The quest for consent in BIMCO standard form contracts: a Brazilian perspective

Marcela Melichar Suassuna

Associate in the Litigation and Arbitration practices of Wald, Antunes, Vita, Longo e Blattner Advogados. Marcela has an LL.M. in International Business Regulation, Litigation and Arbitration from New York University (NYU Law) and graduated the Universidade Federal do Rio de Janeiro (UFRJ). Marcela has published several articles regarding Brazilian domestic and international arbitration.

Abstract: The present article aims at analysing consent in the field of maritime arbitration, focusing on a precedent of the Brazilian Superior Court of Justice (STJ) in 2015, related to vessel "Happy Dynamic". On the occasion, the STJ denied the recognition and enforcement of a foreign arbitral award because the court understood that there was no proof of the charterer's consent to arbitrate eventual disputes arising out of a BIMCO standard form contract. This article intends to present the possibility that the precedent be overruled through two approaches: (i) recognizing that the consent to arbitrate can occur by presumption, implicitly or tacitly in BIMCO contracts and (ii) by applying the New York Convention, which allows proving of the existence and the validity of the arbitration agreement without an specific signing of such clause in the underlying contract.

Keywords: Arbitration. Maritime arbitration. Maritime law. Consent. BIMCO.

I Introduction

In 2015, the Brazilian Superior Court of Justice (hereinafter "STJ", as its Brazilian acronym) denied the recognition and enforcement of an English arbitral award based on the fact that the parties did not specifically sign or agree with the arbitration clause contained in a Baltic and International Maritime Council – BIMCO contract for the chartering of vessel "*Happy Dynamic*".[1]

[1] STJ – Challenged Foreign Award No. 11.593/GB – BIGLIFT SHIPPING BV. vs. TRANSDATA TRANSPORTES LTDA. – Justice Benedito Gonçalves – decided on December 18, 2015.

The parties agreed on a BIMCO Heavy Lift Voyage Charter Party (hereinafter "HEAVYLIFTVOY"). They discussed the conditions of the contract and elaborated a fixture recap with a standard BIMCO Dispute Resolution Clause providing for arbitration in London/UK. Yet, parties did not sign the contract nor discussed, in written, aspects of the arbitration clause.

After the voyage was completed and the freight was paid, a detention claim arose. The ship-owner filed an arbitration in London, as provided in the fixture recap. Despite being duly summoned, the charterer refused to file its response or any motions. The sole arbitrator ascertained the charterer's default and later issued an award in favour of the ship-owner.

However, when the ship-owner requested the recognition and enforcement of the arbitral award in Brazil, the STJ denied it. The court argued that the arbitration clause in the BIMCO contract lacked proof of the charterer's specific consent to arbitrate, making in invalid under Brazilian law.

The case is very sensitive, particularly for the maritime community, as BIMCO contracts are widely used in maritime transportation and arbitration proceedings grounded on a BIMCO dispute resolution clause are generally considered valid.

An important question now arises, five years after the ruling on the *Happy Dynamic* case: is it now possible, under Brazilian law, to overrule the STJ's position and find proper grounds to accept the particularities of BIMCO contracts or do ship-owners and charterers must adapt to the Brazilian reality and consider possible challenges in enforcing their arbitral awards?

The purpose of this paper is to briefly address the use of arbitration in the shipping industry focusing on BIMCO contracts (Part II); arbitration in Brazil, particularly the applicable requirements for the validity of arbitration clauses and the proof of consent to arbitrate (Part III); the enforcement of arbitral awards in Brazil (Part IV); and, specifically, the *Happy Dynamic* case and how it diverted from the international pattern (Part V).

Perhaps, in order to overrule the *Happy Dynamic* case, others means to prove consent to arbitrate and effectively applying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention") must be considered when enforcing arbitral awards in Brazil (Part VI). Hopefully, a different approach can be given to the matter to oppose the STJ's ruling.

II Maritime disputes and BIMCO standard contracts

Arbitration is an important mechanism for the settlement of conflicts, particularly in international disputes. The use of arbitration in such disputes is well consolidated in the shipping and trade sectors, which includes maritime transportation

in general, i.e., accidents at sea, demurrage and detention claims, contractual disputes between ship-owner and charterer, etc.

