ARBITRATION-COURT TRAINING AND PROCEDURAL STATEMENT

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ABSTRACT

Arbitration is one of the conflict resolution methods provided for by law that removes the primacy of the Judiciary to decide disputes between natural or legal persons, leaving the task of settling the matter in question to be judged by a third party freely chosen by the parties. To do so, the arbitration procedure must be established, which depends on the mutual agreement of the parties, provided they are capable, and the subject matter to be submitted to this type of resolution should be a right that can be relinquished. Through the arbitration agreement, which can be arranged through a clause or an arbitration commitment, the parties can define the procedures that will govern the arbitration process and guide the arbitrators' actions. If the parties do not define these procedures, they can adhere to the rules of the chosen arbitration institution where the arbitration will take place, or leave it to the discretion of the arbitrators to define the procedures. It is important to emphasize that, despite all the freedom granted to the parties, they cannot, by explicit legal provision, suppress the right to due process and a full defense. In order to provide a better understanding of the arbitration process, this work intends to cover all its stages, from the legal principles that surround it, evaluating recent legislative changes, through the establishment of the arbitration procedure and the actions involved in the instruction and judgment.

Keywords: Arbitration, Arbitral process, Procedures, Formation of the Arbitral Tribunal, Procedural instruction, Extrajudicial conflict resolution measures.

INTRODUCTION

This article aims to provide legal practitioners with an insight into the establishment of arbitration and the specific procedures that govern the arbitral process. We will present the principles that should be followed by those who intend to use or engage in arbitration.

The establishment of the arbitration procedure is, above all, a choice made by the parties seeking an alternative and more effective way to resolve potential disputes between them without the need to submit the matter to the scrutiny of the Judiciary.

The parties may, by mutual agreement, decide how the arbitral process will proceed, including the establishment of rules and procedures that serve their interests. However, they can never, even under the guise of the principle of autonomy of will, waive the right to due process and a full defense.

Furthermore, they should pay attention to the specific principles of arbitration, such as the principle of competence-competence, which grants the arbitrators the necessary autonomy to decide for themselves on the determination of their jurisdiction to assess the issues between the parties who opt for this procedure.

The parties opting for this extrajudicial tool for conflict resolution – and their legal representatives – must be aware of the moments when they should raise objections related to the arbitrator's incompetence, impartiality, and disqualification, as well as the possible invalidity of the arbitration clause, under the risk of forfeiting their right to make such claims.

Additionally, we will address issues related to the procedural instruction, especially those concerning the examination of parties and witnesses, as well as the autonomy granted to arbitrators in this regard, as they can independently order the presentation of specific evidence, even if not requested by any of the parties, as this will be necessary for them to form their own judgment and substantiate their decisions.

THE ARBITRATION

The coexistence of individuals and their pursuit of goods and rights inherently brings about conflict, as these resources do not exist in sufficient quantity and form to meet the needs of everyone. Due to this, and because of disputes – whether driven by necessity or the mere desire to possess goods and rights – or even disagreements in the interpretation of what is owed from one to another, conflicts arise.

As conflicts arise, modern democratic society, through the evolution of customs and norms, saw fit to assign to the State the power and duty to resolve conflicts that arise among individuals through the Judiciary.

The rush of individuals – whether natural or legal – to the Judiciary, bringing before this entity a wide range of possible and imaginable conflicts, whether in the civil, commercial, family, criminal, political, tax, labor, etc. spheres, has led to an overwhelming number of cases, resulting in slow processing of legal proceedings in various areas of law, and decisions being handed down many times even decades after the filing.

In addition to the legal uncertainty inherent in the uncertainty of achieving the sought-after benefit through judicial proceedings, the delay in judicial pronouncement generates deep uncertainty and distress for the parties involved, as they cannot be certain if and when they will receive a decision for the conflict they submit to the court.

It was for this reason that the master Rui Barbosa stated in his "Oração aos Moços" (Speech to the Young), 1920:

"But delayed justice is not justice, it is only injustice, clear and manifest. Because unlawful delay in the hands of the judge contradicts the written rights of the parties and, thus, harms them in their property, honor, and freedom. Tardy judges are guilty, and common slackness tolerates them. But their guilt triples with the terrible aggravation that the harmed party has no means to react against the powerful wrongdoer, in whose hands the fate of the pending litigation lies."

It is no wonder that the search for non-judicial means of conflict resolution has gained momentum, with the promotion of conciliation, mediation, and also arbitration, taking, when possible, the exclusive competence of the Judiciary to know the law and apply justice (*narra mihi factum dabo tibi ius*) (narrate the facts to me, and I will give you the law).

And one of these extrajudicial forms, arbitration, has proven to be a very viable alternative, especially when seeking a quick solution, delivered by professionals of

recognized competence, and, most importantly, chosen freely by the parties. This often leads to them willingly submitting to this extrajudicial decision and promptly complying with the outcome, accepting the solution provided.

BRIEF HISTORY

Arbitration is not a recent form of conflict resolution, as it was used in antiquity and the Middle Ages, even though it was not institutionalized. As indicated by Luiz Fernando do Vale de Almeida Guilherme (2012:32), citing Plato, who alluded to the fact that decisions made by judges elected by the parties would be the fairest form:

Arbitration is one of the oldest forms of dispute resolution in the world. It was used in antiquity and the Middle Ages, as it represented a certain path to avoid armed confrontation. In the field of Public International Law, this concept has been in use for many years. In fact, even in other branches of law, the resolution of disputes through arbitrators has been utilized for a long time, as Plato himself wrote about judges elected as the fairest way of making decisions.

