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Complexity of the Brazilian Arbitration Law System No. 9,307, of September 23, 1996: State system is not always open or accessible
Is it worth litigating when arbitration is an option?
Complexity of the Brazilian arbitration law system No. 9,307, of September 23, 1996: State system is not always open or accessible Is it worth litigating when you can opt for arbitration?

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SUMMARY

This study analyzes Law No. 9,307/1996, which established arbitration in Brazil, highlighting its relevance in the national and international legal and economic landscape. The law emerged as a response to the shortcomings of the traditional judicial process, characterized by slowness, high costs, inequality between the parties, and low effectiveness in enforcing decisions. Arbitration presents itself as an alternative, granting greater speed, flexibility, and autonomy to the parties.
However, tension persists between the autonomy of litigants' will and necessary judicial intervention, which lends the norm an unstable character. This paper seeks to discuss these contradictions based on theoretical foundations and reflections developed during a doctoral program in Legal and Social Sciences at the University of the Argentine Social Museum.
Keywords: Arbitration; Judicial process; Law No. 9,307/1996; Autonomy of will; Judicial intervention.

ABSTRACT

This study analyzes Law No. 9,307/1996, which established arbitration in Brazil, highlighting its relevance in the national and international legal and economic contexts. The law emerges as a response to the deficiencies of traditional judicial proceedings, characterized by excessive delays, high costs, inequality between the parties, and low effectiveness in enforcing decisions.
Arbitration is presented as an alternative, offering greater speed, flexibility, and autonomy to the parties. However, tensions remain between the autonomy of the litigants' will and the need for judicial intervention, which gives the law an unstable character. This paper discusses these contradictions based on theoretical foundations and reflections developed during a doctoral course in Legal and Social Sciences at the Universidad del Museo Social Argentino.
Keywords: Arbitration; Judicial process; Law No. 9,307/1996; Party autonomy; Judicial intervention.

1. INTRODUCTION

The advances brought about by this law are undeniable. Its importance emerges from the fact that offer responses to the demands of economic expansion, which is increasingly demanding in relations from Brazil, internally or with foreign countries and institutions.

The requirement can be justified based on shortcomings observed in the judicial process common, among which we could list: excessive delay in this process; its costs high and brutal inequality of treatment given to the parties, in view of the material situation experienced by Western society, in which the weapons in play favor the powerful more.

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It is also very disturbing in the traditional process that the decisions handed down do not be fully complied with. Among the reasons given for this to occur is that that the parties claim that the decision did not come from an agreement between them, with the negative addition that the judge, in this case a judge, was not of his choice and, therefore, not of his trust.

Arbitration attempts to counter these factors, as outlined in Law No. 9,307, of September 23, 1996. However, there are criticisms leveled against this diploma, arising from the fact that there is something in its core that qualifies it as a "tightrope". We explain: it oscillates all the time, between the autonomy granted to the parties in dispute and the need for judicial intervention.

This is what we will try to demonstrate in this work, based on theoretical considerations that theme offers, as to (mainly) observations carried out in the course of doctorate taught by Dr. Graciella Torales, in the postgraduate program in Legal Sciences and Social Sciences of the University of the Argentine Social Museum, on the occasion of the 2nd module of the course, held in January and February 2010.

2. THE FREEDOM TO CONTRACT

Law 9,307/96 introduces the concept of the institute in its article 1, although without defining it. It states that: "Persons capable of entering into contracts may use arbitration to resolve disputes relating to to available property rights". [1]

Arbitration is defined as follows in the words of Lília Sales: "Procedure in which the parties elect an arbitrator to resolve disputes. In arbitration, unlike negotiation and mediation, the parties do not have the power of decision, which is the responsibility of the arbitrator."2

Quoted by Sales, Ariana Bruscatto adds: "The arbitration institute came fill a legal gap of valid alternatives for resolving issues, with greater speed and effectiveness of justice, as a good thing in life." [3]

There are many passages throughout the body of the law mentioned that are capable of forming the researcher's understanding of being faced with a diploma guaranteeing freedom. We take the term as synonymous with autonomy and look for signs in the legal text verifiers of this phenomenon. The initial idea we come across points to a life own (independent) of this law.

[1] Law 9,307/96, as per text published in the Official Gazette of the Union, on 9/24/1996.
[2] SALES, Lília Maia de Morais. Justice and conflict mediation. Belo Horizonte: Del Rey, 2003, p. 41.
[3] BRUSCATO, Wilges Ariana. The figure of the private judge. Available at: http://www.wilges.com.br/arbitro.htm. Accessed on: 17.6.2010, p. 1.