Traditionally, these disputes are submitted to arbitration in venues that are already leading exponents in shipping-oriented arbitration, such as London, New York and Singapore. However, a solid ongoing movement aims at strengthening the use of maritime arbitration in other jurisdictions, which includes countries in continental Europe and Latin America.

For example, in Brazil, a domestic arbitration proceeding was filed by the *Companhia Docas do Estado de São Paulo – CODESP*, the state agency that administrates the Port of Santos, in the State of São Paulo against the Brazilian group *Libra Terminais*, specialized in port logistics and terminals. The dispute involved the exploitation of a terminal in the Port of Santos.

The arbitration, which came to an ending in 2019,[2] was filed by the state agency after signing an arbitration agreement with *Libra Terminais*. It was an important step for shipping and port disputes in Brazil as it corroborated the role of arbitration for the settlement of such controversies.

However, in spite of the desire to impulse and develop maritime arbitration in these countries, long-experienced nations are still a preference when submitting shipping and maritime controversies to arbitration. For decades, these jurisdictions bear extraordinary chambers, with highly specialized and competent lawyers and arbitrators.

Consequently, it is common that complex disputes arising out of incidents occurred inside the Brazilian territory are settled by foreign arbitration courts. As incoherent as it is, Brazil and other Latin American countries are regrettably not an intuitive venue for maritime arbitration disputes.

This is corroborated by the fact that countries like the UK tend to simplify the access to arbitration through standard maritime contracts, such as the ones prepared by BIMCO, the largest international shipping association representing ship-owners, headquartered in Denmark.

With around 1,900 members in more than 120 countries, one of BIMCO's goals is to contribute to the development of the shipping international regulatory environment,[3] including the harmonisation and standardization of shipping contracts.

The contractual clauses established in BIMCO standard forms consolidate years of practice and unify the interests of multiples parties in the shipping

[2] The case files are available, in Portuguese, at the Brazilian Attorney-General Office's website at http://agu.gov.br/page/content/detail/id_conteudo/643200, accessed on January 31, 2020.

[3] BIMCO STATEMENTS – Overview, available at https://www.bimco.org/about-us-and-our-members/bimco-statements, accessed on January 31, 2020.

industry. The terms of the contracts are updated periodically in order to follow up with the current developments of the industry and grant efficient solutions to conflicts arising from maritime relations.

In this sense, BIMCO's standard provisions helps parties to save time in negotiating contractual clauses and drafting contracts, which is paramount in an industry as dynamic as shipping and maritime in general.

Although they are standard forms, BIMCO contracts are open to some level of negotiation regarding its provisions. It is also common that these instruments are not formally signed, but acknowledged and agreed to through e-mail communications.[4]

BIMCO standard forms often provide for arbitration as a method for solve controversies. Naturally, most seats of arbitration provided in BIMCO contracts are London, Singapore and New York. However, this cannot be interpreted as if other nations are not sufficiently developed in arbitration – much on the contrary, in Brazil's case, for instance.

III Arbitration in Brazil

Arbitration is broadly used for the settlement of conflicts in Brazil, i.e. construction, energy and corporate disputes. More recently, the demand for maritime dispute resolution has been increasing in Brazil, especially in a domestic setting.

Arbitration in Brazil went through a few acceptance steps. Starting with the enactment of the Brazilian Arbitration Act (hereinafter "BAA") in 1996, followed by the declaration of its constitutionality by Brazil's Federal Supreme Court (hereinafter "STF", as its Brazilian acronym) in 2001 and, further, the ratification of the New York Convention in 2002, arbitration is now in an expansion and innovation phase in Brazil.