Arbitration is not new in Brazil either, as there are references to its provision in the Constitution of the Empire of 1824, which prescribed it in Article 160. Although not all subsequent Brazilian Constitutions expressly maintained it, the provision of this institution was still mentioned in sub-constitutional legislation. Examples include Decree No. 3,084 of November 5, 1898, and the Codes of Civil Procedure of 1939 and 1973.

The Federal Constitution of 1988 itself made explicit reference to this form of conflict resolution by providing for its use in labor disputes. Let's take a look at the original wording of Article 114 and its first and second paragraphs:

Article 114. It is the responsibility of the Labor Court to reconcile and judge individual and collective disputes between workers and employers, including entities of external public law and the direct and indirect public administration of Municipalities, the Federal District, States, and the Union, as well as other controversies arising from the

employment relationship, as provided by law, and disputes originating from the enforcement of its own judgments, including collective ones.

[...]

- 1º. If collective bargaining fails, the parties may choose arbitrators.
- 2º. If either party refuses negotiation or arbitration, the respective unions are entitled to file a collective labor dispute, with the Labor Court being able to establish rules and conditions, while respecting the minimum contractual and legal labor protection provisions.

And, just under two decades ago, Law 9,307 was enacted on September 23, 1996, which repealed Articles 1,072 to 1,102 of the Civil Procedure Code, which previously dealt with arbitration, introducing a new legal framework that established parameters and procedures for the use of this extrajudicial method of dispute resolution.

CONCEPT OF ARBITRATION

The concept of arbitration has not varied much, especially with regard to its core, which is being an alternative means of dispute resolution.

Luiz Antonio Scavone Junior (2014:16) provides the following definition of arbitration:

"Arbitration can be defined as a private and alternative means of resolving conflicts arising from patrimonial and available rights through an arbitrator, typically an expert in the disputed subject matter, who will issue an arbitral award that constitutes a judicial enforcement title."

Carlos Alberto Carmona (2006:33), on the other hand, offers his concept of what arbitration is as follows:

"Arbitration is a technique for resolving disputes through the intervention of one or more individuals who derive their authority from a private agreement, deciding based on this agreement without the intervention of the State, with the decision intended to have the effect of a judicial judgment."

As evident, arbitration is a means of dispute resolution where the State's intervention in its proceedings is not required (except in exceptional cases provided for by law, such as challenging the validity, through a separate action or by objecting to the enforcement of the award), delegating the power to offer a solution to the dispute to a third party (or more, always in an odd number) freely chosen by the parties.

However, not every right can be subjected to arbitration, as stated in Article 1 of the Arbitration Law, only patrimonial available rights can be subject to this type of decision. Similarly, only individuals who are legally capable of disposing of their acts in civil life can engage in this type of judgment, as defined by legal provisions regarding capacity, as described in Articles 3 and 4 of the Civil Code.

It is worth noting that there is no restriction on the type of entity, whether natural or legal, whether public (included by Law No. 13,129 of 2015) or private. They can all opt for this type of solution, provided that, in the case of the public administration, the subject matter of the arbitration is a disposable right, and for other legal entities, any restrictions specified in their articles of incorporation, bylaws, or minutes of meetings, properly filed and recorded in the appropriate registries, depending on the type of legal entity.

The possibility for public law entities – the Federal Government, States, Municipalities, and Autonomous Entities, including public associations and other public law entities created by law (Article 41, Civil Code) – to use arbitration has been established. It's worth noting that arbitration was already being used by the Public Administration in specific situations, such as public-private partnerships (PPP), which were authorized by Law No. 11,079 of December 30, 2004, as provided in Article 11.

Despite this possibility, a restriction was added with the addition of Paragraph 3 to Article 2 of the Arbitration Law, defining that arbitrations involving the public administration can only be conducted under rules of law and must respect the principle of publicity, which clearly excludes arbitration by equity and eliminates – at first glance – the confidentiality typically associated with this type of proceeding.

It is important to note that, despite the freedom of choice for arbitration, in consumer relations, even if both parties – natural or legal – are capable of resolving disputes arising from this type of relationship, the option for this procedure cannot be compulsory. This includes pre-printed clauses in well-known adhesion contracts, as stipulated in Article 51, item VII of the Consumer Protection Code.

Regarding the timing of choosing arbitration, Article 9 of the Arbitration Law allows parties to do so at any time, whether when formalizing a contract (extrajudicial arbitration agreement) – as a way to prevent the method of resolving any dispute related to the business at hand, which would impede filing a lawsuit in the judicial sphere – or even during the course of a judicial action (judicial arbitration agreement).

Furthermore, reinforcing the understanding of the contractual nature of the arbitration institution, Article 2 of Law 9,307/96 grants parties the autonomy to determine how it will be conducted, either by law or by equity. Additionally, Paragraph 1 of the same Article 2 allows parties to freely choose the rules of law by which the judgment will be made, as long as it does not violate good morals and public order, including the legislation to be applied – whether national or foreign – as stated in Paragraph 2 of the same provision.

In the same vein, those involved – the parties, and even the arbitrator(s) – are not bound by or subject to any established procedural or procedural rules, such as the Civil Procedure Code or the Consolidation of Labor Laws.

