are many other examples of local or specific requirements provided by state or specific laws that condition the validity of arbitration agreements entered by the public administration.

Therefore, if the contract was validly executed by a person vested with sufficient authority to represent the public administration, and the arbitration clause was drawn in accordance with specific requirements provided by local or specific law, if any, there is very little – if no, nothing – available to challenge the subjective arbitrability of the dispute arising therefrom.

On the other hand, the BAA sets clear limits to the objective arbitrability of disputes relating to the public administration, limiting the types of disputes that the public administration is entitled to arbitrate. Article 1 provides that 'those who are capable of entering into contracts may use arbitration to resolve conflicts related to freely transferable property rights'. Paragraph 1, which deals specifically with arbitration involving the public administration,

adds that '[d]irect and indirect public administration may use arbitration to resolve conflicts regarding transferable public property rights.'

The key question, therefore, is to establish a clear concept of what should be considered a transferable property right held by a government entity.

TRANSFERABLE PROPERTY RIGHTS

In general, the expression 'freely transferable property rights' is interpreted as encompassing economic disposable rights, which can be freely waived, transferred or negotiated. Contracts entered by the public administration, even when involving property rights, also relate to matters of public interest.

However, there is a clear distinction between primary and secondary public interest, as highlighted by the Superior Court in ***AES v CEEE***. The former covers the collective public interest per se and relates to basic fundamental rights of the whole society; the latter covers acts and economic activities performed by public entities, being of ancillary nature, used as means to pursue the general interest of society as a whole.

As illustrated by Felipe Sperandio: 'the public administration cannot waive or assign its regulatory sovereignty and legislative power to enact tax law, which falls within the definition of primary public interest. The public administration can, however, grant tax benefits, exceptions, and rebates to certain industries or individuals, over a period of time, to incentivise consumption and boost the economy, which falls within the definition of secondary public interest.'[5]

In 2005, when ruling ***AES v CEEE*** (a dispute arising out of a power purchase agreement), the Superior Court of Justice found that the subject matter of the arbitration involved 'economic activities performed by a government-controlled company – in the case at hand, sale of electricity' – falling under the definition of disposable and transferable property or economic rights. Several court precedents that followed the decision confirmed that economic activities performed by the government and discussions on transferable property rights related to the secondary public interest are arbitrable.

In ***TMC Terminal v MPF***,[6] ruled in 2008, the Superior Court of Justice found that the agreement to arbitrate set forth in contracts entered by semi-public companies is mandatory and could not be waived or revoked by supervenient decrees issued by the government. The Court highlighted that 'the use of arbitration by government entities is not only permissible but advisable, since it privileges the public interest' by providing a more efficient means for the resolution of the dispute. It also emphasised that the primary public interest of the whole society cannot be mixed with the secondary public interest, meaning 'the interest of the public administration itself'.

In conclusion, the Court found that contractual rights and payments arising therefrom are disposable and, therefore, arbitrable.

In ***Compagás v Consórcio Carioca Passarelli***,[7] ruled in 2011, the Superior Court of Justice clarified the distinction between primary and secondary public interest. Compagás is a semi-public company controlled by the State of Paraná, which commenced court proceedings seeking a declaration that the arbitration agreement included in a gas supply agreement entered with Consórcio Carioca Passarelli was invalid. The government-controlled company argued that the supply of gas is a matter of public interest and, therefore, does not fall within the concept of transferable and disposable rights.

The Court, however, found that 'the subject matter of the dispute between the parties – discussion of the economic and financial balance of the contract – involves monetary and disposable rights. Therefore, the parties could have settled the dispute directly, without the need to resort to court litigation or arbitration.'

In 2017, in ***ANP v Petrobras***,[8] the Superior Court of Justice ruled a motion to challenge jurisdiction filed by the Brazilian Regulatory Agency of Oil and Gas (ANP) against Petrobras and decided, on a prima facie – and not very clear – analysis of objective arbitrability, that contracts entered by the public administration are, in principle, arbitrable.

In that case, Petrobras had filed for arbitration against ANP on the basis of a concession agreement to explore and produce oil and gas. The parties disputed the location and demarcation of certain oil fields. ANP requested the courts to bar the arbitration, alleging that the subject matter of the arbitration was non-arbitrable because the demarcation oil field falls within the federal government's regulatory powers.

