The "*happy dynamic*" case: Superior Court of Justice's analysis on a foreign arbitration award provided in a maritime contract

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Abstract: This article intends to present and discuss the relevance of arbitration clause in maritime contracts and the challenges faced when enforcing arbitration awards in Brazil's jurisdiction. Thus, this paper will focus in the enforcement process of an arbitration award in the "Happy Dynamic" case and the Superior Court of Justice position.

Keywords: Arbitration. Maritime Contracts. Charter-party. BIMCO Forms. Enforcement of Foreign Award. The New York Convention.

Summary: **1** Introduction – **2** Maritime contracts and arbitration clause – **3** Arbitration in Brazil – **4** Enforcement of a foreign award in Brazil – **5** The "Happy Dynamic" case – **6** Comments – References

1 Introduction

The use of arbitration to solve international disputes is well consolidated in the shipping and trade sectors. Arbitration clauses are commonly used in international maritime contracts, in harmony with the practice and customs of maritime trade.

The purpose of this paper is to give a general picture of the relevant use of maritime arbitration in the shipping industry, focusing on BIMCO contracts and on how the "Happy Dynamic" case, ruled by the Brazilian's Superior Court of Justice, diverted from the international pattern.

2 Maritime contracts and arbitration clause

The terms of a contract are essential for any commercial transaction, as they will rule the relation of the contracting parties. Due to maritime commerce`s inherent international character, it is extremely important for parties involved to have a fast and efficient method for conflicts resolution.

Given the ancient history of maritime trade and the dynamism of the commercial relations, it is common for the shipping industry to adopt international standard contracts issued by well-known maritime organizations. The contractual clauses established in such standard forms consolidate years of practice and unify the interests of multiples parties involved in the industry. The terms are also periodically updated to meet expectations and developments of the shipping business and generate fresh contractual answers and efficient solutions to conflicts.

The Baltic International Maritime Council – BIMCO is one of those organizations. BIMCO is the largest international shipping association, with members in over 120 countries, whose goals are to promote fair business practices and to facilitate harmonisation and standardization of shipping contracts.

BIMCO standard forms are often adopted in the international shipping industry and usually provide for arbitration as a method for resolution of controversies, being London, New York and Singapore some of the most relevant seats for maritime arbitration nowadays.

A standard wording provides a fast and efficient option for the parties to spend less time in the negotiations and drafting of a contract and more time developing their business, on an industry at which 'time is money'.

Despite that, BIMCO contracts are susceptible to negotiations and amendments, as often occurs during the fixture (enquiry, offer, counter, subject, recap, and other stages of the negotiations), so that the parties can take advantage of adopting a contractual wording that is applied internationally by the industry and has already been tested by the courts as well as, at the same time, can still be tailor made to their specific needs by way of amendments to some contractual terms. These additional clauses that substitute or supplement the original wording are known as "rider clauses".

Nonetheless, even if a contract is drafted, such as a charter-party, it is often exchanged by e-mail, left as a "working copy" and not printed nor signed.

3 Arbitration in Brazil

Brazil is a major exporter of commodities and importer of goods and the maritime commerce plays an important role in approximately 95% of the country`s

international trade. Therefore, the demand for resolutions of disputes involving maritime disputes has been constantly increasing in Brazil.

Also, over the past couple decades, arbitration procedures and institutions have been gaining strength in the country. After the enactment of the arbitration law in 1996, which had its constitutionality recognized by the Federal Supreme Court only on 2001, some relevant international conventions were ratified by the country, and several new laws and regulations have been issued by the Federal and State Governments stimulating the use of alternative dispute resolutions methods such as arbitration and mediation,[1] which should now be referred to as adequate dispute resolution matters.

Despite the tendency in Brazil for the parties to litigate their controversies before the judicial courts, the numbers have been changing in the recent years. Several Brazilian parties are also resorting to arbitration instead, especially in the port, shipping, energy and trade sectors. In fact, there is plenty of room for a significant growth in the number of maritime arbitrations in the country, as the Brazilian judiciary system remains extremely bureaucratic and time consuming and, in many occasions, lacks expertise to deal with complex maritime matters.

4 Enforcement of a foreign award in Brazil

For a foreign arbitration award to be considered valid and effective for enforcement in national ground, it is necessary to obtain the ratification from the Superior Court of Justice (STJ), the highest non-constitutional court in the country.[2]

During the ratification proceedings, the Superior Court of Justice must analyse if the arbitration award fulfils some specific requirements. For instance:

(i) the decision needs to be rendered and issued by a competent arbitrator;
(ii) the defendant must have been duly summoned or have its default legally ascertained by the arbitrator;
(iii) the decision must be final;
(iv) the decision cannot be contrary to Brazilian public policy, national sovereignty or dignity of the human person.