LEGAL NATURE

Regarding the legal nature of arbitration, Luiz Fernando do Vale de Almeida Guilherme (2012: 33-34) presents the following:

Determining the legal nature of an institution is to establish its legal existence, i.e., its position in the legal world or its essence. The essence of arbitration is not universally agreed upon, and three well-described perspectives on this matter exist, as explained by J. E. Carreira Alvim: (a) a privatist (or contractualist) perspective, with Chiovenda as its precursor; another, a publicist (or proceduralist) perspective, led by Mortara; and

an intermediate (or conciliatory) perspective, with Carnelutti as its exponent. The first perspective relegates the entire arbitral procedure to the contractual sphere, where arbitrators can only decide on the "logical material" of the award, which remains in the private sphere, and the judge, through the decree of enforceability, transforms it into a judgment, consisting of both a logical judgment and a command. The second perspective sees the arbitration agreement, a private legal transaction, as the source of the arbitrators' authority, or rather, the will of the parties, but it is the will of the law that allows them to enter into it. In other words, they emphasize "the procedural aspect of the arbitration agreement, whose main effect would be the derogation of state jurisdictional rules, highlighting the similarity between the arbitrator's award and the judgment issued by the judge." The third perspective argues, on one hand, that the arbitrator's decision is not a judgment since it requires a decree of enforceability (not only to be enforceable but also to be binding), and on the other hand, the arbitrator and the judge collaborate in forming the decision on the dispute, showing that the judgment (and also the judgment of the court) is constituted by both the award and the magistrate's decree. In conclusion, the distinguished judge from Minas Gerais, Carreira Alvim, concludes that Brazilian arbitration, after the enactment of Law No. 9,307/96, has a judicial nature, except for its origin and essence, as it results from the will of the parties. Since the legal nature pertains to the origin, determining it is to establish its legal existence or essence, as mentioned, so the definition of the legal nature of arbitration seems to be predominantly contractual, with its judicial aspect also in play since this institution arises from the will of the parties, constituting a kind of legal transaction of a bilateral nature.

Therefore, arbitration is an alternative means of dispute resolution to which parties capable of contracting can freely choose and adhere, transferring decision-making authority over the situation at hand, involving available rights, to a third party (one or more, as the case may be).

LEGAL PRINCIPLES

Principles are fundamental sources for every branch of law, influencing both their formation and application.

According to Miguel Reale (2005:203), *principles are certain logical statements accepted as a condition or basis for the validity of other assertions that make up a given field of knowledge*.

On the other hand, Celso Antônio Bandeira de Mello (1991:230) provides the following definition:

A principle is, by definition, the central command of a system, its true foundation, a fundamental disposition that radiates into different norms composing their spirit and serving as a criterion for their precise understanding and interpretation. It defines the logic and rationality of the normative system, providing the tone and giving it a harmonious sense.

According to Celso Ribeiro Bastos (1999, p. 46), a constitutional principle would be defined as follows:

Constitutions are not composed of norms that perform identical functions within the larger text. Two main categories can be identified: one called principles and the other, rules. Rules are those norms that are similar to common law norms, that is, they have the necessary elements to invest someone with the status of a holder of a subjective right. On the other hand, due to their high level of abstraction and the indeterminacy of the circumstances in which they should be applied, others are called principles. Although principles cannot generate subjective rights, they play a transcendental role within the Constitution [...]. Therefore, principles are the mainstays of the constitutional text and they gain concretization not only through other rules of the Constitution – such as the federal principle – but also through ordinary legislation, which must be in accordance with these principles and gradually provide them with an increasingly comprehensive understanding.

Therefore, the significance of a principle in the legal system is undeniable, as it serves as a foundation for all other norms, such that a violation of a positive norm also constitutes an infringement of the principle upon which the norm is built.

This leads us to conclude that principles are fundamental elements of any normative system, serving as a pivotal point in the formulation, observance, and application of legal rules.

And it is no different for arbitration, as it contains certain principles that are inherent to it and need to be observed in order to enable a correct understanding and interpretation, as well as proper application. This is why constitutional principles related to any type of legal process must be respected.

Among the principles, we can highlight the following as the most relevant: the autonomy of the arbitration clause in relation to the contract, due process of law, adversarial proceedings, and the right to a fair hearing, equality of the parties, impartiality, the arbitrator's freedom of judgment, and the requirement for a reasoned decision.

AUTONOMY OF THE ARBITRATION CLAUSE IN RELATION TO THE CONTRACT

In the realm of Contract Law, the principle of conserving contracts prevails, including references to preservation (Article 184 of the Civil Code), conversion (Article 170 of the Civil Code), and utilization ("In a clause susceptible to two meanings, it shall be interpreted in accordance with what is feasible. Nullities, in turn, may be of two types: absolute nullity and relative nullity" - Articles 166 and 171 of the Civil Code).

In arbitration, the principle of the autonomy of the arbitration clause in relation to the contract prevails, which means that even in the face of the contract's nullity, the clause will not lose its integrity or validity, contrary to the provision that the effects of the principal contract extend to the accessory.

COMPETENCE-COMPETENCE

Also known as *Kompetenz-Kompetenz*, this principle of competence-competence presupposes that the arbitrator has the authority to decide issues related to the

possible invalidity of the arbitration clause or the contract, as stated in the sole paragraph of Article 8 of the Arbitration Law.

Therefore, the arbitrator is given the competence to assess their own competence, evaluate the validity of the arbitration clause, and establish the arbitral tribunal as competent to adjudicate the matter, thus excluding the judiciary from dealing with issues related to such validity.

As a result, if there is any dispute regarding the competence of the arbitral tribunal, and if the judge encounters an arbitration clause, they must declare themselves incompetent to consider the matter and refer the parties to the chosen arbitral tribunal.

DUE PROCESS OF LAW

As seen earlier, the parties' choice of arbitration is grounded in the principle of autonomy of the will, as they can opt for a less bureaucratic means of dispute resolution and define the procedure to be followed.

If the parties do not make this choice and opt for a particular chamber or arbitral tribunal, they may encounter their own rules and procedures related to the progress of the process, as allowed by the wording of Article 21 of the Arbitration Law.

Given this freedom of choice, the arbitration process does not require the same form as the civil process, for example. Most established chambers have their own rites and procedures to which the parties agree, and depending on the flexibility of the chamber, they can adjust them to their intentions, as stated in the aforementioned Article 21 of Law 9,307/96.

