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CONSIDERATIONS ON INTERNATIONAL TRADE ARBITRATION IN BRAZIL*

CONSIDERATIONS ON INTERNATIONAL TRADE ARBITRATION IN BRAZIL

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SUMMARY

The objective of this article is to discuss International Commercial Law and the arbitration it imposes. We also briefly analyze various interpretations of the changes made to arbitration law by the new Code of Civil Procedure (Law 13.105/2015). Finally, we examine the arbitration system in international trade and the advantages and disadvantages of using this system in Brazil.

Keywords: Arbitration. International Law. International Arbitration. International Trade.

ABSTRACT

The purpose of this article is to respect international commercial law and to arbitrate for its institution. A brief analysis of several interpretations of the amendments that the new Civil Procedure Code - Law 13.105 / 2015 made to the arbitration law was also made. Finally, we study or arbitration system in international commerce, as advantages and disadvantages of using this system in Brazil.

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1 INTRODUCTION

Arbitration is a form of conflict resolution and its importance is due to recognized, as we commonly observe the incapacity of the state justice system of a country of resolve the many disagreements that arise every day.

The arbitration system has great relevance in our national law today and this importance increased even more with the entry into force of the new Code of Civil Procedure, promoting notable changes in the arbitration procedure.

The main factors that were responsible for the increased use of arbitration in our present world were the wide development of international trade and the enormous

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the need for its members to have a safe and fast way to resolve disputes, without needing to use the traditional state form.

Arbitration has always been, and probably always will be, an important form of conflict resolution, both domestically and internationally.

International commercial arbitrations present themselves as a mixed system, demonstrating specific jurisdictional as well as contractual characteristics.

In any type of arbitration, as a rule, the arbitrator must apply substantive law indicated. In the absence of this, the standards arising from recognized formal sources must then be applied, such as general principles of law, equity, custom, case law when applicable, as well as international trade practices.

Nowadays, as a result of a globalized world and, naturally, an increase in the number of businesses between nations, the number of conflicts has increased. international, therefore having a lack of faster and less complex solutions institutionalized to litigation, mainly due to the urgency of cases involving economic agreements regional and the dynamism of globalized trade.

The most amiable and even peaceful resolution of controversies that exist and that always will exist, has some relevance in our current moment of integration, being the instrument that authorizes the intervention of the external community association in a more effective and present manner. The integration or association of States is unacceptable without a system that accommodates them. disputes arising from this relationship, and that promptly provide a solution to them, whenever based on international treaties and rules established for such integration or association, and never under the view of one or another national legislation.

With the development of International Law, National States began to to be bound to a pre-established legal order, without, however, abandoning its sovereign legitimacy. The differences between States are based on factual situations, which may necessarily correspond to legal situations that lead to the resolution of differences in a peaceful manner.

2 ARBITRATION DEFINITIONS

We can define arbitration as an extrajudicial form of solution and/or dispute resolution, in which an arbitrator, a third party chosen by the parties involved, decides a dispute, which necessarily involves discussion about available property rights.

René David defines arbitration as:

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> Arbitration is the technique that aims to provide a solution to issues concerning the relationships between two or more people, by one or more people – the arbitrator or the arbitrators – which have powers resulting from a private agreement and decide based on this convention, without being invested with this mission by the State (DAVID, 2002, p.61).

In the Middle Ages, the natural law theory showed a theological content, as the The foundations of natural law were intelligence and divided will. Thus, natural law was conceived at this stage as a set of immutable norms or moral principles, enshrined or not in the company's legislation, since they result from the nature of things and the man, and are therefore immediately received by the human mind as true.

Thus we also have the idea of Natural Law, which is found in the most remote civilizations, however, it is among Greek thinkers that the acceptance of a Natural Law superior to Positive Law presents itself as a theory:

> If no people, in antiquity, exceeded the Romans in the worship of Law and in the formulation of legal institutes, it is worth noting, however, that their first conceptions originated in Greece, where it stood out as one of the oldest doctrines, that of Natural Law, the fruit of a cosmological thought, in which speculations on reason and nature appear indissolubly linked, it is enough to recall, described by Sophocles, the passage of Antigone, when questioned by King Creon (TEIXEIRA, 1998, p.172).

