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Commentary

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The 2015 Amendments to Brazil's Arbitration Law definitively settled a question that had long been percolating: whether the Brazilian state and state entities could enter into enforceable arbitration agreements. The answer, a resounding yes, is not a change in direction, but rather reflects the organic development of arbitration with state entities alongside Brazil's explosive growth of commercial arbitration over the past twenty years.

The growth of both private and state arbitration is rooted in Brazil's Arbitration Law, passed in 1996. That law begins, "*people capable of entering into contracts may use arbitration to resolve conflicts regarding disposable patrimonial rights*."[1] Disposable patrimonial rights are rights that can be alienated or assigned, and have an economic or pecuniary nature—in essence, they can be transferred to third parties and reduced to monetary amounts.

While the Arbitration Law's failure to expressly address state arbitration proved to be a controversial issue, it was this first section of the law that the Superior Tribunal de Justiça ("STJ"), the highest court for non-constitutional issues, invoked nine years later in concluding that a specific type of state entity, mixed-capital companies, could arbitrate disputes. The STJ reasoned that mixed-capital companies are capable of entering into contracts and that their rights derive from their economic activity and so constitute disposable patrimonial rights. Accordingly, the court concluded, mixed-capital companies are entitled to arbitrate under the 1996 Arbitration Law.[2] Additional court decisions and statutes reinforced and expanded state entities' ability to arbitrate.

The 2015 Amendments authoritatively settled the state's authority to arbitrate. In doing so, however, the 2015 Amendments adopted the exact language of the 1996 Arbitration Law, adapting it only so as to apply to the state and state entities: "*the direct and indirect public administration may use arbitration to resolve conflicts regarding disposable patrimonial rights.*"[3] Accordingly, the state and state entities are authorized to arbitrate the same disputes as private parties. But an authorization that appears expansive in the context of private arbitration—the ability to arbitrate all disposable patrimonial rights—takes on added complexity in the context of arbitrations with state and state entities, which uniquely deal in the public interest and non-waivable, non-economic rights.

This complexity has yet to be fully addressed in Brazilian law; the boundaries of what exactly qualifies as arbitrable disposable patrimonial rights remain murky. Despite this, concession agreements

and other contracts with the state or state entities now frequently provide for arbitration. While there is no sign of change in Brazil's pro-arbitration stance, including in respect of arbitrations involving the state, parties entering into arbitration agreements with the state or state entities should take care by closely evaluating the current state of the law regarding disposable patrimonial rights to ensure their arbitration agreement is enforceable.

The 2015 Amendments

As stated above, the 2015 Amendments begin as the 1996 Arbitration Law does, providing: "*the direct and indirect public administration may use arbitration to resolve conflicts regarding disposable patrimonial rights.*"[4] This provision, permitting arbitration by direct and indirect public administration, encompasses the entirety of the Brazilian government. "Direct public administration" comprises organs directly linked to the various levels of government, such as the president, governors, ministries, and secretaries; these do not have a separate legal identity from the government or control a separate budget. "Indirect public administration," meanwhile, comprises entities with their own legal identity, budget and autonomy, and include, for example, public/private partnerships, mixed-capital companies (such as Petrobras and Banco do Brasil), public foundations and regulatory agencies. The 2015 Amendments also clarify that the same authority or body with capacity to celebrate agreements should enter into the arbitration agreement.[5]

The 2015 Amendments impose two restrictions on arbitration with the state or state entities: "*[a]rbitration that involves public administration will always be at law, and will be subject to the principle of publicity.*"[6] Accordingly, a resolution of the arbitration may not be on equitable principles and the arbitration must be public, a principle founded in Brazil's Federal Constitution.[7] Just as with disposable patrimonial rights, the exact requirements of this provision are yet to be developed.

Other statutes, including those governing public/private partnerships and concessions, impose additional requirements on arbitrations with the state, including that the arbitrations be seated in Brazil and conducted in Portuguese.[8] As a result, an evaluation of the enforceability of an arbitration agreement with the state or state entities should also include a review of the statutes applicable to the contract.

The Delineation of Disposable Patrimonial Rights

The STJ has attempted to define disposable patrimonial rights and indisposable rights in its decisions. In the case described above involving mixed-capital companies, the STJ defined disposable patrimonial rights as follows:

> [w]hen the contracts celebrated by the state company concern economic activity in the strict sense—that is, public services of an industrial nature or economic activity of the production or marketing of goods, susceptible of producing income or profits, the rights and obligations arising from the contracts are transferable, disposable, and therefore, subject to arbitration.[9]

Indisposable rights, meanwhile, involve the "primary" public interest. The STJ described these as follows: "*[w]hen the activities developed by the state company result from the imperial power of the Public Administration and, consequently, their attainment is directly related to the primary public interest, indisposable rights will be involved, and therefore, are not subject to arbitration.*"[10] It quoted the commentator Celso Antônio Bandeira de Mello in further defining "*the primary public interest as that 'which the law appoints as being the interest of the collective[.]'*"[11] These collective rights are not arbitrable, as it is reasoned that the judiciary is their only "natural judge" absent a specific law authorizing otherwise.[12]

These definitions, while helpful in theory, provide insufficient guidance in evaluating whether a particular scenario involves disposable patrimonial rights and is thus arbitrable. Certainly, a wide swath of contracts with the state or state entities flow from economic activity. Because the state is involved, however, it is easy to envision scenarios invoking the indisposable primary public interest. This lack of clarity in the law, at minimum, provides opportunity for gamesmanship and delays in the arbitral process; it could also put the enforceability of the arbitration agreement at risk.