This principle aims to protect the parties from any form of arbitrariness by the arbitrators or from the surprise of some procedure not foreseen or accepted by the party, causing harm to them or to the process.

ADVERSARIAL PROCEDURE AND DUE PROCESS

"Despite the freedom of the parties to choose the procedure, it is undeniable, however, and as explicitly stated in the mentioned § 1 of Article 2, that there must be no violation of good morals and public order, especially those related to due process and adversarial procedure.

Cândido Rangel Dinamarco (2013:26) sheds light on the matter when he says the following:

The awareness of the *jurisdictional nature* of arbitration and its inclusion in the general theory of process puts beyond doubt the imperativeness of sheltering it under the mantle of *constitutional procedural law* – which involves considering its institutions in light of the superior principles and guarantees addressed by the Constitution to all procedural institutions and particularly those of a jurisdictional nature. Part of the specialized doctrine strives to bring arbitration into the system of guarantees and principles directly addressed to state procedural law, which is a valuable methodological premise indispensable to its proper understanding and the correct solution of the inherent problems. Thus, it is in a valuable study in which Vincenzo Vigoritti emphasizes, regarding the arbitral tribunal, the need "to respect the fundamental rules of civil proceedings, traditionally summarized in the formula of *procedural due process*."

Luiz Antonio Scavone Júnior (2014: 139-141), when addressing the freedom of the parties, expresses himself as follows:"

The possibility for the parties to regulate the arbitral procedure or, in a supplementary manner, the tribunal or the arbitrators, does not mean they can do so in an entirely unrestricted manner.

Some principles must be observed, under penalty of nullity of the arbitral procedure (art. 32, VIII, of the Arbitration Law).

This is what art. 5, LV, of the Federal Constitution provides, which guarantees that 'the litigants, without judicial or administrative proceedings, and the accused in general are ensured due process and a full defense, with the means and resources inherent to it.'

In this regard, art. 21, § 2 of the Arbitration Law imposes in arbitration:

1. *The principle of due process*

In this regard, by informing the acts performed by the opposing party, there should always be a possibility for a reaction, noting that what is required is the opportunity for the other party to express themselves, and there is no violation of due process if, alongside this possibility, the opponent remains inactive.

Therefore, the utmost caution should be exercised in the communication of procedural acts, even if stipulated by the parties or the arbitral institution, allowing the litigants to influence the decisions to be made.

It should be noted that the principle of due process and fair hearing, fully applicable to the arbitral procedure, requires that the arbitrators hear the parties and do not resolve the dispute without giving them the opportunity to express themselves, and the same conditions should be provided for them to state their position on various matters before the arbitral tribunal, especially regarding the evidence presented or the documents filed in the case.

EQUALITY OF THE PARTIES

Equality of the parties" is a concept that has been developed for a long time, and it is divided into formal equality and substantive equality.

Formal equality is the one granted to everyone under the law, ensuring that everyone has the same rights, as well as equal access to all rights, and the equal application of all available legal rules, as provided in Article 5 of the Federal Constitution.

Substantive equality involves considering certain specificities among those involved, so as to provide, as Aristotle stated, equal treatment to equals and unequal treatment

to those who are unequal, in proportion to their inequality. The extent of this treatment is, of course, determined by the legislator, who enacts rules that allow for a balance of power.

In the case of arbitration, the parties are, at least in theory, considered equal, as they have the option to freely choose this type of procedure to resolve their disputes, as stated in Article 1 of the Arbitration Law, as well as the rules that will be followed in the judgment of the dispute.

Therefore, during the course of the arbitration proceedings, the arbitrators must treat the parties without any distinction, offering them equal opportunities, so that there is no favoritism or preferences for any reason

IMPARTIALITY OF THE ARBITRATOR

The arbitrator's performance must be guided by the same requirements and restrictions imposed on any judge, as they are equated with judges of law, according to Article 18 of the Arbitration Law.

In doing so, they are bound in their performance to observe the principles set forth in Law 9,307/96, specifically in paragraph 6 of Article 13, requiring them to demonstrate impartiality, independence, competence, diligence, and discretion.

In fact, arbitrators, under penalty of liability, are obligated to disclose any potential conflicts of interest or biases when appointed to act as arbitrators (paragraph 1, Article 14, Law 9,307/96).

FREE CONVICTION AND MOTIVATION

This principle ensures the arbitrator the faculty to render a decision in accordance with their own conviction, freely evaluating the evidence and all that has been presented regarding the subject matter of the dispute and the law (or the rules of equity) that are applicable to the case, as agreed upon by the parties.

And this freedom in evaluating the elements and evidence in the case should be included in the award (Article 24, caput, of Law No. 9.307/96), as well as the reasons for their conviction should be expressed and justified, following the requirements that must be stated in the award (Article 26, caput, of Law No. 9.307/96).

The arbitrator's decision has the force of an enforceable award, and for its enforceability, it is not subject to judicial scrutiny or approval (Article 31). By the way, the decision rendered by the arbitrators is an award, which is not subject to an appeal or any other type of review, except for a request for clarification (equivalent to a motion for judgment clarification).

ARBITRATION PROCEDURE

Valuing the autonomy of the parties, Law No. 9,307/96 left it to the parties' discretion to choose and regulate the procedure to govern and conduct the arbitration process. They can adopt rules that best suit their needs, as long as they respect good customs and public order, as provided in paragraph 1 and 2 of Article 2 of the Law.