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Confirming this freedom, we read in art. 2, § 1, the expression "to freely choose the rules of law that will be applied in arbitration" as an item that will solidify in the parties interested in the strength of the institute.

The path to freedom reaches a point where it divides into two paths. It is necessary to detail the Arbitration Court, taking for this purpose art. 3 of the law, which branches the Convention of Arbitration in: Arbitration Clause and Arbitration Agreement.

The arbitration clause governs future litigation, therefore it does not yet exist when the settlement of this clause.

The arbitration agreement governs an already existing dispute, a present issue, already formed.

The first form of agreement is made by written contract. The second can be made by term in the records (when judicial) or by private writing (when extrajudicial).

The law continues its path of pride and autonomy and thus reaches art. 5, which in the wake of previously established principles, confirms that "arbitration will be instituted and processed in accordance with such rules."

What rules? Those chosen by the parties, of course.

But we come to Article 6. Here is the beginning of a real stir or, if you will, to designate in another way, a turnaround in the autonomous way of considering this law.

What happens?

There is an express reference to seeking the Judiciary to help resolve the issue. arbitration. This is stated in the **sole paragraph, verbatim:**

> If the summoned party does not appear or, if it appears, refuses to sign the arbitration agreement, the other party may file the lawsuit referred to in Article 7 of this Law, before the body of the Judiciary that would originally be responsible for the judgment of the case.

The procedures of Arbitration are mixed with those of the Judiciary. And then we see art. 7 and its §§ 1, 2, 3, 4, 5, 6 and 7 refer to the terms "citation", "judge", "hearing", "instruction of request", "judgment on merits" and the like that give another color to the initial appearance of this law.

From then on, the autonomy of treatment designed for disputes will give way dependence on the judicial system.

3. WHAT TO SAY ABOUT THE PROCEDURE?

The institution of arbitration leads to the understanding that the parties are free to choose the rules. These, once chosen and established, become binding on the parties. Another

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aspect of complexity. Before arbitration is agreed, there is broad freedom. Once the option is made by the rules, obligation arises and, therefore, the parties are bound by the agreement.

This aspect is a consequence of the very notion of the institution of arbitration. This is because in this scope, the arbitrator is chosen by the parties (freedom); in the judicial system, on the contrary, it is given by the rules themselves a judge to the case, generally in accordance with rules of jurisdiction distributed by subject matter (subject of the dispute), place of occurrence of the events discussed or in reason of the litigants.

In any case, arbitration offers a margin of freedom, as it provides choice of judge to the contenders. The judicial system, in turn, imposes a judge on the cause.

Article 21, in § 1 of the law under study, states that "If there is no stipulation regarding the procedure, it will be up to the arbitrator or arbitration tribunal to regulate it."

Here, we observe a new face of freedom. Arbitration, which in itself already constitutes a freedom granted to the resolution of disputes, involves a kind of subspecies of freedom. The The parties are free to choose the procedure. However, if they do not do so, the arbitrator has the right to choose. In other words, if the parties do not exercise autonomy, the arbitrator exercises it in this regard. arbitrator.

Still in art. 21, § 2, there is a provision that "The following shall always be respected in the procedure: arbitration the principles of adversarial proceedings, equality of the parties, impartiality of the arbitrator and of your free will."

Are such principles of contrariety, equality and impartiality observed in the Judiciary?

We have already had the opportunity to participate in several hearings before the state system. Starting with the way the audience members are arranged in the room designated for that purpose, one can see how questionable the aforementioned notions are in forum practice.

The simple way in which participants position themselves around the work table begins to deny equal treatment. Normally, the judge takes over the head of the table, which is most often square or quadrangular, leaving what is left of it to others. Sometimes it is placed so far from one part that it is difficult to look at it or even hear it.

In this same wake of formalities, rituals are followed that suffocate the participants. There is a time for proclamation, for sitting down, and for presenting matters. When the judge is with the word, it is a serious offense for most of them to interfere with anyone. Under the argument that the hierarchy of authority gives him an air of wisdom, it is "forbidden" to get in the way his speech or make some observation to him at that moment.

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In such cases, it may happen that some idea comes from the party, witness, participant in the clash, not prosper, even if perceived as useful later, simply because it is not convenient for you demonstration for the occasion. The restraint is imposed by the judicial system, with its formalism exaggerated, which, failing to look at the solution to the problem brought to the system, lists the system as more relevant than the problem to be treated.