Justice Napoleão Nunes Maia Filho, originally assigned to preside the case, found that the contractual and economic nature of the rights at stake did not allow Petrobras to transfer or dispose of them, since the exploration of oil and gas is not made for the benefit of Petrobras but to the government and society as a whole.

Dissenting Justice Regina Helena Costa, whose opinion prevailed, highlighted that the action of entering into a contract is by itself a form of disposing of property rights. Furthermore, 'property rights set forth in concession agreements are disposable, and therefore, can be submitted to the arbitral jurisdiction.'

Justice Benedito Gonçalves added that 'the dispute between Petrobras and ANP arising out of a concession agreement for exploitation of oil and gas touches disposable property rights, being, therefore, arbitrable.' This ruling strengthened the idea that monetary disputes arising out of concession agreements are arbitrable.

Following the amendment of the BAA in 2015, there has been a significant increase in the number of arbitrations involving the public administration in Brazil. Most of the decisions rendered so far by state courts of preferred arbitration seats, such as São Paulo, Rio de Janeiro and Minas Gerais, have embraced the idea that monetary disputes arising out of contracts entered by government entities are, in general, arbitrable – not only disputes concerning the economic and financial balance of concession contracts, but disputes relating to payments, indemnification, liquidated damages and even penalties for breach of contract.

UNFAVOURABLE PRECEDENT OVERTURNED BY THE STATE COURT OF THE FEDERAL DISTRICT OF BRAZIL

In ***Centrad v GDF***,[9] ruled in November 2019, the State Court of the Federal District of Brazil had found that a government procurement contract was not arbitrable. The case related to a high-stake construction contract between construction companies involved in Operation Car Wash and the state government, where one of the parties to the contract had entered into a leniency agreement admitting that the contract was procured by corruption.

The State Court of the Federal District of Brazil, ruling a request for a preliminary injunction filed by Centrad, had found that the competence-competence rule and the autonomy of the arbitration clause provided by article 8 and sole paragraph of the BAA should be mitigated in

light of the general principle of administrative morality. The underlying idea of that principle is that both the public agents and the private parties involved in negotiations of public contracts have a general duty of honesty.

In sum, the Court found that the duty of honesty, once violated by corruption, tainted the entire contract, including the arbitration clause and, therefore, undermined arbitral jurisdiction. It based its decision on a precedent of the Superior Court of Justice (***Odontologia Noroeste v GOU***)[10] in which the Third Bench of Justices concluded that '[t]he Judiciary may, in cases where the arbitration clause is prima facie pathological, that is, clearly illegal, declare the nullity of this clause regardless of the stage of the arbitration proceedings.'

In our view, the decision in ***Centrad v GDF*** was incorrect because the procurement of public contracts by bribery does not necessarily lead to pathological or prima facie illegal arbitration clauses. The purpose of article 8 of the BAA is precisely to ensure the autonomy of the arbitration clause, regardless of the invalidity of the contract.

The rule is quite broad, encompassing all possible defects that may make a contract null and void or invalid. There is no reason not to apply article 8 of the BAA and the principle of separability when the defect making the contract invalid is corruption.

It seems that the Court treated the nullity for corruption as a special or worse kind of defect deserving moral punishment, which is not supported by any statutory rule or general principle of law. This unfounded intention to give special status to invalidity for corruption and to 'punish' the parties (by preventing them from resorting to arbitration) was made clear in the following excerpt of the decision:

> if the competence-competence principle can be exempted in relations between private subject to the legal regime of private companies, then, a fortiori, it may also be so when the public interest is at stake, as in the present case, in which there are serious suspicions of serious offense to the principles of morality and probity, perhaps with repercussions in the penal sphere. In fact, the appellant is a group that, as it is internationally public and notorious, is sunk in an ocean of corruption involving astronomical figures, to the detriment of national interests - which are the ones that interest us most closely -, with the participation of agents public, especially the first echelon, everything that has already resulted in arrests and convictions (…). On the other hand, the arbitration clause was agreed in 2008, that is, when the local authority was removed from office by court order, imprisoned cautiously, became the target of numerous criminal actions and many other for improbity, already counting on some convictions.

This dangerous precedent was not corroborated by any rule or principle of law provided by the Brazilian legal system and was rendered in the context of an interlocutory appeal where the public administration sought interim relief to suspend the effect of the arbitration clause.

