Arbitration-Court training and procedural statement

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SUMMARY

Arbitration is a means of conflict resolution provided for by law that extract the judiciary the primacy to decide conflicts between natural or legal persons, leaving the task of settling the question put to trial for a third, chosen freely by the parties. To this end, there should be the institution of the arbitration procedure, which depends on the adjustment of will between the parties, since, with the object to be subjected to that kind of a right deslinde available. Can the parties, through the Arbitration Convention-to be adjusted by means of arbitration agreement or clause-set procedures that will govern the arbitration procedure and to guide the performance of the referees. If you do not define this procedure, parties will strictly adhere to the rules of the arbitral institution chosen where tramitará to arbitration, or leave at the discretion of the arbitrators define the procedures. Important to point out that, despite all the freedom conferred on the parties, may not, by express legal provision, suppress the adversarial and the ample defense. In order to allow a better understanding of the arbitration process, this work intends to iterate through all its procedures, since the legal principles that involve assessing the recent legislative changes, passing by the
institution of the arbitration procedure and the acts that involve education and trial.


INTRODUCTION

This article aims to offer operators the right insight into the institution of arbitration and the procedures governing the arbitral proceedings. We will present the principles that must be followed by those who want to use the arbitration or her military.

The institution of the arbitration procedure is, first and foremost, an option the parties seeking an alternative and more effective solution to any disputes between them, without the need to refer the matter to the judiciary.

The parties may, by common accord, decide how will be the arbitral proceedings and may establish rites and procedures that meet your interests. However, can never, even under the argument the hostel of the autonomy of the will, suppress the right to adversarial and ample defense.

In addition, should pay attention to the principles of the arbitration, such as the competence-competence, transferring to the arbitrators the necessary autonomy to decide themselves about the definition of its competence to assess the existing issue between the parties who opt for this procedure.

Should the parties choosers for this tool of conflict resolution-and their attorneys – know the times when should offer the appeals relating to incompetence, suspicion and impediment of the referee, as well as of the possible invalidity of the arbitration clause, under penalty of preclusion from the right to use this complaint.

Still, will be verified procedural statement issues, in particular those relating to the hearing of parties and witnesses, as well as the autonomy conferred the referees on this subject, to the extent that they can themselves determine the realization of certain evidence, although not requested by either party, to the extent that it will depend on to form your convincing and can substantiate their free decisions.

THE ARBITRATION

The coexistence between people and the pursuit of these assets and rights brings in itself a conflict, insofar as those don't exist in sufficient amount and form to meet everyone. Because of this, and the dispute-either by necessity or by the mere realization that being holder of assets and rights on people – or
even divergence between the interpretation of what is due from one to the other is what causes conflicts arise.

When conflicts arise, the modern and democratic society there was, through the evolution of customs and standards, in assigning to the State the power-duty to resolve the conflicts that arise between people, through the judiciary.

The race of the people – natural or legal entities – the Judiciary, leading to this being the full range of possible and imaginable conflict – whether in the sphere of civil, commercial, criminal, family, politics, tax, labor, etc. provoked assoberbamento of processes, causing, in various fields of law, the processes had a slow processing and decisions were handed down many times until decades after its filing.

In addition to the legal uncertainty, the uncertainty itself to reach the well of life fetched via judicial process, delaying judicial pronouncement generates deep uncertainty and distress in the courts, to the extent that they're not sure that summer – and when – a decision for the conflict to submit to the judges togados.

That's not why the master Rui Barbosa so professed, in his "Oração aos Moços", 1920:

But justice delayed is not justice, otherwise qualified and manifest injustice. Because the extension illegal in the hands of the judge contradicts the written law of the parties, and thus the lesa in heritage, honor and freedom. The judges tardinheiros guilty, that joint laxity tolerating. But its tresdobra fault with the awful aggravating that the victim has no way to react against the powerful offender, in whose hands lies the fate of pending litigation.