Natural law had an objective and material conception in the 13th century. From the in the 17th century, this idea was being replaced by the subjective and formal natural law doctrine, due to the process of secularization, in which natural law no longer has roots theological, seeking their foundations of validity in the identity of human reason.

Grotius made a significant contribution to International Law. According to him, the natural law that regulates coexistence among different nations is the Law of Nations, and this Law is a detached fragment of natural law.

“Grotius was responsible for formulating the Law of Nations, as a complete, rational and coherent set with its well-defined basic postulates” (SOARES, 2002, p.29).

Grotius turns to the study of human nature, highlighting not only religion but also politics. It is against Hobbes's State that he emphasizes the need to define expects the legal system in the face of the State. Only independent of religion and political power is that the law could remain faithful to the ideal formulation of justice that sustains it.

During the 19th century there were reactions against natural law, among them positivism legal, in which positive law begins to be considered as law in its proper sense,

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thus occurring, the reduction of all law to positive law, and natural law is excluded from category of law, in the conception of its adherents.

> (...) Legal positivism is a conception of law that arises when Positive law and natural law are no longer considered law in the same sense, but positive law comes to be considered law in its own right. Due to legal positivism, all law is reduced to positive law, and natural law is excluded from the category of law: positive law is law, natural law is not law. From this point on, the addition of the adjective "positive" to the term "law" becomes a pleonasm, because, if we wish to use a concise formula, legal positivism is the doctrine according to which there is no law other than positive law.

Legal positivism is based on the principle of the prevalence of a specific source of law, in this case the law, over all other sources. The legal system must be complex and systematized in hierarchy.

3 ARBITRATION IN BRAZIL

Law 9,307/1996 regulates all forms of arbitration in Brazil. This Law, establishes in its article 1 that “People capable of contracting may avail themselves of arbitration to settle disputes relating to available property rights.”

The ability to resolve disputes through arbitration is a restriction of a subjective, considering that only people civilly capable of contracting, according to the law, may avail themselves of arbitration.

Another restriction provided for by law is that only conflicts relating to rights patrimonial disputes can be settled through arbitration.

Rights that the holder cannot give up are considered unavailable rights, such as the right to life, liberty, health and dignity, on the other hand, are rights available to those whose holder can freely dispose of them.

It is also worth noting that in some cases the legislation itself prohibits the use of arbitration as a form of conflict resolution.

4 DEVELOPMENT ON THE SUBJECT

Each country has its own system regarding the celebration procedure, acceptance and incorporation of International Treaties. Members of the International Society of current days regulate the rules specific to governing the relationship between international law and the

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domestic law.

States have adopted different positions on this matter. In Brazil, the Federal Constitution of 1988, in its article 84, section VIII, determines that it is the responsibility of exclusive to the President of the Republic to conclude treaties, conventions and international acts, subject to a referendum by the National Congress. In article 49, paragraph I, the Brazilian Constitution states it is the exclusive competence of the National Congress to definitively resolve treaties, international agreement and acts.

Thus, there is a need for communication between the Executive and Legislative branches. in the finalization of international treaties. These are only considered perfect when the will of the Executive Branch, expressed by the President of the Republic, through the celebration, if added at the will of the National Congress, which approves it by legislative decree. After the treaty is approved by the National Congress, the President of the Republic must ratify it. through ratification the treaty becomes binding both at the international level as in the internal sphere here in Brazil.

Thus, the treaty was signed by a representative of the Executive Branch, approved by the National Congress and, finally, ratified by the President of the Republic, the treaty is passed to produce legal effects.

As José Carlos de Magalhães rightly observes:

> When examining the process of rectification of treaties and the moment in which it becomes mandatory for the national community, the STF has understood that the treaty, even if rectified by Congress and even if the instrument of ratification has been deposited abroad, as provided for in the treaty, only acquires validity in the domestic order, after the promulgation of a decree, by the President of the Republic, putting it into effect (MAGALHÃES, 2000, p.69).

Once the internal ratification procedure has been observed by the President of the Republic, and external, with the fulfillment of the formality of exchanging the instruments of ratification or the its deposit, the country is bound by the treaty, only being able to withdraw from it by denunciation, provided for in the Vienna Convention (1969), to which Brazil, despite not being a party, complies precepts.