Recently, the State Court of the Federal District ruled the case on the merits and denied the public administration's claim to set aside the arbitration clause, overturning the previous decision on the preliminary appeal. The Court found that the agreement to arbitrate was valid and binding upon the public administration (***Centrad***) because the arbitration clause was included in the public bidding and in the contract, and the use of arbitration is authorised by article 11(III) of Federal Law No. 11,079/04 (the Public-Private Partnerships Act).

Moreover – and most importantly – the Court stated that 'the principle of good-faith prevents the public administration from acting in contradiction to its previous behaviour' of agreeing

to arbitrate during the bidding phase and including the arbitration clause in the contract. The Court applied the prohibition on contradicting one's own behaviour, conceived in the expression ***venire contra factum proprium*** (estoppel in common law countries)

ISOLATED (AND UNCLEAR) PRECEDENT

The Superior Court of Justice handed down an unclear and controversial precedent in 2019-[11] in a motion to challenge jurisdiction filed by the federal government in the context of a class action (collective arbitration) brought by several shareholders against Petrobras and the federal government, seeking compensation for the devaluation of Petrobras's shares in the São Paulo Stock Exchange-B3, allegedly caused by the corruption scandal unveiled by Operation Car Wash.

The arbitration clause is set forth in Petrobras's by-laws and is binding upon all shareholders. The federal government is the controlling shareholder of Petrobras, which appointed the former officers and directors of the company who committed the wrongful acts disclosed within Operation Car Wash. The federal government, ultimately responsible for payment of damages, argued that it was not bound to the arbitration agreement in Petrobras's by-laws.

The Court reaffirmed that 'at the current stage of Brazilian legislation, it is undoubtful that the public administration, both at the direct and indirect levels, is entitled to use arbitration to resolve its disputes,' adding that the arbitrability of shareholder disputes is also undoubtful. However, it concluded that the federal government should not be a party to the arbitration, on the basis that there was no law or statute authorising the federal government to arbitrate shareholder disputes. The ruling also found that the nature of the dispute – a collective action for damages arising out of corruption – 'transcended the limits of the arbitration clause'.

This decision has raised several concerns among the arbitration community because it reopened discussions regarding the principle of legality and the need for legal authorisation to arbitrate – issues that had been definitively clarified, and overcome, with the amendment of the BAA in 2015. The decision was challenged via motion for clarification, which has not been ruled yet.

Regardless of the possible outcome of the motion for clarification, this decision will not be a setback in arbitral jurisprudence, because: (1) the ruling is not binding on future cases, since Brazilian precedents are binding only under exceptional circumstances that are not present in the case at hand; and (2) the major concern of the Superior Court of Justice was clearly to avoid class arbitration against the federal government for corruption activities uncovered within Operation Car Wash.

CONTRACTS PROCURED BY CORRUPTION

The debate on objective arbitrability has additional layers of complexity when it comes to disputes involving contracts procured by corruption. In general, issues of corruption are arbitrable in Brazil.

The definition of corruption under Brazilian law requires the involvement of a government entity or a public official. The Brazilian legal framework adopts a broad concept of 'public official', who is, in general, any individual who works for any branch or agency of government at any of its levels (federal, state or municipal), or for any state-owned company or entity. The concept of public official is also extended to anyone who works for a private company that has been engaged to provide public services (eg, concessionaries).

Private bribery is not regulated by Brazilian legislation, but corruption in public procurement contracts or contracts in general entered with government entities is widely regulated by statutory law. The relevant laws dealing with the civil consequences of corruption on contracts are as follows.

- The Public Bid Act (Law No. 8,666/93), which establishes that contracts resulting from public tenders are null and void in the event of any illegality in the tender procedure (article 49, paragraphs 1 and 2).
- The Anti-Corruption Act, also called the Clean Company Act (Law No. 12,846/13), establishes an entire system of civil and administrative liabilities for companies involved in bribery, including a broad set of consequences of corruption on contracts with the public administration. The Act also introduced into the Brazilian legal system the leniency mechanism, allowing companies that agree to cooperate with legal authorities (disclosing information and documents proving the acts of corruption) to enter into leniency agreements for the indemnification of state entities harmed by corruption.
- The Improbity Act (Law No. 8,429/92), which punishes illicit enrichment of public officials, as well as the losses caused to the public treasury as a result of any illicit conduct. Sanctions for acts of improbity are applicable not only to public officials but also to third parties (individuals or legal entities) who have induced or contributed to the wrongdoing or who, in any way, have benefited from the act. Sanctions vary from confiscation of assets or profits that may have been unduly obtained to the detriment of the public treasury to payment of fines or prohibition to enter into contracts with the government, among other things.
- The Civil Code (Law No. 10,406/2002) governs private contracts in general and contains several provisions that may apply to contracts tainted by corruption as it is also applicable to certain contracts entered by state-owned companies (especially semi-public corporations). In short, contracts providing for corruption are null and void (articles 166(II), 167 and 187) and, therefore, unenforceable, whereas contracts procured by corruption are voidable (articles 145, 146 and 171(II)) and can be enforced, if none of the parties seeks to avoid it. In the case of voidable contracts, an innocent party can seek the revision of burdensome provisions obtained through corruption (articles 478 and 479) or claim damages for actual losses (article 403), undue payments (article 876) or unjust enrichment of the other party (article 884).