More recently, Brazil has also new enacted legislation aimed at consolidating the use of alternative of arbitration and mediation. The Brazilian Code of Civil Procedure of 2015 (Law 13,105/2015) embraces arbitration as an adequate dispute resolution method and establishes the use of mediation as a preliminary step

[4] "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". Lucas Leite Marques and Gabriela Judice Paoliello. *The "Happy Dynamic" case: Superior Court of Justice's Analysis on a Foreign Arbitration Award provided in a Maritime Contract*. In: Revista Brasileira de Alternative Dispute Resolution – RBADR. 2ª Ed. Dez/2019.

for all court cases. Further, Law 13,129/2015, changed many provisions of the BAA and Law 13,140/2015 was enacted shortly after, which represents on the Brazilian Mediation Act.

Within the legislation more oriented to the infrastructure and commercial sectors, the Law 12,815/2013 established the possibility of arbitration with the public administration. Decree 8,465/2015 regulated arbitration with the public administration in the port sector. The latter was further complemented by Decree 10,025/2019, which regulated arbitration with the public administration in the sectors of ports, road, railway, waterway and air transportation.

As part of this trend, the implementation and development of methods to expand access to arbitration in Brazil are the subject of intense discussions, aiming at simplifying and de-bureaucratizing arbitration in order to allow its use by a larger number of people.

As a corollary, the rethinking of important concepts in arbitration has taken place to adapt to this new reality. One of these concepts is the consent to arbitrate, which has paramount importance in analysing the validity and enforcement of arbitration clauses and was decisive for the STJ's ruling in the *Happy Dynamic* case.

III.1 Consent to arbitrate and the arbitration clause

The consent to arbitrate consists of agreement of the parties to submit their differences or disputes to arbitration rather than before national courts.[5] Commonly, consent manifests through written agreements, such as arbitration clauses in a contract or an arbitration commitment, elaborated after a dispute has arisen.

Consent is also paramount because it has implications on jurisdiction. If the existence of an arbitration agreement is in dispute, generally, the judicial courts will have jurisdiction to determine its existence. Yet, if concluded that the parties have agreed to submit all disputes to arbitration, it becomes a matter of consent of the parties to give to the arbitrator powers to decide upon these issues.

These circumstances have led to the widely accepted view that arbitration is a *consensual* dispute resolution mechanism.[6] As a result, theoretically, the absence of the parties' consent to arbitrate undermines the validity of the arbitration itself.[7]

---

5 Emmanuel Gaillard. *Anti-Suit Injunctions Issued by Arbitrators in Albert Jan van den Berg* (ed). In: International Arbitration 2006: Back to Basics?, ICCA Congress Series, Volume 13 Issue, p. 238.

6 James M. Hosking. *Non-signatories and International Arbitration in the United States: the Quest for Consent*, page 1 (1st paragraph); and Andrea Marco Steingruber. *Consent in Investment Arbitration*, In *Consent in International Arbitration*, ¶15.01.

7 "While it is important to differentiate between the characterizations of 'consensual' as one of the essential criteria for arbitration's qualification and 'consent' as a condition for the validity of the arbitration agreement, these two aspects influence each other." Steingruber, *supra* note 6, ¶15.06.

Arbitration clauses are commonly used in international maritime contracts, which aligns with the practice and customs of maritime trade. The terms of a contract, including the arbitration clause, are fundamental for commercial transactions in the shipping industry, as they will rule the relation of the contracting parties.

As there are not many international disputes in Brazilian courts, part of the debate related to maritime disputes, including the validity of arbitration clauses and consent, are analysed by the STJ, which has exclusive jurisdiction to rule on recognition and enforcement of foreign arbitral awards.

IV Enforcement of foreign arbitral awards in Brazil

For a foreign arbitration award to be valid for recognition and enforcement in Brazil it is necessary to obtain the ratification of such award from the STJ, the highest court in the country for non-constitutional legal matters.[8] During the ratification proceedings, the STJ must analyse if the arbitration award fulfils some specific form requirements:

(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 a person.

In addition, the party interested in the recognition and enforcement of the award must present the original copy or an apostilled or notarized copy of the award. All foreign documents – including the copy of the arbitration agreement – must be certified by the Consulate of Brazil and must be translated by a sworn translator.