[1] E.g. Law 8,307/1996 (Arbitration Law); Decree 4,311/2002 (1958 New York Convention); Law 13,129/2015; 13,140/2015 (Mediation Law); Law 13,105/2015 (Civil Procedural Code, stimulating the use of mediation as a preliminary step for all court cases); Law 12,815/2013 (Port Law, establishing the possibility of arbitration with the public administration); Decree 8,465/2015 (regulating arbitration with the public administration in the port sector); Decree 10,0205/2019 (regulating arbitration with the public administration in the sectors of ports, road transportation, railway transportation, waterway transportation and air transportation)

[2] Mendes Vianna, Godofredo. The New York Convention and Maritime Arbitration: Brazilian and Latin American Perspective, CMI YEARBOOK 2016, Part II – THE WORK OF THE CMI, p. 296-310.

The Brazilian Superior Court cannot intervene in the merits of the case, being limited to analyse the formal requirements for ratification.

Moreover, all documents presented in court for ratification must be legalized before the Brazilian Consulate or apostilled and supplemented by a sworn translation, including the copy of the arbitration agreement or arbitration clause.

5 The "Happy Dynamic"[3] case

A decision rendered by the Brazilian Superior Court of Justice, rejecting the enforcement of an English award rendered in the "Happy Dynamic" case, generated concern within the shipping industry.

The vessel "Happy Dynamic", owned by a Dutch company, was chartered by a Brazilian company for a specific voyage from the port of Santos to the port of Pecém, by an agreement made on a BIMCO HEAVYLIFTVOY.[4]

The entire negotiation was made through phone contacts and email messages, including the discussion of the charter agreement, setting a fixture recap. Ultimately, the BIMCO form was exchanged electronically between the parties with all agreed conditions but was never physically signed. During negotiation stage the BIMCO Dispute Resolution Clause was not amended by the parties, neither subject to any remarks, having been stated that English law and LMAA arbitration should apply.

The contract was fulfilled, the maritime voyage completed and duly paid, in accordance with the conditions established by the charter-party. Nevertheless, as per contractual terms, a detention claim emerged by the owners given a delay caused by charterers at the port of loading. Since charterers refused to pay it, the

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[3] CHALENGED FOREIGN JUDMENT No. 11.593 – GB (2014/0148674-1)

CIVIL PROCEDURAL. CHALLENGED FOREIGN AWARD. ARTICLES 15 AND 17 OF LAW OF INTRODUCTION TO THE BRAZILIAN CIVIL CODE. LACK OF SIGNATURE ON THE CONTRACT. INEXISTENCE OF ARBITRATION CAUSE. LACK OF JURISDICTION OF THE ARBITRAL TRIBUNAL.

1 In Accordance with articles 15 and 17 of the Law of Introduction to the Brazilian Civil Code and articles 216-C, 216 D and 216-F of STJ's Internal Regulations, which currently govern the recognition of foreign awards procedure, it is an indispensable requirement that the award was rendered by a competent authority.

2. Charter contract between Brazilian ports, negotiated and performed in Brazil, and not signed by Defendant. Non-compliance with the arbitration clause written form requirement of the Brazilian Arbitration Act (article 4, subitem 1, of Law 9,307/96), mainly applicable to the verification of the validity of the law and jurisdiction clause (article 9, subitem 1, Law of Introduction to the Brazilian Civil Code.

3. In addition, there are no elements in the records evidencing Defendant's acceptance of the arbitral tribunal's jurisdiction.

4. Failure to demonstrate the jurisdiction of the arbitral which rendered the foreign award precludes its enforcement in accordance with article 15, "a", of the Law of Introduction to the Brazilian Civil Code.

5. Recognition rejected.

Brazilian Superior Court of Justice (STJ) – Challenged Foreign Judgment Nº 11.593 - GB (2014/0148674-1); BIGLIFT SHIPPING BV. Vs. TRANSDATA TRANSPORTES LTDA, in 18/12/2015; Superior Court Judge Benedito Gonçalves.

[4] HEAVYLIFTVOY is a voyage charter-party for the heavy lift sector carrying specialist cargo.

owners brought a claim under the London Maritime Arbitrators Association (LMAA), based in the contractual arbitration clause.

Despite being properly summoned at arbitration proceedings in London, Brazilian's charterers did not appear and did not present a defence, having such default been registered by the arbitrator. In the end, an award was rendered condemning the charterer for payment of the detention fees.

Vessel's owners subsequently filed a request before the Brazilian Superior Court of Justice in order to seek the enforcement of the foreign award against debtor's assets in Brazil. During the ratification proceedings, charterers then appeared and submitted a defence challenging the enforcement and arguing the nullity of the arbitration clause. Charterers also contested the nature and validity of BIMCO's contract, as an alleged contract of adhesion.

The Superior Court of Justice ultimately held that the arbitration clause was not valid, considering the lack of signature of the parties in the contract.