In this regard, Carlos Alberto Carmona (2009:23) states:

The rule advocated is as follows: the parties can adopt any procedure they see fit, provided that they respect the principles of adversarial proceedings, equality of the parties, impartiality of the arbitrator, and their free and rational conviction. If they do not specify the procedure to be adopted and do not refer to the rules of any institutional body, it will be up to the arbitrator or the arbitral tribunal to establish the rules to be followed, always in compliance with the aforementioned principles, which, ultimately, summarize the content of what historically became known as due process of law.

Thus, it can be said that, respecting the principles mentioned, as well as good customs and public order, the fundamental characteristic of the arbitration process is its flexibility. The parties can define it or follow the rules previously established by the chosen arbitration institution or even by the arbitrator if no rules are in place, as provided in paragraph 1 of Article 21 of the Arbitration Law.

These procedures can be defined from the moment the parties choose arbitration, when they include the arbitration clause in the contractual instrument (Article 4 of the Arbitration Law), or through the arbitration agreement (Article 9 of the said Law) when a conflict arises and there is no arbitration clause, and the parties agree to opt for arbitration, or through the signing of joint terms that stipulate rules freely agreed upon by the parties.

It is important to note the difference between the two types of agreements, as the arbitration agreement, as stated in Article 9 of the Arbitration Law, is one entered into before the arbitral tribunal, where the parties waive the jurisdiction of the state courts and commit to the decision of the arbitrators. In other words, the conflict already exists, and the agreement is entered into during its course. It may or may not result from the existence of a prior arbitration clause.

On the other hand, the arbitration agreement - or arbitration clause, as provided in Article 8 of Law 9,307/96 - is an arrangement through which the parties, in a contract, include a specific provision where they agree in advance to submit any future disputes or conflicts arising from the contract to arbitration. This agreement is established at the initial moment of formalizing the contract, ensuring that the parties refrain from seeking state court jurisdiction to resolve disputes arising from the business conducted.

Cândido Rangel Dinamarco (2013:52), when discussing the arbitration procedure, provides the following instruction:

Just like the procedure that takes place before the Judiciary, the arbitration procedure *consists of the acts by which, in the process, the arbitrator exercises jurisdiction, and the parties defend their interests.*

Therefore, it involves the development of minimal rituals that allow its participants to exercise their roles, whether to protect the parties' rights (such as the right to a fair hearing) or because the Arbitration Law requires them to adhere to specific conduct.

This becomes evident when one encounters specific legal provisions, such as the duty of disclosure, which requires the arbitrator to disclose, as soon as appointed and before

accepting the role, any potential conflicts or doubts that might compromise their impartiality and independence, or the definition of the specific moment when a party may raise concerns about the arbitrator's impartiality.

In this same sense, Cândido Rangel Dinamarco (2013:52) adds:

Just like in any legal process, the arbitration process must necessarily include certain indispensable acts that constitute its *structural elements.* And, as in any process of judicial knowledge, the structural elements of the arbitration process are the *claim,* the inclusion of the *defendant* in the procedural relationship (service there, notification here), the *defendant's response*, the evidence-gathering phase, and the final award, which can be either a merits award or a termination award, depending on the circumstances of each case.

Let's examine, then, within the scope of the arbitration process - the subject of this work - each of its stages.

ESTABLISHMENT OF ARBITRATION

The moment of instituting arbitration, as per the rule outlined in Article 19 of the Arbitration Law, occurs with the appointment of the arbitrator (or multiple arbitrators, if that's the case), naturally following their acceptance.

The selection of arbitrators or the president of the arbitral tribunal – exercised freely by the parties – as per the new phrasing given in paragraph 4 of Article 13 grants the right to exclude the provision that the arbitrators themselves, by majority, could choose the chairman, even if such a rule exists in Arbitration Chambers, including regarding the selection of arbitrators not belonging to the institution's ranks.

Despite this definition seeming straightforward, the demarcation of this milestone is of fundamental importance, given that, prior to this moment, any other measure intended to protect rights – such as provisional measures – should be requested from the Judiciary, and the competent body would be the one capable of considering the demand if the parties hadn't chosen arbitration.

The mere existence of an arbitration agreement – whether through a submission clause or an arbitral commitment – doesn't imply the existence of an arbitral tribunal. Carlos Alberto Carmona (2013:278) succinctly but with great clarity articulates:

The arbitration agreement, as one can discern, might not establish the arbitral tribunal: if the appointed arbitrators fail to enter into the arbitral commitment, for example, arbitration is not yet established, but a mere expectation of forming the arbitral tribunal.

From this point forward, the arbitrators assume their jurisdictional function, without which they wouldn't have the authority to proceed with the arbitration process. It's essential to note that before this institution, the party intending to institute arbitration must adopt certain procedures, as will be explained later.

If the parties have referred, in the submission clause, to the rules of a specific arbitration institution, the institution shall follow the prescribed procedures, as per Article 5 of the Arbitration Law, especially regarding how to summon the opposing party to participate in the process (through notification, as previously discussed).

On the other hand, if the rules of a specific institution haven't been chosen and the submission clause doesn't establish the method of instituting arbitration, the call to the other party to enter into the arbitral commitment can be done through postal mail, with acknowledgment of receipt, specifying the date, time, and location for that purpose, as stated in Article 6.

In case the invited party refuses to attend, the interested party in instituting the arbitration may file the relevant action with the judiciary to compel the former to sign the arbitral commitment. They will request the competent court to summon the resisting party to appear in court at a special hearing to sign the arbitral commitment.

The development of this judicial process will depend on a few factors:

1. Should the parties appear, the magistrate will attempt a conciliation regarding the subject matter of the dispute, which, if unsuccessful, will be followed by an

attempt to have the parties sign the arbitral commitment (paragraph 2 of Article 7).