The doctrine is divided regarding the hierarchical position to be occupied by treaties international within the domestic legal system.

According to the provisions of art. 102, III, b, of the Federal Constitution of 1988, the Supreme Federal Court is given the power to judge, upon appeal extraordinary, cases decided in a single or final instance, when the appealed decision declare the unconstitutionality of a treaty or federal law.

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In view of the aforementioned constitutional provision, Flávia Piovesan5 defends the hierarchy infraconstitutional of international treaties, with the exception of international treaties of protection of human rights, which have a hierarchy of constitutional norms.

> It is argued, (...) that traditional treaties have an infra-constitutional, but supra-legal, hierarchy. This position is consistent with the principle of good faith in force in International Law (pacta sunt servanda) and which is reflected in art. 27 of the Vienna Convention, according to which the State may not invoke provisions of its domestic law as justification for non-compliance with a treaty (PIOVESAN, 2002, p.83)

Another module of our Brazilian doctrine began to defend the same hierarchy legal basis for treaties and federal laws, thus applying the principle “later law repeals law” previous that is incompatible with it”. This conception, in the view of Flávia Piovesan, compromises not only the principle of good faith, but constitutes an affront to the Vienna Convention on the Law of Treaties.

5 ARBITRATION IN INTERNATIONAL TRADE

As a definition of the term “conflict”, we have two or more hypothetical situations that are exclusive and distinct, that is, they cannot occupy a simultaneous place because they are incompatible. Conflicts can arise in many areas, including personal, business and international, and their resolution is fundamental for the maintenance of order and social peace.

Laws are created to avoid, mitigate, resolve and resolve conflicts, so that society begins to live in harmony and the law achieves its objective, which is social peace. In the context of international trade, where interactions between countries and companies from different jurisdictions are frequent, the possibility of conflicts becomes even more evident. The Cultural, legal and economic differences can generate disputes that, if not addressed properly, can compromise trade relations and economic stability.

As countries, in general, cannot or do not manage to produce all the products and services they need, they specialize in certain areas in which have more aptitude. This specialization leads to exchanges, trades and commerce, that is, the sale and purchase of products between nations. International trade, therefore, is a essential practice for economic development, allowing countries to access goods and services that are not available in their own markets.

Conflicts can occur internally, but in an increasingly globalized, are not rare, and in fact conflicts have become increasingly common

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international. Globalization, by facilitating the flow of goods, services and capital between countries, also intensifies the complexity of trade relations, increasing the probability of disputes. If international conflicts undeniably exist, it is it is necessary to create mechanisms and systems to resolve them.

In this way, the important mechanism of international arbitration emerges, which has its importance based, firstly, on the non-existence, at the international level, if a legal system that serves as a basis for the resolution of conflicts. Arbitration offers a viable alternative to the traditional court system, allowing parties to choose the specialized arbitrators and define the rules of the process, which can result in faster decisions, more suited to the specificities of international trade.

However, the lack of similar cases and the absence of international legislation or a supranational entity, body or institution that can resolve the dispute are the biggest obstacles that international conflicts currently encounter. The diversity of legislation national laws and the lack of a unified legal system make dispute resolution difficult, leading the parties to seek alternative solutions, such as arbitration.

The lack of such supranational legislation is mainly due to the fact that States are sovereign with regard to their laws. Therefore, there is no need to talk about subordination or dependence on any other State. Each country has the right to establish their own rules and regulations, which may result in conflicts of law and difficulty of application of arbitration decisions in different jurisdictions.

In any case, every State is free and can ratify a given treaty international. Therefore, if you opt for ratification, you will not be able to subsequently place obstacles to its compliance. Furthermore, according to the rules of international law, only the denunciation may remove from the State its internationally assumed responsibility, with regard to to treaties other than human rights treaties.

International arbitration, therefore, presents itself as an effective solution for resolving disputes, as it allows the parties involved to choose a neutral and arbitrators with expertise in the matter in dispute. This flexibility is one of the main attractions arbitration, as it allows the parties to adapt the process to their needs specific, promoting a more efficient and satisfactory resolution.