According to the Court, the absence of a signed contract would lead it to being interpreted as an unwritten contract and the parties hand signature would be mandatory to consider the foreign arbitration award enforceable in national ground, pursuant to Section 4, paragraph 1, of the Brazilian Arbitration Law.[5]

6 Comments

Despite the absence of an express signature in the contract, the conditions of contract were duly negotiated by parties, exchanged by emails and agreed in a fixture recap, having the contract been fulfilled with the main obligations being duly performed by both parties, except for the detention dispute that arose afterwards.

Nonetheless, as opposed to ordinary contracts, to which general civil law does not impose any specific requirement for a written form, an arbitration agreement must be in writing, as per established by the Brazilian Arbitration law.

As stated before, in the ratification process, the Brazilian Superior Court cannot intervene in the merits of the case, being limited to analyse the presence of some formal. However, such *exequatur* is made in accordance with Brazilian law. Thus, as a matter of public policy, the judges can step into the elements of formation of the charter-party agreement clauses and investigate whether the arbitration clause was validly contracted.

[5] Section 4, Law 9,307/1996: "An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration any disputes that might arise with respect to that contract".
Paragraph 1: "An arbitration clause will be in writing, and it may be inserted into the contract itself or into a separate document to which it refers".

In this case, there was a valid BIMCO contract agreed between parties, however, when it comes to consider the validity of the dispute resolution clause, the Superior Court ruled that there was a lack of signature nor proof of consent of the Charterer.

Thus, the Superior Court of Justice ruled that there is no irregularity for a charter-party not to be printed or signed, as the law does not impose a written form requirement for such type of contract. However, as for the arbitration agreement, this one must be in writing, pursuant to the Brazilian Arbitration Law.

The court further pointed out that, in order to the arbitration agreement be consider valid under the Brazilian law, it cannot be done implicitly or tacitly, but only by parties expressly acceptance, that is, by a written contract, signed by parties.

As stated by the Superior Court, since the case was based on an unsigned charter-party and there was no express or clear evidence of acceptance of the arbitration clause by the Charterer, such as the express assent during the email exchange or the charterer attendance in the arbitration proceedings in London,[6] the clause cannot be considered valid.

The fact that the charter-party in the "Happy Dynamic" case was not signed by the parties lead the Superior Court to interpret it as an unwritten contract, and consequently, to an invalid arbitration agreement, an obstacle for the arbitration award enforcement.

Unfortunately the Superior Court's decision did not comment on the provision established in Section II, paragraph 2, of the 1958 New York Convention,[7] which acknowledges that "the term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".[8]

Such provision of the New York Convention has already been addressed before the UNCITRAL. Indeed, a Recommendation[9] regarding its interpretation

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6 The Brazilian Superior Court of Justice (STJ) rendered a decision in 2005 ratifying the foreign arbitration award in a very similar case to "The Happy Dynamic", arguing that the defendant attendance during a foreign arbitration proceeding could be considered evidence of acceptance of the arbitration clause: *Challenged Foreign Judgment Nº 856 - EX (2005/0031430-2); L'AIGLON S.A. vs. TÊXTIL UNIÃO S/A., in 18/05/2005; Superior Court Judge Carlos Alberto Menezes Direito.*

7 Ratified in Brazil through the Federal Decree n. 4,311/2002

8 Article II, NY Convention: 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

9 Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June

was adopted in the sense that the provision should be read broadly, so as not to exclude other forms of written communications such as e-mail, fax or telex, regularly used in modern commercial transactions, and not limit the parties' rights toward the agreed arbitration.

The ruling in the "Happy Dynamic" was subject to debates before the Comite Maritime International (CMI), the International Bar Association IBA) and other international maritime associations and congresses. It represented a discouragement to the international shipping industry and placed risks and caution for foreign players when negotiating with a Brazilian party, especially when contracts such as BIMCO forms, widely adopted by the industry, are often not signed.

It seems that if the contract is not signed by the parties, if the Brazilian party does not join the arbitration proceedings or if there is no circumstance that indicate an express or unequivocal acceptance of the arbitration clause, the Brazilian Superior Court may not recognize the existence of an arbitration agreement and, therefore, not accept to enforce a foreign arbitration award in such a case.

Hence, when dealing with a Brazilian party and planning ahead the enforceability of the contract in Brazil, contracting parties should be cautious in the negotiation stages and attempt to obtain, if not a signed counterpart of the contract, at least a clear and express consent towards the acceptance of the arbitration clause. This could help allowing the enforcement of the contractual arbitration clauses in Brazil and avoid any controversial interpretation from the Brazilian Superior Court of Justice.

As to the "Happy Dynamic" claim, the creditor decided not to dispute the Superior Court's decision in Brazil and pursued the credit against the debtor abroad, in a foreign jurisdiction that would respect the contractual terms and recognize validity to the arbitration award.

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