The two remedies provided by Brazilian law for contracts tainted by corruption are the voidance of the contract and payment of damages. The voidance of the contract does not affect the arbitrability of the dispute, since the BAA adopted the ***Fiona Trust*** approach,[12] based on the doctrine of separability, under which the arbitration clause may remain in force, even when the main contract is null and void.

In Brazil, the separability of the arbitration agreement from the main contract is a rule of law, provided by article 8 of the BAA, as follows:

> [a]n arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

A further paragraph adds that:

> [t]he arbitrator has jurisdiction to decide ex officio or at the parties' request, the issues concerning the existence, validity, and effectiveness of the arbitration agreement, as well as the contract containing the arbitration clause.

Several court precedents corroborate the doctrine of separability.[13]

One can, therefore, easily presume that issues of corruption are arbitrable in Brazil, provided that the contract contains a valid arbitration clause, drafted in accordance with specific requirements set forth by local or specific law, such as state decrees, since the legal remedy applicable to findings of corruption is the voidance of the contract and payment of damages, which fall within the concept of transferable and disposable property rights.

This presumption, however, is not always so clear.

CONTRACTS PROVIDING FOR CORRUPTION

Brazilian law draws a distinction between contracts procured by corruption and contracts that provide for corruption. Except for contracts concluded as a result of illegal public tenders, contracts procured by corruption are merely voidable at the instance of the innocent party, whereas contracts providing for corruption are null and void.

The difference is that a voidable contract is 'valid and enforceable' until the innocent party takes action to set it aside. Under the article 172 of the Civil Code, an innocent party is not compelled to set aside a voidable contract and may choose to enforce it. Pursuant to article 177, the decision annulling a voidable contract will be effective ***ex nunc*** (ie, as of the date of ***res*** judicata).

Conversely, a contract that is null and void is from the outset regarded as entirely ineffective. The nullity cannot be remediated (article 169 of the Civil Code), as it can be raised by any interested party or by the Public Prosecutor's Office (article 168) and can also be declared ex officio by the court (article 168, sole paragraph). A decision declaring a contract null and void is effective ***ex tunc***, as if the contract had never come into existence.

Article 166 of the Civil Code also states that a contract is null when 'its object is illicit, impossible or cannot be determined', 'the common determining motive of both parties is illicit' or 'its purpose is to defraud imperative law'.

The joint intention to commit corrupt acts under the contract may be expressly stipulated or mey be, as is more commonly the case, dissimulated. In any case, a contract providing for corruption falls within article 166(II) to (IV) of the Civil Code, therefore being null and void and entirely ineffective from the outset.

It may seem unlikely that a contract that never came into existence according to imperative law could produce a binding agreement to arbitrate. It may seem unreasonable to advocate that the arbitration clause contained in a contract providing for corruption would be a separate agreement. Corruption is at the heart of the contract and, therefore, the illicit object and the illicit common motive of the contract would also taint the arbitration clause.

Although the separability of the arbitration agreement from the main contract is a fixed rule of law in Brazil, article 8 of the BAA prescribes that the nullity of the contract shall 'not necessarily' entail the invalidity of the arbitration clause, making clear that separability is a presumption that might be disregarded depending on the circumstances of the case at hand.

It is, therefore, questionable whether contracts providing for corruption fall under the exceptions to the separability rule.

The approach adopted by English courts in ***Fiona Trust*** may provide a balanced solution of the apparent dichotomy between article 8 of the BAA and article 166 of the Civil Code.

In ***Fiona Trust***, the Court of Appeal considered that if arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery, just as much as they can decide whether a contract has been procured by misrepresentation or non-disclosure. It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular.