Furthermore, arbitration is often preferred in international contracts because to its confidential nature, which is especially important in commercial transactions where Sensitive information is at stake. Confidentiality helps protect the interests commercial interests of the parties and to preserve the reputation of the companies involved.

Finally, the growing acceptance of arbitration as a means of dispute resolution in

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international trade reflects the need for effective mechanisms that can deal with the complexity of trade and global relations. As international trade
continues to expand, arbitration will become increasingly relevant, offering a
viable and efficient alternative for resolving disputes that transcend borders,

5.1 BRAZILIAN LEGISLATION ON COMMERCIAL ARBITRATION INTERNATIONAL

In light of Law 9,307/96, international commercial arbitrations are those that have their decision rendered outside the national territory. By means of the aforementioned law, these arbitrations received more favorable provisions in the procedure for the approval and execution of foreign arbitral awards.

The national legislator, with the advent of the law, began to require, for purposes of recognition and execution in Brazil, that the foreign arbitral award be approved only by the
STF, definitively extinguishing the need for “double approval”. (Before the Law
9.307/96 there was a need for double approval, which consisted of a first approval,
in the place where it was issued and a second approval in the place where execution is requested).

Thus, another positive point brought by Law 9,307/96 is that arbitration decisions currently have the same effects as sentences handed down by bodies of the Judiciary
here in Brazil, in addition to constituting executive titles.

We must also note that, prior to the ratification of the New York Convention
in 2002, many of its provisions were already in our legal system through
of Law 9,307/96.

The New York Convention establishes a regime for the recognition and enforcement of judgments foreign arbitration institutions, promoting confidence in arbitration decisions and encouraging the use of arbitration as a means of dispute resolution. The incorporation of its principles into Law No. 9,307/96 was an important step towards the consolidation of arbitration in Brazil, especially
in a context of increasing globalization of commercial relations.

5.2 APPROVAL AND ENFORCEMENT OF FOREIGN ARBITRATION AWARDS IN BRAZIL

The approval and execution of foreign arbitration awards in Brazil are matters very important for international trade contracts, as Brazilian companies have the
habit of inserting arbitration clauses in these contracts, providing for the establishment of an arbitration court

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abroad.

Law 9,307/96, in its articles 34 and 40, provides for the recognition and execution of foreign arbitral awards, in which the term “foreign arbitral award” is used. Thus, foreign arbitration awards are equivalent to foreign judgments, applying them if, as far as applicable, they apply all the rules applied to foreign judgments in general.

The same law considers a foreign arbitral award to be one rendered outside the territory national (art. 34, sole §).

It is a rule established by art. 35 of the aforementioned law that foreign arbitration awards are subject to approval, which, before Constitutional Amendment No. 45/2004, was the responsibility of the STF such assignment.

It should be noted that the function of the homologation process is limited to examining whether a foreign judgment violates formal or substantive public order. If no rules apply, specific to the law, it is possible to apply the general rules for the approval of the sentence foreign.

Law 9,307/96 was strongly influenced by international rules, such as the Convention Inter-American Convention on International Commercial Arbitration, 1975, and mainly the New York Convention of 1958, although when this law was enacted, Brazil had not yet ratified the latter.

Analysis of the provisions of Law 9,307, of September 23, 1996, regarding the recognition and to the enforcement of foreign arbitral awards, demonstrates a strong influence of the Convention of New York of 1958.

It is also noted that, in accordance with the provisions of the New York Convention, which aims to promote the recognition and execution of arbitration awards foreign, the interested party may choose to apply the law of internal origin or other treaties, if they further facilitate the recognition and enforcement of a judgment foreign arbitration than the New York Convention.6

Law 9,307/96 did not adopt this same rule as the Convention, limiting itself to prescribing that the foreign arbitral award be recognized and enforced in Brazil, in accordance with the international treaties, effective in the domestic legal system, and, in their absence, strictly with the terms of the law.

We should also note that, with the advent of Constitutional Amendment No. 45 of 08 December 2004, there was a change in the jurisdiction of the approval process of foreign judgment. Previously, it was the exclusive jurisdiction of the Supreme Federal Court and, currently falls under the jurisdiction of the Superior Court of Justice, due to paragraph “i” added to section I of art. 105 of the Federal Constitution. This wording was then reformulated:

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"Art. 105. The Superior Court of Justice is responsible for: I – processing and originally judging: i) The homologation of foreign judgments and the granting of exequatur to letters rogatory." (BRAZIL, 1988).

