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RECOGNISING THE VALIDITY OF A US COURT DECISION BY THE BRAZILIAN SUPERIOR COURT OF JUSTICE IN THE RATIFICATION OF AN ARBITRAL AWARD

BY **PAULO BRANCHER AND STEFANIA MARIOTTI MASETTI**

> AZEVEDO SETTE ADVOGADOS

Almost 10 years ago, the Brazilian Adriano Dedini Ometto sold two sugar and alcohol plants to Spanish company Abengoa, which paid for them with BRL 300m in cash; as a consequence of this transaction, the company assumed total debts amounting to BRL millions.

After some time, Abengoa felt it was betrayed, and stated Mr Ometto sold the plants based on a

promise that their production capacity would be higher than it actually was. The case was tried before the International Chamber of Commerce (ICC). The resulting award was favourable to Abengoa; Ometto was ordered to pay indemnification amounting to nearly US\$150m.

The decision, which became final, was challenged in the US at federal level. According to Ometto, the

award should be annulled because the chairman of the arbitration tribunal was not impartial, having a conflict of interest arising from his relationship with Abengoa during the arbitration process. The chairman of the arbitration tribunal argued he was not aware of the conflict of interest alleged by Ometto, and Ometto was not successful in this North American lawsuit.

Meanwhile, Abengoa filed lawsuit 9412/SE before the Brazilian Superior Court of Justice, aiming to have the foreign decision duly ratified, making it valid and effective in Brazil as provided for in the Civil Procedure Code. This would allow it to collect the award payable to it. In the claim, Abengoa tried to demonstrate that all the requirements needed for ratification had been met.

Ometto opposed the decision, alleging the New York Courts made a mistake when determining compliance with an award that would be defective based on the chairman of the arbitration's conflict of interest.

Ometto stated that this fact, associated with many other violations of the Brazilian public order principles, namely the judge's impartiality and independence, would be enough to annul the adverse arbitral decision that could not, therefore, be ratified. His allegations were based not only on the Arbitration Law, but also on the provisions of

the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Brazil is a signatory.

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Those facts gave rise to the lawsuit opposing the foreign award at the Superior Court of Justice under the same number (9412/SEC), which is still pending a final decision. Notwithstanding, Abengoa took the lead. The reporting judge, Hon. Mr Félix Fisher, understood that the Brazilian Courts may not, under any circumstance, violate American sovereignty.

Later, judges João Otávio de Noronha and Nancy Andrichi came to a completely different understanding. They accepted Ometto's defence and opposition to the foreign award. Decisions of the other judges of the Special Courts are still pending.

Ultimately, what do the basic principles of the Brazilian law determine? Which is to prevail: sovereignty of a foreign country or the Brazilian

public order?

It is known that the Superior Court of Justice lacks jurisdiction to examine the merits of decisions involving claims for the ratification of foreign awards. This is because the lawsuit is not a new judgment on a dispute already settled by a foreign authority. It is not a national judicial review of a foreign award. On the contrary, it concerns the control of documentary and procedural formalities required for a correct decision.

In other words, ratifying a foreign award is a mere examination and, therefore, has limited litigation capacity. It is about assessing certain requirements established by the national legal system, and authorising ratification of an award and permitting its effects in the country. The requirements

in question include an analysis of the aspects related to national sovereignty, public order and morality.

Thus, the validity of an arbitration award would depend on whether there was some violation of Brazilian public order. That is, if a decision somehow violates the Brazilian legal system, it may not be deemed valid and effective in the country, as provided for in article 963, item VI, of the new Civil Procedure Code.

So, if we understand that the arbitrator was guilty of corruption and this can be considered 'a matter of public



order', the possibility to review a foreign decision would be justified.

The concept of public order is, as we know, rather wide, so the Superior Court of Justice has understood that, for the purpose of ratifying a foreign decision, it must be limited to acts evidently and absolutely inconsistent with the Brazilian legal system.

At the same time, one must bear in mind that New York Convention, to which Brazil is a signatory, determines, in its article 5, item II, subitem b, that recognition and enforcement of an award may be refused if, in the understanding of the competent authority, it is not in accordance with the public order of the country.


In the same sense, article 39, II, Brazilian Arbitration Act (Law 9307/1996, as subsequently amended) determines that, if the national public order is violated, the foreign decision may not be deemed valid and effective.

Thus, much depends on whether the Superior Court of Justice decides that the partiality and lack of independence of the chairman of the arbitration tribunal in charge of entering the foreign decision are facts that violate the national public order.

The well-known jurist Manuel Pereira Barrocas clarifies that "an arbitrator is, in a way, like a judge. The independence is a State of Mind of a judge and, also, of an arbitrator". So it seems obvious that the statements constitute, without a shade of doubt, violations of the Brazilian public order. Violating the principle of a judge's or arbitrator's impartiality

violates not only the parties' interests, but also that of the public order, since violating a principle is much more serious than violating a rule.

In other words, disregarding a principle implies violation not only of a specific mandatory order, but of the entire system of orders. It is the most serious kind of unlawfulness or unconstitutionality; so, if corruption committed by the chairman of the arbitration tribunal is proven, nullifying the foreign decision, provided it is based on a well-grounded decision, may be beneficial to the Brazilian Judicial Branch, as a way to avoid an unreasonable number of lawsuits filed to discuss the merits of foreign decisions within the scope of ratifying foreign awards.

To date, the lawsuit has not unified judges in deciding that this is a violation of public order. Nevertheless, the final result will be a milestone in the Brazilian ratification system. 



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