It is no less than the search for non-judicial means of dispute resolution has been taking body, with the appreciation of conciliation, mediation and arbitration, also, when possible, from the hands of the judiciary the exclusive competence for knowing the law and apply the law (narrates mihi factum dabo tibi ius) (translation: Tells me the facts and give you the right.).

And one of those extrajudicial forms, arbitration, has been showing very viable alternative, especially when seeking a quick solution, given by professionals of recognized competence and, above all, free choice of the parties, which means that, in most cases, undergo this pronouncement of court and comply with what was decided rapidly and quickly, conforming with the solution given.

**BRIEF HISTORY**

Arbitration is not a form of conflict resolution, behold, not institutionalized, was used in antiquity and in
the middle ages, as in indicates Luiz Fernando de Almeida Guilherme Valley (2012:32), quoting Plato, that there to the fact that the decision by the judges elected by the parties would be the most fair:

Arbitration is one of the ways of resolving the world’s oldest controversy. Was used in antiquity and in the middle ages, because it represented a way to avoid a military confrontation, that, in the sphere of public international law, already in other branches of the law, can speak to the solution of conflicts by means of arbitrators has been used for many years, since the own Plato wrote about judges elected like the fairest way of decision.

Even in Brazil's new arbitration, with reporting of his prediction in the Constitution of the Empire, from 1824, that the prescribed in article 160. While not all Constitutions homelands following the have maintained the forecast of this Institute, in infraconstitutional legislation still did score. Examples include the Decree 5.11.1898, 3084, and Civil procedure codes, 1939 and 1973.

The Federal Constitution of 1988 alluded expresses that form of conflict solution, to provide for the possibility of their use in labor issues. See the original article 114 essay and its first and second paragraphs:

Art. 114. It is up to the labour courts conciliate and adjudicate individual and collective disputes between the workers and employers, covered the external public-law entities and the direct and indirect public administration of the municipalities, the Federal District, of States and of the Union, and in the form of the law, other disputes arising from employment contracts and employment relationships, as well as disputes that originate in the fulfillment of their own sentences , including press conferences.

[...]

- 1. Frustrated to collective bargaining, the parties may elect arbitrators.
- 2. Refusing any of the parties to the negotiation or arbitration, is provided to the respective syndicated judge and the collective bargaining labor courts set standards and conditions, conventional provisions and minimum legal protection to work.

2016, pp: 68-97 – ISSN: 0959-2448

1. The contradictory

To that extent, through information of acts performed by the opposing party, should always be possible a reaction, noting that what is needed is the opportunity for the other party to manifest, and there is no affront to the contradictory, aware of this possibility, the contender remains inert.
So there must be as much caution in the communication of the procedural acts, even if it is so stipulated by the parties or by the arbitration, allowing the litigants can have an influence on the decisions that will be taken.

It should be noted, therefore, that the principle audi alteram partem and of ample defense, applies fully to the arbitral proceedings, requires that the arbitrators hearing of the parties and promoting dirimam not the conflict without giving them the opportunity to demonstrate, and should be given the same conditions of externalizarem its position on the various issues before the arbitration, in particular on the evidence produced or in relation to the documents joined to the proceedings.

EQUALITY OF THE PARTIES

Equality of the parties is a concept that has been built a long time ago, being split between formal equality and material equality.

Formal equality is that afforded to all under the law, making sure all the same rights, as well as access to all rights, in addition to the equal application of all legal rules available, as is laid down in the chapeau of article 5 of the Federal Constitution.

Material equality already provides for the observance of certain particularities between those involved, in order to check, as Aristotle, treatment equal to equal and unequal to the unequal, the extent of their inequality. The measure of this treatment, obviously, it is up to the legislator, editing rules that allow the balance of forces.

In the case of arbitration, the parties are, at least in theory, equal, insofar as they have the option to choose this type of procedure for solution of their conflicts, as article 1 of the law of arbitration, as well as the rules to be followed in the trial of the dispute.

Thus, during the course of the arbitral proceedings, the referees must treat the parties without any distinction, offering also to them the same opportunities, so that there is favoritism or preferences, for any reason.