2. If there has been no agreement on the signing of the commitment, the judge will issue a decision within ten days, after hearing the defendant, regarding this dispute (specifically on whether the signing of the commitment is mandatory or not), as per paragraph 3 of Article 7.
3. When making the decision, it will be the judge's responsibility to check what the arbitration clause says about the appointment of arbitrators, and in the absence thereof, after hearing the parties, it will be up to him to appoint the arbitrator to resolve the dispute - here, the actual subject matter in dispute in the arbitration proceedings (paragraph 4 of Article 7).
4. If the plaintiff is absent from the hearing scheduled for the execution of the arbitration agreement without justified reason, the judge will declare the process to be extinguished without judgment on the merits (paragraph 5 of Article 7).
5. If the defendant is absent, also without a justifiable reason, it will be up to the judge to decide on the arbitration agreement, appointing an arbitrator (paragraph 6 of Article 7), with the judgment serving as the arbitration agreement (paragraph 7 of Article 7).

It should be noted that even if the judge replaces one party's expression, as they were summoned to participate in this judicial procedure and had the opportunity to express themselves and be aware of the decision - even if they are in default, having been given the opportunity through citation - the fact is that the arbitration will continue, even if the party is in default, suffering the same consequences applicable to defaults in judicial procedures (confession regarding matters of fact and any document that was not timely submitted to the record).

Returning to the institution of arbitration, once it has been instituted, if the arbitrators identify the need for clarification of the arbitration agreement, they will call the parties for this purpose, drawing up an addendum to the agreement (clause or arbitration commitment), signed by all parties, which will become part of it, according to the sole paragraph of Article 19 of the Arbitration Law. This addendum is also known as an Arbitration Amendment, as in the designation given by the Arbitration and Mediation

Chamber of the Brazil-Canada Chamber of Commerce (CAM/CCBC) in its Regulations, in item 4.17 of Article 4.

In fact, given the absence of defined procedures in the Arbitration Law, it is up to the parties, in this term, to make the definitions they consider appropriate for the processing of arbitration or to submit to the rules of the chosen institution.

OBJECTION TO THE ARBITRATOR'S JURISDICTION, RECUSAL, AND DISQUALIFICATION OF THE ARBITRATOR, AND NULLITY OF THE ARBITRATION CLAUSE

Despite the mentioned freedom that the parties have to define procedures related to the arbitration process, the fact is that the Arbitration Law imposes that certain acts must be performed in a timely manner.

One of these requirements of the law pertains to the timing of raising issues that would be prejudicial to the progress of the arbitration process and that, if left for a future opportunity, would jeopardize one of the aspects that distinguishes arbitration from the judicial process, which is expediency.

Well then. The legislator determined, in Article 20 of Law 9.307/96, that the party must, at the first moment they express themselves in the arbitration process, immediately after the institution of arbitration – hence, after the signing of the Arbitration Agreement – raise issues related to the jurisdiction of the arbitration tribunal, the recusal or disqualification of the arbitrators, and also the grounds for the nullity, invalidity, or ineffectiveness of the arbitration agreement.

At first glance, this seems to invoke the doctrine of preclusion if these matters are not raised at the first opportunity. However, the same Arbitration Law, which introduced this requirement in the aforementioned Article 20, did not specify the consequence of not exercising this prerogative/obligation. This will have a direct impact if, at the end of the arbitration process, the party intends to invoke the circumstances in Article 33 of

the mentioned Law to argue the nullity of the arbitral award or even the procedure, in case there are incurable defects in the arbitration agreement.

Regarding this uncertainty in the mentioned provision of Article 20, Carlos Alberto Carmona (2013:284) states as follows:

The issues dealt with in the legal provision are hybrid and deserve to be separated for differentiated analysis: there are matters that border on public policy and concern the principles of the process (specified in § 2 of Article 21), whose violation does not admit rectification; there are others, however, that are fully within the realm of party autonomy, allowing for the application of the principle of party autonomy.

Among these are some of the issues related to the disqualification and challenge of the arbitrator: if the parties, knowing the grounds for disqualifying the arbitrator, fail to assert them, they are tacitly agreeing that such grounds will not affect the impartiality of the judgment (or, at the very least, they are accepting the risk of potential bias), and consequently, they cannot reserve the right to raise the issue after the award has been rendered (unless, of course, the grounds for disqualification or challenge were discovered later). Preclusion will occur here if the party that becomes aware of the grounds that could lead to the disqualification of the arbitrator fails to raise the respective objection at the first available opportunity.

The same will apply in the event that the parties have stipulated that the arbitrator (or arbitrators) to be appointed by a third party must possess certain characteristics, and an appointment violates the pre-established parameters. Imagine that the parties, in the arbitration agreement, have agreed that the arbitrator to be appointed by a specific arbitration institution must have a minimum of ten years of experience in the textile market; once the arbitrator is appointed, the parties realize that the arbitrator does not meet this requirement: the party wishing to invoke the grounds for nullity must allege the defect at the first opportunity, under penalty of not being able to rely on it in the future in an annulment action.

[...]

As for the other issues, the rule is, in principle, merely procedural. If a party fails to raise the nullity of the arbitration agreement or the arbitrator's lack of jurisdiction to decide a particular matter during the arbitration proceedings, it will not be precluded from filing the action referred to in Article 33 of the Law.

As observed, depending on the subject matter, the failure to assert such grounds may suffer the effects of preclusion due to party autonomy, while others, on the contrary, may be subject to subsequent challenge in the judicial system. This may occur through an annulment action or by means of a motion to set aside the award (the original wording of the Law referred to objections to the enforcement of the award - then provided for in Article 741 of the Civil Procedure Code). Due to changes introduced by Law 11.232/2005, the enforcement of the award was replaced by the motion to set aside the award provided for in Article 475-L. In the future, with the entry into force of Law 13.105/2015 - New Civil Procedure Code, which will take effect on March 15, 2016, it will be governed by Article 525.