After filling the enforcement and recognition proceedings, the opposing party is summoned to challenge the request for ratification if it deems applicable. If there are objections to the enforcement by the Federal General Attorney or by the opposing party, the proceedings will go to trial by the panel of Justices of the STJ. If all requirements are met and there are no objections by the Federal General Attorney nor challenge by the opposing party, the President of the STJ shall automatically grant the *exequatur.*[9]

As a rule, the STJ cannot re-examine the merits of the underlying case, but is limited to analyse the abovementioned formal requirements for ratification.

---

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

9 Mendes Vianna, *supra* note 8.

In practice, however, the STJ tends to review some aspects of the cases submitted to its jurisdiction when examining public policy issues. Although a very subjective analysis, it is sufficient to bar the recognition and enforcement of judicial and arbitral awards in Brazil. That was precisely what occurred in the *Happy Dynamic* case.

V The *Happy Dynamic* case

On the aforementioned case, Dutch company *Biglift Shipping BV* chartered the vessel *Happy Dynamic* to *Transdata Transportes Ltda.*, a Brazilian company specialized in cargo transportation, for a specific voyage from the Port of Santos, São Paulo, to the Port of Pecém, Ceará.

Parties agreed on a BIMCO HEAVYLIFTVOY, a voyage charter party for the mid-sized heavy lift sector carrying specialist cargo. However, parties negotiated the charter agreement through phone contacts and email messages, setting a fixture recap.[10] Ultimately, the BIMCO form was shared by e-mail between the parties with all agreed conditions but was never physically signed.[11]

During those communications, neither of the parties opposed to the BIMCO Dispute Resolution Clause, which established English law as applicable for dispute settlement and that any controversy among the parties would be solved through London Maritime Arbitrators Association (hereinafter "LMAA") arbitration. In fact, the arbitral clause was not amended by the parties, nor subject to any specific remarks.

After the contract was fulfilled, the voyage completed and paid in accordance with the conditions established by the charter-party, a detention claim emerged due to a delay caused by charterer at the port of loading. When charterer refused to pay the detention fees, the ship-owner brought a claim under the LMAA.

Even though the charterer was duly summoned in the arbitration, it chose not to appear before the arbitration nor file any motions. The sole arbitrator ascertained its default and issued an award in favour of ship-owner, ruling that the charterer was liable for the detention fees.

Shortly after, ship-owner filed a request for recognition and enforcement of the London arbitral award the STJ in Brazil. The charterer submitted a challenge to the enforcement, arguing that the arbitration clause provided in the BIMCO contract was invalid because it was not signed by the parties.

More generally, charterer also claimed that BIMCO contracts should be deemed as contracts of adhesion under Brazilian law, which would reinforce the

10 Marques and Paoliello, *supra* note 4.
11 *Id.*

invalidity of the arbitral clause for lack of the necessary proof of consent to arbitrate their disputes.

Surprisingly, the STJ held that the arbitration clause was not valid, given the lack of signature of the parties. Such ruling was based in four main arguments:

(i) Pursuant to the Law of Introduction to the Brazilian Civil Code and the STJ Internal Rules, which govern the recognition of foreign awards, it is indispensable that the award is rendered by a competent authority;

(ii) Since the contract was not signed by charterer, it did not comply with the arbitration clause written form requirement provided in the BAA (section 4, paragraph 1[12]), mainly applicable to the verification of the validity of the law and jurisdiction clause;

(iii) There were no elements in the records proving charterer acceptance of the arbitral tribunal's jurisdiction;

(iv) Failure to prove the jurisdiction of the arbitral tribunal that rendered the foreign award bars its enforcement in Brazil.

In the end, the STJ interpreted the arbitration clause as invalid under Brazilian law, which barred the enforcement of the London arbitration award in favour of ship-owner.

This case was particularly worrying for the maritime arbitration community because there was a valid BIMCO contract agreed between parties, which could be entirely enforced in spite of the lack of signature. However, when dealing with an arbitration clause, the STJ brought a much more restrictive view as it conceived that the absence of a written, signed clause compromised the validity of the dispute resolution applicable to that legal relationship.

Likewise, the STJ showed a very restrictive view on consent. In practice, the STJ dismissed the possibility of an implicit or tacit acknowledgment of an arbitration agreement, but only by parties expressly acceptance.