IMPARTIALITY OF THE ARBITRATOR

The performance of the referee must be guided by the same requirements and restrictions imposed on any judge, since these, according to article 18 of the Arbitration Law, are treated as such.

In so being, are restricted in their activities, to observe the principles laid down in the law itself 9,307/96,
specifically in paragraph 6 of article 13, and required in the performance of his mistér, impartiality, independence, competence, diligence and discretion.

So much so that the referees, under penalty of accountability, are under an obligation to decline, when appointed to act as such, any obstacles or suspicion (paragraph 1, article 14, Law 9,307/96).

FREE PERSUASION AND MOTIVATION

This principle ensures the referee College made its decision according to his belief, freely taking care the evidence and how it was presented about the object of the controversy and the law (or the rules of equity) that are applicable to the deal, as has been agreed by the parties.

And this freedom of appreciation of the elements and the evidence from the record should be thrown in the sentence (article 24, caput, of 9,307/96 Law), as well as should be outsourced and justified the motivations for which there was your conceit, atendando for the requirements to be included in the sentence (article 26, caput, the law 9,307/96).

The decision of the referee has strength, and enforcement, for its effectiveness, is not subject to the sieve or judicial approval (article 31). By the way, the decision by the arbitrators is a sentence, which is not subject to the double degree of jurisdiction or any other type of resource, except for the request for clarification (equivalent to the embargo of Declaration).

ARBITRAL PROCEEDINGS

Enhancing the autonomy of the will of the parties, the law No. 9,307/96 left at the discretion of the parties choose and discipline procedures to be adopted to govern and conduct the arbitral proceedings, so that can they adopt rules that best meet their needs, subject to compliance with the principles of morality and public order, as calls for the first and second paragraph of article 2 of the law.

About, so pronounced Carlos Alberto Carmona (2009:23):

The proposed rule is the following: the parties may adopt the procedure that they see fit, subject to compliance with the principles of contradictory, equality of the parties, the impartiality of the referee and their free rational persuasion. If anything have about the procedure to be adopted and if you don't report to any institutional organ rules, the arbitrator or the arbitral tribunal dictate the rules to be followed, always met the principles will little mentioned, these principles which, in the final analysis, summarize the content of what was historically known as the due process of law.
Thus, it can be said that respected the principles mentioned, as well as the principles of morality and public order, the fundamental characteristic of arbitration is its flexibility, and the parties set them or follow the previously defined by arbitral institution chosen or even the referee, if the rules are not placed as advocates the 1st paragraph of article 21 of the law of arbitration.

And these procedures can be defined from the moment that opts for arbitration when it enters the arbitration clause in the contract (article 4 of the Arbitration Law), or through the arbitration agreement (article 9 of the law) when the conflict, and not existing the arbitration clause, the parties agree with the option by arbitration or by the signature of terms sets that will stipulate rules freely adjusted by the parties.

Important to register the difference between the two kinds of adjustments, since the arbitration agreement, according to the own diction of article 9 of the Arbitration Law, is that agreement before the arbitration, where the parties renounce State jurisdiction and agree to submit to the decision of arbitrators – i.e. the conflict already exists and the commitment is signed on your complication. Can pass or not the existence of an arbitration clause.

The Arbitration Convention already – or arbitration clause provided for in article 8 of Law 9,307/96 – is the setting through which the parties, in a contract, include a specific provision where agree previously on submitting any conflicts or future disputes arising from contract, to arbitration. This setting is born, therefore, in the initial moment of the formalization of the contract, in order to ensure that parties refrain from looking for State jurisdiction to resolve conflicts arising from the deal.

Cândido Rangel Dinamarco (2013:52), when treating of the arbitral proceedings, brings us the following lesson:

As much as the one that develops before the Judiciary, arbitration is the set of acts whereby, in the process, the arbitrator has jurisdiction and the parties to defend their interests.