As provided in paragraph 1 of Article 20 of Law 9.307/96, regarding the challenge based on the disqualification or challenge of arbitrators, if accepted, it will lead to their replacement as provided in Article 16 of the same Law. On the other hand, if the arbitrator or the arbitral tribunal's lack of jurisdiction or the nullity, invalidity, or ineffectiveness of the arbitration agreement is recognized, it will result in releasing the parties to bring the disputed matter for a decision by the competent judicial authority for the type of action they may intend to file.

If the challenge is not accepted, the arbitration proceedings will continue as agreed upon by the parties in the arbitration agreement, or according to the rules of the chosen institution, without prejudice to potential review by the judicial system, as mentioned earlier.

FREEDOM OF THE PARTIES TO CHOOSE THE ARBITRAL PROCEDURE

The provision of Article 21 of the Arbitration Law reinforces the concept of broad autonomy of the parties, including regarding how the arbitration procedure will unfold, allowing them to choose the steps to be followed, adhere to the rules of the chosen arbitral institution, or let the arbitrators chosen by them determine how the proceedings will proceed, a provision confirmed by the first paragraph of this article.

It is important to highlight that, regardless of the parties' choice - whether they define the procedure to be followed themselves, adhere to the rules of the arbitral institution, or leave it to the arbitrators to make such decisions - the fact is that the principles of adversarial proceedings, equality of the parties, impartiality of the arbitrator, and their free conviction must be respected, as prescribed by paragraph 2 of Article 21.

Furthermore, the parties may exercise their right to act or defend themselves on their own (represent themselves), given the availability of the right subject to arbitration, or, as is customary, be represented by a lawyer and be assisted by an assistant, as authorized by paragraph 3 of the mentioned Article 21 of the Arbitration Law.

It is important to note that, despite this freedom, the arbitrator is required, at the beginning of the procedure, to seek reconciliation between the parties. If an agreement is reached between the parties, the arbitrator shall declare this fact in an award. Otherwise, if no settlement is reached, the arbitration procedure will continue.

DISCOVERY IN ARBITRATION PROCEEDINGS

As noted in the opening paragraph of Article 22 of the Arbitration Law, the procedural instruction is entirely directed by the arbitrators, to whom the power is given to undertake the necessary steps for the formation of their own free judgment.

Carlos Alberto Carmona (2013:312), when addressing the issue of the arbitrator's powers in the instruction process, provides the following lesson:

Similarly to a judicial judge, the arbitrator may instruct the case, that is, prepare it for a decision by gathering the useful, necessary, and relevant evidence to form their judgment. The commented legal provision, in its opening paragraph, summarizes and simplifies the guidelines of Articles 125 and 130 of the Civil Procedure Code, making it clear that the arbitrator does not depend on requests from the parties to determine the production of any evidence they consider important for resolving the dispute.

It is the arbitrator's responsibility to take the statements of the parties, hear witnesses, and, when necessary, order the performance of expert opinions or the production of other evidence that they deem necessary to clarify the matters submitted for their consideration. These procedures can be initiated upon request from either party or, at their discretion and judgment, ex officio, given that they are the recipient of the instruction and the one responsible for forming a judgment on the facts.

Francisco José Cahali (2014:242), when discussing evidence in arbitration, provides the following insights:

First and foremost, it is important to note the different approach in arbitration regarding the production of evidence.

Based on our experience with disputes, we tend to consider that the initiative for evidence production lies with the party seeking to prevail in the action, with less significance for a productive role in the process, in comparison to the academic debates on the distribution of the *burden of proof* (Article 333 of the Civil Procedure Code).

This idea is fully realized in arbitration because there are no mandatory criteria in the law regarding the obligation to prove relevant facts capable of influencing the outcome of the dispute. In a few words but with significant consequences: *there is no statutory allocation of the burden of proof in the arbitration procedure.*

In this sense, the contribution of the parties to instruct the case is of their complete interest, and it is up to them to participate as fully as possible in the presentation of evidence, focusing on the revelation of the occurrence of the facts, not only as alleged

by the interested party but also in the version that suits them (or in demonstrating its non-occurrence), even if alleged by the opponent.

Furthermore, the arbitrator has expanded their authority, both in law and in practice, in conducting the procedure, and it is their responsibility to actively interfere in the instruction of the case to establish their free judgment on the facts, necessary for the proper resolution of the conflict. By their initiative, facts can be investigated to discover the truth.

In the questioning of the parties and witnesses, it is the arbitrators' responsibility to define the date, time, and location for such proceedings, which will be communicated in advance in writing to the interested parties. During these proceedings, the testimonies and witness statements will be recorded, with the signatures of those involved – parties, witnesses, and arbitrators, as per the paragraph 2 of Article 22 of Law 9,307/96.

In the event of a party's non-appearance to provide personal testimony, the arbitrator will consider this behavior along with other evidence when making the decision. In the case of a witness's absence, it will be the arbitrator's responsibility to request the judicial authority with jurisdiction to enforce the appearance of the witness, all in accordance with paragraph 2 of the mentioned Article 22.

On another note, the default of any party will not disrupt the normal course of the arbitration procedure because the arbitrator can issue a judgment based on the information they have, as supported by paragraph 3 of the aforementioned Article 22, of course, aligned with the diligence duty imposed by paragraph 6 of Article 13 of the same Law.

If it becomes necessary to take precautionary or coercive measures during the arbitration procedure, except those related to the witness testimony, as discussed earlier, paragraph 4 of Article 22 of the Arbitration Law provides that the arbitrators must request such measures from the judicial authority that would have the competence to adjudicate the matter if it were not pending in the arbitral tribunal.