In the opinion of Cláudio Finkelstein (FINKELSTEIN, 2005, p.121):

> The change of Court is welcome, since (...) the analysis of such cases is perhaps the most frequent judicial procedure in the Supreme Federal Court and, often, such acts do not deal with constitutional matters, the original vocation of the court. The Superior Court of Justice, (...) with an infrastructure adequate, is able to perform this function more quickly and with the same degree of accuracy.

And the same jurist continues stating that:

> References in scattered laws, such as the Arbitration Law and the Code of Civil Procedure, to the jurisdiction of the Supreme Federal Court to ratify foreign judgments (or arbitral awards) and grant exequatur are recurrent. However, despite not being expressly revoked, since these are amendments to the constitutional text, any and all mentions in this regard were implicitly revoked, and such acts fall under the exclusive jurisdiction of the Superior Court of Justice.
> (FINKELSTEIN, 2005, p.121).

Therefore, it can be stated that, with the advent of Constitutional Amendment No. 45/2004, not only foreign judgments, but also foreign arbitration awards become approved by the Superior Court of Justice, and no longer by the Supreme Federal Court, as it was before.

Despite advances, Brazilian legislation still faces practical and theoretical challenges in the application of international arbitration. Among the main obstacles are the need for standardization of jurisprudence and overcoming cultural resistance, especially with regard to refers to the high cost and time required to carry out arbitration procedures in the country. Furthermore, the lack of a culture of conflict resolution through arbitration is still an obstacle to its widespread acceptance.

5.3 LEX MERCATORIA AND THE AUTONOMY OF THE ARBITRATION WILL INTERNATIONAL.

Lex Mercatoria represents a set of widely accepted transnational norms by international trade operators, consisting of general principles of law,

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commercial uses and customs, conventions and repeated practices. Their relevance in the context of international arbitration is justified by the fact that the parties, when opting for this method alternative dispute resolution, can freely choose a legal system unrelated to specific national legislation, based on the principle of autonomy of willing.

This contractual flexibility gives the parties the possibility of choosing not only the law applicable to the merits of the dispute, but also the language of the proceedings, the place of arbitration, procedural rules and arbitrators, enabling a more effective solution aligned with commercial interests involved.

The application of Lex Mercatoria does not mean the absence of legality, but rather the application of an autonomous legal system, internationally recognized, which respects the fundamental principles of law, such as good faith, contractual balance and reasonableness. However, it is important to highlight that this freedom is not absolute: it must respect the limits of public order and good customs, both nationally and internationally.

In the Brazilian context, although Lex Mercatoria does not have autonomous legal status, its application is compatible with Law No. 9,307/96, especially when it comes to contracts international agreements, provided that there is express provision in the arbitration agreement. Such compatibility contributes to the consolidation of Brazil as a jurisdiction favorable to international arbitration.

6 CONCLUSION

In view of all the above, it is concluded that arbitration represents an effective, fast and dispute resolution insurance, especially in the context of international trade. By allowing that the decision is made by technical and specialized arbitrators, allows an approach more suited to the specificities of commercial relations, overcoming the limitations of the system state judicial system, especially with regard to the slowness and complexity of the process. The adoption of international arbitration has expanded due to the demands of trade globalized by fast, confidential and specialized solutions. International conventions, such as that of New York of 1958, and the incorporation of its principles by Law No. 9,307/96, consolidated arbitration as a legitimate and effective instrument in the legal system Brazilian.

Although challenges persist, such as the high cost of the procedure and a certain cultural resistance to it, arbitration, there is a growing acceptance of this institute in the country, driven by sophistication of commercial relations and the search for more efficient extrajudicial mechanisms. The autonomy of the parties' will, a central element of arbitration, strengthens its application

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international, especially when associated with Lex mercatoria, which increases the flexibility of legal solutions adopted.

Therefore, international arbitration must be recognized as an indispensable tool for the contemporary legal and economic scenario, which is constantly evolving and strongly interconnected, where the search for agile and effective solutions is imperative.

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