If adapted to the Brazilian legal framework, the ***Fiona Trust*** approach leads to the following conclusions.

- An arbitration clause contained in a contract providing for corruption is not invalid per se. Under article 8 of the BAA, the arbitration agreement is to be treated separately from the main contract that has an illicit object. The terms and conditions providing for corruption are illegal and, therefore, should be considered null and void, pursuant to article 166 of the Civil Code; however, the agreement to arbitrate is not illicit and does not violate any imperative law and, therefore, should be regarded as valid and enforceable.
- The arbitration agreement should not persist, being null and void from the beginning, when the arbitration clause itself was procured by corruption. When the validity of the agreement to arbitrate is put into question, and it is proven that corruption is at the heart of the arbitration clause, arbitral jurisdiction should be refused.

NULLITY OF PUBLIC TENDERS AND PUBLIC CONTRACTS

Article 49 of the Public Bid Act declares that the competent authority for approving tender procedures 'must annul the bid in case of illegality, ex officio or at the request of third parties' and that 'the invalidity of the tender procedure leads to the invalidity of the contract'.

Brazil's most cited legal scholars and most court precedents admit that the Public Bid Act imposes a non-waivable duty on the competent authorities to declare the nullity of a contract concluded within an illegal tender process carried out by the public administration; thus, the nullity of a contract resulting from a public tender tainted by corruption would be non-waivable and non-arbitrable for lack of objective arbitrability, since the government would not be entitled to dispose of its right to annul the contract.

It is questionable, though, whether damages arising from such annulment can be claimed through arbitration. The public administration is entitled to recover the amounts unduly paid under the illegal contract and to be reimbursed for all costs and expenses incurred with the tender procedure. Those issues concern economic aspects of the annulment of the tainted contract.

In such case, the arbitral tribunal would not have to rule on annulment of the contract itself, but on the proof and measurement of damages resulting from the annulment declared by the competent court or by the public administration itself.

ACTS OF IMPROBITY

Procuring contracts through bribery of public officials is an act of improbity (see above) that holds not only the public official but the briber liable under the Improbity Act.

Acts of improbity are investigated by the Public Prosecutor's Office. The Improbity Act (articles 15, 16 and 17) vests the Public Prosecutor's Office and state entities with exclusive standing to bring action against the public official who committed the wrongdoing and harmed the public administration. The Public Treasury Court is the proper venue to hear improbity lawsuits and apply the sanctions set forth by article 12 of the Improbity Act.

Commentators and court precedents understand that companies or private individuals involved in acts of improbity cannot be sued alone. The joinder of the public official who participated in the wrongdoing is mandatory. In most cases, however, public officials are not parties to the contract containing the arbitration clause and cannot be submitted to arbitration proceedings.

More importantly, the Improbity Act (article 17(1)) prohibits 'negotiation, settlement and conciliation' of improbity actions. Hence, actions of improbity are non-negotiable by virtue of law. Most precedents suggest that not even the measurement of damages can be settled or negotiated.

CIVIL SANCTIONS BASED ON THE ANTI-CORRUPTION LAW

The Anti-Corruption Law (article 19(I)) imposes judicial sanctions on companies involved in corruption. The reference to 'judicial' may imply that the sanctions can only be applied by judicial courts.

Nonetheless, a broad interpretation of the concept of judicial sanctions is also admissible to encompass not only sanctions applied by a judicial court but also by jurisdictional bodies with similar powers, such as an arbitral tribunal.

It is widely accepted in Brazil that arbitration, as an alternative dispute resolution method, precisely fulfils the fundamental right of access to justice provided by article 5(XXXV) of the Constitution (***SERPAL v Continental do Brasil***).[14] Moreover, the BAA (article 18) rules that '[a]n arbitrator is the judge in fact and in law, and his award is not subject to appeal or recognition by judicial court'. Thus, the arbitrators have powers, within the scope of their mandate, to apply the 'judicial sanctions' set forth in the Anti-Corruption Act.

LENIENCY AGREEMENTS

Leniency agreements may also give rise to challenges to the arbitral jurisdiction. The Anti-Corruption Law (article 16) allows legal entities to enter into leniency agreements with the relevant authorities, as long as they admit their wrongdoings, cease their involvement in the illicit practice and agree to effectively cooperate, on a permanent basis, with the investigation. Under article 16,(2), the execution of a leniency agreement shall reduce the amount of the applicable administrative fine by up to two-thirds and exempt the legal entity from the civil sanctions set forth in article 19.