Thus, the STJ 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. Yet, the arbitration agreement must be in writing, as required by Brazilian law.

A few years have passed after the STJ decision on the *Happy Dynamic* case. Therefore, it becomes adequate to revisit the court's ruling to analyse whether the current Brazilian legal conjuncture could present a diverse conclusion in analogous cases; that is, whether the *Happy Dynamic* case can be overruled in the future.

[12] Section 4, BAA: "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".

VI Can the *Happy Dynamic* case be overruled?

To build proper legal grounds for the *Happy Dynamic* case to be overruled, two proposed approaches shall be taken into consideration: (i) the possibility of proving consent by presumption or tacit/implicit consent; and (ii) in analysing the recognition and enforcement of arbitral awards, the Brazilian courts must apply the New York Convention, ratified by Brazil in 2002.

VI.1 Demonstrating consent by presumption or tacit/implicit consent

Thinking about consent is clearer when two parties express their intention to arbitrate through a written arbitration clause or arbitration commitment. The bilateral character of this arrangement makes unequivocal the consent to arbitrate – unless, of course, one of the parties lacks capacity, or the agreement is invalid under the applicable law.[13]

In addition, under Brazilian *lex arbitri*, an arbitration agreement must be in writing, as noted by the STJ in the *Happy Dynamic* ruling.

However, the international practice has shown that a party's participation in an arbitration will not always be based on an explicit expression of consent.

By using some theories of contract and usages of international trade (where BIMCO fits perfectly), the parties' common intent, reflected in their conduct, could arguably indicate their consent to arbitration.

To address this issue, the presumption of consent or tacit/implicit consent plays an important role. As Park observes, "in some instances consent must be explicit or in writing, on other occasions, circumstances might permit consent to be inferred or presumed"[14]. Presumptions may be used when is not possible to detect an express consent.

Where it is tricky to find consent, the presumptions will frequently be based on equitable notions, such as good administration of justice, efficiency, and fairness.[15]

To provide better context, presumed consent is seen, for example, in *assignment*, in which there is a presumption that if the entire contract is assigned, the arbitration clause will be transmitted as well.[16] Under the *agency* theory, the

[13] These international standards are reflected in Article V(II)(a) of the New York Convention. There are a few other examples, such as duress, mistake, fraud, waiver, etc.

[14] William W. Park. *The arbitrator's jurisdiction to determine jurisdiction.* Boston Univ. School of Law, Public Law Research Paper No. 17-33, p. 83.

[15] Bernard Hanotiau. *Consent to Arbitration: Do We Share a Common Vision*. In: Arbitration International, Vol. 27, No. 4 (LCIA, 2011). pp. 541, 543 and 545.

[16] *Id.*, p. 541.

same presumption applies for directors, employees and representatives of a signatory company. Presumed consent is also seen in *subrogation* and *third-party beneficiary*.[17]

In some cases, in order to preserve the efficiency of arbitration, the track to consent completely fades away, but a party would still be bound to arbitrate through a presumed consent.

This notion applies precisely to the *Happy Dynamic* case. In spite of the absence of signature in the BIMCO contract, the conditions of contract were duly negotiated by parties, exchanged by emails and agreed in a fixture recap. The contract was later fulfilled with the main obligations being duly performed by both parties, except for the detention dispute that arose afterwards.

A presumed consent can be found in relation to the charterer, since charterer agreed with all terms of the BIMCO HEAVYLIFTVOY through e-mail and phone contacts without making any remarks or challenges to the dispute resolution provision, which provided for arbitration in London. It can be presumed that charterer agreed with the arbitration clause as it was.

This is also a means to avoid certain injustices, as it was only when ship-owner filed a claim against the charterer that it began to argue that the BIMCO contract had to be signed in order for all its provisions to be deemed valid and enforceable, like the arbitration agreement.

It is not logic that all obligations of the BIMCO standard form could be enforceable in spite of the lack of signature of the contract but the arbitration clause had to be specifically agreed and expressed in writing. Naturally, two highly competent and specialized companies like the charterer and the ship-owner in the *Happy Dynamic* case should acknowledge that BIMCO contracts will normally provide for arbitration; thus, their acquiescence to arbitrate can be easily detected.