The opportunity for gamesmanship is illustrated in *Companhia Paranaense de Gás Natural – Compagás v. Consórcio Carioca Passarelli*, a case in which a mixed-capital company, Compagás, attempted to nullify an arbitration agreement it had entered into by arguing, *inter alia*, that

the arbitration involved the public interest and was therefore indisposable. Compagás's attempts to nullify the arbitration agreement were ultimately unsuccessful, but nonetheless introduced delays into the dispute. In rejecting Compagás's arguments, the STJ noted that the record established that the arbitration was limited to financial issues and upbraided Compagás for the delays it had caused, accusing it of bad faith.

Significantly, the court accused Compagás of acting against the public interest in delaying resolution of the dispute. It quoted commentators in arguing that the legal certainty, speed and the technical specialization of an arbitral tribunal served the public interest.[13] The court's interpretation of the indisposable public interest to include the public's interest in the speedy resolution of disputes involving a state entity—a definitive advantage of arbitration given the nearly 100 million cases pending in Brazilian courts—suggests that the STJ's pro-arbitration stance will continue when defining the limits of disposable patrimonial rights.

Conclusion

Even so, how disposable patrimonial rights will be distinguished from the non-arbitrable indisposable rights in practice remains unclear: the current definitions provided in case law remain vague and imprecise when attempting to evaluate concrete scenarios. While the enforceability of arbitration agreements in a small number of scenarios—commercial contracts with mixed-capital companies—are currently established and courts' reasoning in the few existing decisions is decidedly pro-arbitration, a risk remains that the 2015 Amendments' limitation of arbitration to disposable patrimonial rights could affect the enforceability of an arbitration agreement with the Brazilian state. Until greater clarity is provided, private parties entering into arbitration agreements with the state or state entities must bear this risk in mind, carefully evaluating whether the rights involved could arguably constitute indisposable rights.

Endnotes

1. Lei Nº 9.307 (1996), Art. 1. The original text reads: "Art. 1° As pessoas capazes de contratar poderão valer-se da arbitragem para dirimir litígios relativos a direitos patrimoniais disponíveis."

2. *Companhia Estadual de Energia Elétrica—CEEE v. AES Uruguaiana Empreendimentos Ltda.*, STJ, REsp. Nº 612.439-RS, Rel. Min. João Otávio de Noronha, j. 25.10.05. The Brazilian Federal Supreme Court had also recognized arbitration involving state and state entities some thirty years earlier in *União Federal v. Espolio Lage*. STF, *caso Lage*, RE N° 71.467/GB, Min. Rel. Bilac Pinto, Tribunal Pleno, *in* DJU de 15.02.74.

3. Lei Nº 13.129 (2015), Art. 1 para. 1. The original text in Portuguese reads: "§ 1º A administração pública direta e indireta poderá utilizar-se da arbitragem para dirimir conflitos relativos a direitos patrimoniais disponíveis."

4. *Id.*

5. *Id.* at Art. 1 para. 2 The original text in Portuguese reads: "§ 2º A autoridade ou o órgão competente da administração pública direta para a celebração de convenção de arbitragem é a mesma para a realização de acordos ou transações. (NR)"

6. *Id.* at Art. 2 para. 3. The original text in Portuguese reads: "A arbitragem que envolva a administração pública será sempre de direito e respeitará o princípio da publicidade. (NR)"

7. Brazilian Federal Constitution, Art. 37 *et seq*.

8. *See* Lei Nº 11.079 (2014), Art. 11 and Lei Nº 8.987 (1995), Art. 23-A.

9. STJ, REsp. Nº 612.439-RS, Rel. Min. João Otávio de Noronha, j. 25.10.05.

10. *Id.*

11. *Id.* (quoting Celso Antônio Bandeira de Mello, *Curso de Direito Administrativo*, 4ª ed., Malheiros, São Paulo, 1993, p. 22).

12. STJ, AgRg no MS N° 11.308-DF, 1ª Seção, Min. Rel. Luiz Fux, *in* DJU de 14.08.06.

13. STJ, REsp. N° 904.813/PR, Rel. Min. Nancy Andrighi, 3ª Turma, *in* DJe de 28.2.12. ■

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