Therefore, it is the development of a minimum allows their ritualistic actors can, each exercising its role, is not to be injured parties ' rights (as, for example, the large defence) but also to be required, by law, a certain conduct.

And realize when faced with certain legal forecasts expressed, as the duty of disclosure, which requires the referee to declare, as soon as indicated and before accepting the role, any hindrances or concerns that may remove the impartiality and independence, or even the definition of the specific time that the party has to argue any suspicion of the referee.
Cândido Rangel Dinamarco sense that (2013:52) complements:

As in any process, the arbitration procedure must necessarily include certain acts that constitute their essential structural elements. And, as in any process of knowledge, the structural elements of the arbitral proceedings are to demand the inclusion of the defendant in the procedural relationship (quote there, notification here), the response from the defendant, the statement and the sentence – which will be of merit or, in accordance with the terminative circumstances of each case.

Let's see, do, inside the arbitral proceedings-object of the present work – each of its steps.

INSTITUTION OF ARBITRATION

The moment of institution of arbitration, in accordance with article 19 of the law rule of Arbitration, with there is the appointment of the arbitrator (or, if more than one), preceded, of course, the acceptance of these.

The choice of arbitrators or the President of the arbitral tribunal-free exercise of the parties – with the new wording to paragraph 4 of article 13 grants to the parties the right to exclude the prediction that the arbitrators themselves, by a majority, could pick the President, although there is such a rule in Arbitration Chambers, including the choice of Referees not belonging to the institution.

In spite of seeming simple this definition, it is certain that the delimitation of this milestone has fundamental importance, since before this time, any other measure that is intended to adopt to safeguard rights – the precautionary example – should be required to the Judiciary, where one would be to assess the demand, if the parties hadn't opted for arbitration.

The mere existence of an arbitration agreement – whether by arbitration clause or arbitration agreement – does not imply the existence of an arbitration court. And that's how Carlos Alberto Carmona (2013:278), with simplicity but with a lot of objectivity, is expressed:

The Arbitration Convention, as one realizes, can not establish the Arbitration Court: If the arbitrators not entering into the arbitration agreement as indicated, for example, there will be no arbitration established yet, but mere expectation of formation of the arbitral tribunal.

From this moment, so the arbitrators to exercise its judicial function, without which they will not have jurisdiction to proceed to arbitration. Important record that, before this institution, that it wishes to initiate the arbitration should adopt certain procedures, as further explained below.
If the Parties reported, in an arbitration clause, the rules of certain arbitral institution, the institution must follow the procedures specified by it, in accordance with article 5 of the law prescribes, in particular on how to call the opposing party to the procedure (by means of notification, as seen elsewhere).

On the other hand, if you have opted for the rules of a particular institution and has not, in the arbitration clause, established the form of the arbitration institution, the call of the other party to enter into the arbitration agreement may be made by the interested party via mail, with acknowledgement of receipt, by day, time and place specified for both, in the form of article 6.

In case of refusal of the called party to attend, it will be up to the interested party in the establishment of arbitration to propose, by the judiciary, the competent action to compel one to sign the arbitration agreement. To do so, require the judgment that would be competent to judge the deal to quote the part resistant to attend proceedings in special audience, in order to sign the arbitration agreement.

The course of this lawsuit will depend on a few factors:

1. in attending parties, the magistrate will attempt a reconciliation on the object of the dispute, which, unsuccessful, will be followed by an attempt to get the parties to sign the arbitration agreement (paragraph 2 of article 7);
2. If there was no composition regarding the signing of the commitment, the judge shall within 10 days, after hearing the defendant, decision about this conflict (specifically about being mandatory or not signing the commitment) as paragraph 3 of article 7;
3. in deciding, will fulfill the judge finds that the arbitration clause on the appointment of the arbitrators and, in the silence of these will compete, after hearing the parties, appoint the referee for the solution of the dispute–here, the object effectively in dispute in the arbitration sphere (paragraph 4 of article 7);
4. If absent the hearing the author without a justified reason the hearing designated for the drawing up of the arbitration agreement, the judge decretará the extinction process, without judgment of merit (paragraph 5 of article 7);
5. the absence is the defendant, also without due cause, it is up to the magistrate to set about the compromise naming arbitrator (article 7, paragraph 6), the sentence as arbitration agreement (paragraph 7 of article 7).