It is essential to note that, despite the expression "request them from the judicial authority," the overwhelming doctrine understands that this request is for the enforcement of the precautionary measure considered and granted by the arbitrators since, as seen, it is the arbitral tribunal's competence to consider all issues related to the dispute at hand.

If the precautionary measure is directed against one of the parties involved in arbitration, and that party complies with the arbitral tribunal's order, there is no need for involvement of the judicial authority. However, if there is a need for compliance with the precautionary measure by third parties not involved in arbitration (such as providing bank statements), or when the party against whom the precautionary measure was granted resists, then it will be necessary to request the judicial authority to exercise its power of coercion to ensure compliance, even against the will of the party obligated to fulfill the obligation.

It is important to emphasize that this request to the judicial authority would merely be for the issuance of the "compliance" (similar to a commission issued by a court of another jurisdiction) – as the arbitral tribunal lacks the coercive authority that the state court possesses – and there cannot be any type of reevaluation or judgment by the state judge regarding the legality of the arbitral tribunal's decision.

In this regard, Francisco José Cahali (2014:269) expresses:

The arbitral tribunal has full authority to consider and grant precautionary measures during arbitration. The jurisdiction of the arbitrator (or panel) is comprehensive for the resolution of all issues related to the conflict. It is important to remember the absence of coercive power or enforcement powers for these measures, which are exclusive to the Judiciary. If the arbitral order is not complied with voluntarily, or if voluntary compliance is impossible, the cooperation of the state court must be requested for the forced implementation of the measures determined by the arbitrator. In short, the arbitrator has ius cognitio, but lacks ius imperium to enforce their decisions in practice.

Following the same line, Carlos Alberto Carmona (2013:323), reinforcing the arbitral tribunal's competence to consider and grant precautionary measures:

The 1996 legislator did not make the same mistake as the Code of Civil Procedure, abandoning the formula of Article 2,086, which prohibited the arbitrator from decreeing precautionary measures. Instead, it determined, albeit indirectly, that the arbitrator, when there is a need for coercive measures, should request them from the state judge. Although the legislator was not explicit, they made it clear (or, at least, clearer than in the Code of Civil Procedure) that, when there is a need for protective measures, the party seeking the measure should approach the arbitrator (and not the state judge), formulating their request with a foundation. The arbitrator, considering that the *fumus boni iuris* and the *periculum in mora* are demonstrated, will grant the precautionary measure. If the party against whom the measure is ordered complies with the decision, with no need for the intervention of the Judiciary; if, on the other hand, there is resistance, the arbitrator will request the support of the state judge, not for the judge to deliberate on whether or not to grant the requested measure, but only to enforce it.

Regarding the potential replacement of the arbitrator, paragraph 5 of Article 22 allows the new arbitrator (substitute) to decide whether to assess the evidence already produced or repeat it, as they will be responsible for the analysis and evaluation of the evidence to form their free judgment and substantiate their decision – as required by Article 26, section II, of the Arbitration Law.

Carlos Alberto Carmona (2013:332) provides valuable clarification on this topic:

If the arbitrator (or any of the arbitrators on the panel) who has already commenced the evidentiary proceedings needs to be replaced for any reason (death, suspicion, disqualification, illness, incapacity), their substitute will have the discretion (not the obligation) to have the evidence that has already been produced repeated. This is, as you can see, a criterion that softens the principle of immediacy: it is desirable for the judge to have direct contact with the parties, experts, and witnesses, but it will be up to the judge to assess whether the evidentiary acts carried out by their predecessor are satisfactory for their conviction or if they feel the need to repeat some, a few, or all of them.

The primary target of this provision is oral evidence: the arbitrator may want to hear a witness, party, or expert again, but this is likely to occur only if the judge perceives that there was a flaw in the conduct of the evidence, which should translate into direct impressions on the judge.

Therefore, it is important for the new arbitrator to substantially evaluate all the evidence produced to determine if they feel secure enough to render their decision based on the content of the record and what was produced by their predecessor, or, if needing to form their own impressions, they may redo the evidence they consider important.

It is worth noting the possibility provided for in the Arbitration Law to render partial awards (new wording of paragraph 1 of Article 23), and in the new paragraph 2, the possibility for the parties to agree to extend the deadline for the final award to be rendered, which is entirely in line with the contractual freedom aspect surrounding arbitration. This helps avoid any nullity of the procedure due to a deadline overrun, as stipulated in Article 32, Section VII, which declared void an award rendered beyond the deadline.

Furthermore, according to the wording of Article 30, the parties are given the option to, by mutual agreement, adjust the deadline for requesting clarification or correction of the award (a type of motion for clarification), so they are no longer bound by the previously prescribed legal deadline of five days. They are free to set any other deadline, and the same applies to the deadline for amending the award.

CONCLUSION

Arbitration is a highly useful tool for dispute resolution, available to capable individuals (natural or legal persons - both private and public law) to adjudicate matters related to disposable rights.

Parties choosing this procedure can select the process and rules that will be applied in the judgment, allowing them to avoid conventional procedural rules.

It is a process that emphasizes the autonomy of the parties, prioritizing their preferences, especially regarding the procedural aspects. They can determine the procedures to be followed and may choose to adhere to the rules of the institution they have selected for the arbitration process or allow the arbitrators to define these procedures.

In arbitration, the use of the principle of adversarial process and the right to a full defense is open, enabling parties to present all arguments and facts relevant to the disputed issue, aiming to convince the arbitrator of the preponderance of their rights.

Therefore, it can be concluded that arbitration is an effective means of social reconciliation, available for contracting parties who may voluntarily opt for it and define procedures as they see fit, as long as they respect public policy, ethical standards, and the principles of adversarial process and the right to a full defense.

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