The arbitration chooses to place the referee in the center of the table, arranging the participants in equidistance from the center. A round table is well suited for this purpose. The dialogues, if respectful, can be interspersed and interrupted, because what is wanted, by the spirit of the disputes, it is the solution to these (and which should really matter) much more than the jacket of the judge (how he dresses), and the position he holds (judge or appellate judge or member of a court of last resort).

In the same art. 21, § 4, the arbitration system copies the judicial system, saying: "It will be up to to the arbitrator or arbitration tribunal, at the beginning of the procedure, to attempt to reconcile the parties...".

There would be no point, as is the case with a system that tries to focus and encourage autonomy of will, the parties were prevented from reaching an agreement. More than in judicial system, arbitration can lead to genuine agreements. Experience has shown us shown that before the forum what we have, most of the time, is something that we cannot designate, authentically speaking, in agreement. The so-called conciliators, even before proclaiming the parties to the audience, ask them about the possibility of composition. From then on, the What we have seen is a festival of insanity that the state system should curb and not stimulate.

Let's say the parties agree, right away, to the idea of ending the dispute. In that case, In this case, everything is fine. The respective term is drawn up immediately and the process is concluded without any problems. But there are cases, and they are not few, in which one of the parties refuses to accept the agreement, and the conciliator, in turn, insists even insultingly to dissuade her.

Such action is dangerous for several reasons. First, it is not the role of a conciliator. force anyone to agree to something they don't want. Then, much more dangerous than to force someone is to instill fear in them. Yes, there is a "conciliator" who haunts the party, assuring them that "if you don't make the agreement, you may lose the case", that "the process is long; even if win the case, you may not be alive to receive the resulting payment...".

And arguments from the party trying to dissuade the conciliator are not even valid at these times. Your responses are prepared for even illogical situations, such as when the party asks you says "The court has consolidated jurisprudence in my favor in this case", to which he then responds "Yes, but it may change its understanding!".

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The lesson to be learned from all this is that the freedom of the judicial system, even when dealing with of conciliation, is questionable. Another system of dispute resolution can and should be sought in that the institution of conciliation be more respected. An agreement should not be made simply agreement, nor because the conciliator has imposed it. An agreement derives from free will, not of imposition.

§ 2 of art. 22 of the law in question is perhaps, among all the provisions of the diploma arbitration, which brings us the most complexity as researchers. Let's look at its content:

> In the event of failure to comply, without just cause, with the summons to give personal testimony, the arbitrator or arbitral tribunal shall take into account the behavior of the defaulting party when issuing its award; if the absence is due to witness, in the same circumstances, the arbitrator or the president of the arbitral tribunal may request the judicial authority to bring the reluctant witness, proving the existence of the arbitration agreement.

If we consider the practical difficulty involved in the appearance of litigants and witnesses at hearings where any human controversies are discussed, we could, just by reading this device, perceive the arbitration system as incapable of resolve the matters for which he is called.

And this is a characteristic that leads many analysts (mainly members of the Judiciary) not to take arbitration seriously. Their argument is that the institute there is no way to force anyone to attend the hearing. They leave it implied, on the other hand, that the fact that the system resorts to the Judiciary to assist it with public force (conduction forced by parties and witnesses), takes away its reason for being.

This is not, however, an adequate view to understand the device under study. The arbitration system is an attempt to encourage people to decide outside the system state. If at the present historical moment it has not yet consolidated itself as an instance capable of respond only to the claims of litigants through its internal contours, requiring support from other systems that are external to it, this fact does not denature it, but rather enriches it of possibilities.

4. ARBITRAL AUTOPOIESIS

"Poiesis" comes from Greek and means production. Autopoiesis therefore means, self-production. The arbitration system, by this notion, is composed of units or elements

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that organize and disorganize. But it is thanks to such phenomena that it can provide responses to their purposes.

If we recognize that such elements (living and conflicting beings) are common to equality in organization and the difference in structure, we will arrive at Humberto's explanation Maturana, who taught on the subject:

> The most peculiar characteristic of an autopoietic system is that it rises by its own strings and constitutes itself as distinct from the environment by its own dynamics, in such a way that the two are inseparable. What characterizes a living being is an autopoietic organization. Different living beings are distinguished because they have different structures, but they are the same in organization.4

Now, human beings are the units that have the greatest autonomy. If from the point of view from a biological point of view, they maintain the basis of this independence in the pure notion called "life"; in social system, in turn, this autonomous character is based on the integrative basis called "communication".