This position was, in fact, recently recognized by the STJ, when analysing the existence of an arbitration agreement and concluding that, under prism of a presumed consent, should be deemed valid and enforceable.

VI.2 The Brazilian superior court of justice's recent view on consent

In 2018, the STJ admitted that there are cases in which the agreement to arbitrate a dispute will not be based on express consent, but rather, in presumed, tacit or implicit consent, which considers the common intent of the parties to arbitrate.

[17] *Id.*, p. 542.

While it is correct to affirm that the BAA only admits that consent is proven through written agreements, the STJ provided more flexibility to this interpretation. The court analysed an improper use of corporate status case where a corporation that did not formally sign the arbitration agreement in detriment of other party was bound to the arbitration clause.

One particular excerpt of the STJ's ruling in the abovementioned case is elucidative of the court's new flexibility in analysing consent in arbitration:

> The subtract of arbitration is party autonomy that, in a conscious and voluntary manner, renounce the state jurisdiction, electing a third party, an arbitrator, to solve eventual conflicts of interests arising out of a contractual relationship. This consent to arbitrate, that must be protected, can present itself not only in an express manner, but also tacitly, which allows, for this purpose, the demonstration, by diverse means, of the participation and adhesion of the parties to the arbitration proceedings, specifically the underlying contractual relationship.[18]

The STJ's novel position when analysing unsigned arbitration agreements poses as a tenable means to reconsider the *Happy Dynamic* ruling.[19]

By recognizing that presumed, tacit or implied consent is admitted under Brazilian law, it becomes natural to allow BIMCO dispute resolution provision part of the standard forms to be deemed valid and enforceable even when there is no specific, signed agreement, as long as the intention of the parties entails their consent.

VI.3 Application of the New York Convention

Another approach aimed at detecting the proper consent of the parties to arbitrate – albeit without a specific written arbitration agreement – is to apply the provisions of the New York Convention, ratified by the Brazilian government through the Federal Decree No. 4,311/2002, when examining recognition and enforcement proceedings in Brazil.

---

18 STJ – Special Appeal No. 1698730/SP – JUAN MANUEL QUIROS SADIR et al. vs. CONTINENTAL DO BRASIL PRODUTOS AUTOMOTIVOS LTDA. – Justice Marco Aurélio Bellizze – 3rd Panel – decided on May 8th, 2018.

19 Although a novel position from the STJ, the State Court of São Paulo addressed a similar matter in the *Anel vs. Trelleborg* case, in which the state court ruled that the holding company was bound to an arbitration agreement even though it did not sign it. The holding's participation in the contract's negotiation and fulfilment of the contractual obligations established therein were sufficient proof of the holding's consent to arbitrate. This would correspond to a presumed consent or consent by conduct. *See* TJSP – Appeal No. 267.450-4/6 – ANEL EMPREENDIMENTOS PARTICIPAÇÕES E AGROPECUÁRIA LTDA. vs. TRELLEBORG DO BRASIL LTDA. et al. – Judge Constança Gonzaga – 7th Panel – decided on May 24, 2006.

When analysing the STJ's ruling on the *Happy Dynamic* case, there is no mention to the New York Convention, even though it is the most widely used international instrument for the recognition and enforcement of arbitral awards.

In this sense, Section II, paragraph 2, of the New York Convention demands that the arbitration agreement must be in writing but admits other proofs of the existence of such agreement, which can occur through letter or telegram communications.[20]

The UNCITRAL has issued a Recommendation regarding the interpretation of such provision, in which it adopts a broad interpretation in order to include to forms of written communications, i.e. e-mails, fax or telex,[21] regularly used in modern commercial transactions. This applies perfectly in the *Happy Dynamic* case, as ship-owner and charterer exchanged many e-mails to discuss the terms of the BIMCO form, and ended up agreeing with its terms without opposing to the arbitration clause therein.

Perhaps if the STJ had examined the *Happy Dynamic* case under the New York Convention, the outcome would be entirely different. Regrettably, the STJ's lack of enthusiasm in grounding recognition and enforcement proceedings in the New York Convention ends up limiting the parties' rights toward an agreed arbitration.