Although the leniency agreement 'does not exempt the legal entity from its obligation to make full restitution for the damages caused' (article 16(3)), the lenient company should not be compelled to pay the same indemnification twice. In this sense, the relevant authorities must assure that the same indemnification agreed and paid by the lenient company will not be claimed again before other forums.

Thus, the execution of a leniency agreement may affect not only the admissibility of a case on the merits, but also on the jurisdiction, raising questions regarding whether the arbitral tribunal should rule a case based on corruption that has already been settled with the competent authorities.

CONCLUSION

In conclusion, the arbitrability of disputes involving the public administration is no longer a controversial issue in Brazil. The use of arbitration by the public administration was embraced by legislators and, therefore, authorised not only by several specific laws that apply to public administration affairs but also by the BAA.

Objective arbitrability is broad and encompasses all conflicts relating to 'freely transferable property rights', which can be transferred, waived or disposed of by the public administration. According to court precedents, monetary disputes arising out of contracts in general or economic activities performed by government entities, as well as disputes for payments or damages arising out of concession agreements, fall within this category of arbitrable rights.

However, it is still unclear whether all sorts of disputes resulting from contracts procured by corruption are arbitrable. In general, issues of corruption are arbitrable in Brazil, but certain types of remedies cannot be sought outside judicial courts because they involve non-waivable rights, such as the nullification of illegal tender procedures and contracts resulting therefrom, and damages against public officials involved in acts of improbity.

Nevertheless, Brazilian courts have usually adopted a pro-arbitration approach and, therefore, courts tend to admit the use of arbitration at least to resolve claims for indemnification brought against private companies and government entities involved in illegal bids or acts of improbity.

Endnotes

1 STF, Extraordinary Appeal N71467, Presiding Justice Bilac Pinto, judgment of 14 November 1973. ^ Back to section

2 TJRS, Interlocutory Appeal N70003866258, Presiding Judge Teresinha de Oliveira Silva, judgment of 14 November 2002. ^ Back to section

3 TJRJ, Interlocutory Appeal N 2003.002.07839, Presiding Judge Ademir Pimentel, judgment of 29 October 20. ^ Back to section

4 STJ, Special Appeal N 612.439/RS, Presiding Justice JOÃO OTÁVIO DE NORONHA, judgment of 25 October 2005. ^ Back to section

5 Gloria M Alvarez, Mélanie Riofrio Piché, Felipe V Sperandio, *International Arbitration in Latin America: Energy and natural Resources Disputes* (Wolters Kluwer: 2021), p. 450. ^ Back to section

6 STJ, Writ of Mandamus N 11,308/DF, Presiding Justice Luiz Fux, judgment of 09 April 2008. ^ Back to section

7 STJ, Special Appeal N 904,813/PR, Presiding Justice Nancy Andrighi, judgment of 20 October 2011. Back to section

8 STJ, CC N 139,519, Presiding Justice Regina Helena Costa, judgment of 11 October 2017. Back to section

9 State Court of the Federal District, Interlocutory Appeal 0711026-55.2018.8.07.0000, Presiding Judge Fernando Habibe, judgment of 20 November 2019. Back to section

10 STJ, Special Appeal N 1.602.076, Presiding Justice Nancy Andrighi, judgment of 15 September 2016. Back to section

11 STJ, CC N 151,130, Presiding Justice Luis Felipe Salomão, judgment of 17 November 2019. Back to section

12 *Fiona Trust & Holding Corp & Ors v Yuri Privalov*, [2007] EWCA Civ 20, decision of 24 January 2007. Back to section

13 See, for example, Superior Court of Justice, Special Appeal N1.550.260, RS, judgment of 12 December 2017, Presiding Justice Paulo de Tarso Sanseverino; State Court of São Paulo, Interlocutory Appeal N2027249–62.2018.8.26.0000, judgment of 4 July 2018, Presiding Judge Fortes Barbosa. Back to section

14 STJ, Special Appeal N 1.698.730/SP, Presiding Justice Marco Aurélio Bellizze, judgment of 8 May 2018. Back to section

Andre de Luizi Correia andre@cfgs.com.br

Brazil

Tel: +55 11 5180 5700

http://www.cfgs.com.br/

Read more from this firm on GAR