**9. REFERENCES**


**Internet searches**

**ARBITRATION CHAMBER OF THE BRAZIL-CANADA CHAMBER OF COMMERCE.** <http: ccbc.org.br/materia/1067/regulamento>-06.03.2016 access.</http>
BR/regulation >-06.03.2016 access.

CASA DE RUI BARBOSA. <http: www.casaruibarbosa.gov.br/dados/doc/artigos/rui_barbosa/fcrb_ruiba 
bosa_oracao_aos_mocos.pdf”>-06.03.2016 access.</http:>

BRAZILIAN CIVIL CODE. Available on internet: <http:  
www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm”>-06.03.2016 access.</http:>

CODE OF ETHICS AND DISCIPLINE OF THE OAB. Available on internet: <http:  
www.oab.org.br/arquivos/pdf/legislacaoab/codigodeetica.pdf”>.<http:>

CODE OF CIVIL PROCEDURE. Available on internet: <http:  
www.planalto.gov.br/ccivil_03/leis/l5869.htm”>.<http:>

NATIONAL COUNCIL OF JUSTICE. Available at: <http:www.cnj.jus.br”>06.03.2016 access.</http:>

CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL. Available on internet: <http:  
www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm”>-06.03.2016 access.</http:>

POLITICAL CONSTITUTION of the EMPIRE of BRAZIL, (25 MARCH 1824). Available on internet:  
<http: www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm”>-06.03.2016 access.</http:>

Decree No. 3048, 06 MAY 1999 – available on internet: <http:  
www.planalto.gov.br/ccivil_03/decreto/d3048.htm”>06.03.2016 access.</http:>

DECREE-law No. 1608, of SEPTEMBER 18 1939 – available on internet: <http:  
www.planalto.gov.br/ccivil_03/decreto-lei/1937-1946/del1608.htm”>06.03.2016 access.</http:>

DECREE-law nº 5452 of 1st MAY 1943 – available on internet: <http:  
http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm”>06.03.2016 access.

CONSTITUTIONAL AMENDMENT No. 45, of 30 DECEMBER 2004-Available on internet <http:  
www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc45.htm”>-Access in 06.03.2016.</http:>

STATUS OF THE LAW AND OF THE BRAZILIAN BAR ASSOCIATION. Available on internet:  
<http: www.planalto.gov.br/ccivil_03/leis/l8906.htm”>-06.03.2016 access.</http:>
NATIONAL INSTITUTE OF MEDIATION AND ARBITRATION. Available on internet: <http: www.inama.org.br="">06.03.2016 access.</http:>

Law No. 3071 of 1 JANUARY 1916. Available on internet: <http: www.planalto.gov.br/ccivil_03/leis/l3071.htm="">06.03.2016 access.</http:>


ORDINATIONS PHILIPPINES. Available on internet: <http: www1.ci.uc.pt/ihti/proj/filipinas/ordenacoes.htm="">06.03.2016 access.</http:>

EXTRAJUDICIAL MEASURES CAN MAKE EFFICIENT LEGAL-article published in the Folha de Sao Paulo, available from internet: 08.03.2014 day <http: www.adamsistemas.com/archives/2877="">06.03.2016 access.</http:>


The SENATOR'S BILL No. 517/2011. Available on internet <http:
Resolution No. 125 of the CNJ, 29.11.2010. Available on internet: <http: www.cnj.jus.br/images/stories/docs_cnj/resolucao/arquivo_integral_republicacao_resolucao_n_125.pdf>=06.03.2016 access.</http:>

FEDERAL SENATE. Available on internet: <http: www.senado.gov.br/>=06.03.2016 access.</http:>


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