But, however it is considered, both on the biological basis and on the social basis, the living systems (with their conflicting elements) need the "environment" in which they live to obtaining resources and answers. Then something curious and complex happens: at the same time that systems are autonomous, they are also dependent on each other.

This autonomy/dependence paradox makes the systems complementary. It becomes circulars in their production. For Maturana, structure is a determinant of organization autopoietic. Everything that happens to a living being, at a given moment, is the result of its structures. If the arbitration system, when functioning, is perceived by its actors as sufficient to provide the desired results, the autonomy of the system is sufficient in itself. There is nothing more to pursue title of problem-solving method between the parties. Otherwise, if the perception that is obtains from the system is such as to characterize an insufficient response, it is urgent that the system open to another, in this case the Judicial, so that, from this link (or solidarity of systems), reach a safe harbor in the conflict resolution.

Let's see if this isn't what happens with the arbitration system. It tries to live or function by itself. It is embodied with rules and procedures that make it autonomous as a system, so much so that it is often enough to solve the problems presented to it. However, It's not always like that. You can't always get people to decide on their own such a system, within it. It is then that it reveals its greater or lesser dependence on the system that

[4] MATURANA, Humberto; VARELA, Francisco. The Tree of Knowledge. Translated by Humberto Mariotti and Lia Diskin. 5th ed. São Paulo: Palas Athena, 2005, p. 55.

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is external (the Judicial system). There is no reason to deny the interconnection. Using the force of another system is a healthy measure for its maintenance and the purpose of solving the problem.

The arbitration system under Law 9,307/96 is not closed. Like any system, biological, opens up to communication with another system, in this case the Judicial. It requires the exchange of energy, and since it deals with conflicts, it seeks through these relationships the means to overcome the fragility of oneself.

The author of "The Tree of Knowledge"[5] called this interplay "coupling" structural". The designation is the least important thing. What really matters is understanding that the systems living beings and the environment on which they depend are constantly changing. This is because they are not closed systems and can thus exchange energy and establish communication.

By the way, it is worth transcribing what an open system is, for the purposes of this work. Let's listen to Morin:

> The open system is the origin of a thermodynamic notion, whose first characteristic was to allow for the negative circumscription of the field of application of the second principle, which requires the notion of a closed system, that is, one that has no external energy/material source. Such a definition would be of no interest if it could not be used to consider a certain number of physical systems (a candle flame, the movement of a river around a bridge pillar), and especially living systems, as systems whose existence and structure depend on an external supply, and in the case of living systems, not only material/energetic but also organizational/informational.[6]

The elements of the arbitration system can thus act on the structures of elements of the judicial system and thus provoke compensatory relationships. In turn, the opposite it can also be verified: the judicial system influences a change of direction for the performance of the parties when they have already entered into an arbitration solution. Each case to be discussed is which will indicate the best path, that is: the arbitration system or the judicial system.

The parties will weigh and measure, in their disputes, various elements involved, such as thus: money, time, travel, conditions to bring witnesses, proof of their arguments, which will lead to the choice of a solution system. In such contexts, they cannot fail to realize that if you choose the judicial system, you will give up, at least initially, your autonomy.

CONCLUSION

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[5] MATURANA, Humberto; cf. work already cited.
[6] MORIN, Edgar. Introduction to Complex Thought. Translated from French by Eliane Lisboa. Porto Alegre: Sulina, 2006, pp. 20/21.

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Law 9.307/96 links two systems, the judicial and the extrajudicial. The law also leads to interpenetrate freedom and dependence. The law works with two systems that, in interaction, function autopoietically. There is a constant prediction of complementarity. There is a pendulum movement, sometimes to one side, sometimes to the other, between freedom of the parties and absence of this freedom. The same applies to private justice and state justice.

The institution of arbitration falls within the notion of complexity. It is easy to see that initially assuming prominence in the world of private relations, it nevertheless maintains contact with the public sphere. It constantly interacts with the notions of jurisdiction and even uses them as a way to complement their performance. This back and forth between mechanisms of private justice and public justice leads us to recognize arbitration as a way dispute resolution duo.

This understanding has already been supported by statements from the highest court of justice Brazilian (Supreme Federal Court), which was able to receive Law 9,307/96 with its peculiarities, both public and private, at the same time.

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