VII Conclusion

The *Happy Dynamic* case represented a discouragement to the international shipping community since it discredits the nature of contracts such as BIMCO forms, which are widely adopted by the industry and are often not signed. It placed risks and caution for foreign players when negotiating in Brazil and/or with a Brazilian party, contributing to legal uncertainty and, ultimately, dissuading international maritime transportation in Brazil.

However, the new approach given by the STJ to presumed or tacit/implicit consent can pose as an optimistic factor that could potentially lead to the overruling of the *Happy Dynamic* case in the future.

[20] "Section II, New York 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."

[21] "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 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session". The United Nations Commission on International Trade Law. In: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf, accessed on January 31, 2020.

Likewise, it is advisable that Brazilian courts, particularly the STJ, when analysing recognition and enforcement proceedings, apply the provisions of the New York Convention rather than limiting their analysis to Brazilian law requirements. The New York Convention undoubtedly represents a more international-friendly approach, which is compatible with maritime trade and customs in general.

In any case, while the STJ still waits for another similar case to be submitted to their analysis, it is safer for foreign maritime companies to adopt some precautions when dealing with a Brazilian party and planning ahead the enforceability of the contract in Brazil.

Ultimately, as advised by Marques and Paoliello, 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, which could help allowing the enforcement of the contractual arbitration clauses in Brazil and avoid any controversial interpretation from Brazilian Courts.[22]

Resumo: O presente artigo pretende analisar o consentimento no campo de arbitragem marítima sob o enfoque de precedente proferido pelo Superior Tribunal de Justiça do Brasil em 2015, referente ao navio "Happy Dynamic". Na ocasião, o STJ negou o reconhecimento e execução de sentença arbitral estrangeira ao entender pela inexistência da prova de consentimento do afretador para arbitrar eventuais litígios oriundos de contrato padrão BIMCO. Pretende-se expor, neste artigo, a possibilidade de que haja uma reconsideração do referido posicionamento por meio de duas abordagens: (i) o reconhecimento de que o consentimento para arbitrar pode ocorrer de forma presumida, implícita ou tácita nos contratos BIMCO e (ii) a efetiva aplicação da Convenção de Nova York, que possibilita comprovar a existência e aplicabilidade da convenção de arbitragem mesmo que inexista assinatura específica da cláusula no contrato.

Palavras-chave: Arbitragem. Arbitragem marítima. Direito Marítimo. Consentimento. BIMCO.

References

BIMCO STATEMENTS – Overview, available at https://www.bimco.org/about-us-and-our-members/bimco-statements, accessed on January 31, 2020.

Andrea Marco Steingruber. *Consent in Investment Arbitration*, In *Consent in International Arbitration*, 15.01.

Bernard Hanotiau. *Consent to Arbitration: Do We Share a Common Vision*. In: Arbitration International, Vol. 27, No. 4 (LCIA, 2011). pp. 541, 543 and 545.

Emmanuel Gaillard. *Anti-Suit Injunctions Issued by Arbitrators in Albert Jan van den Berg* (ed). In: International Arbitration 2006: Back to Basics?, ICCA Congress Series, Volume 13 Issue, p. 238.

[22] Marques and Paoliello, *supra* note 4.

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

James M. Hosking. *Non-signatories and International Arbitration in the United States: the Quest for Consent*, page 1 (1st paragraph)

William W. Park. *The arbitrator's jurisdiction to determine jurisdiction.* Boston Univ. School of Law, Public Law Research Paper No. 17-33, p. 83.

STJ – Challenged Foreign Award No. 11.593/GB – BIGLIFT SHIPPING BV. vs. TRANSDATA TRANSPORTES LTDA. – Justice Benedito Gonçalves – decided on December 18, 2015.

STJ – Special Appeal No. 1698730/SP – JUAN MANUEL QUIROS SADIR et al. vs. CONTINENTAL DO BRASIL PRODUTOS AUTOMOTIVOS LTDA. – Justice Marco Aurélio Bellizze – 3rd Panel – decided on May 8th, 2018.

TJSP – Appeal No. 267.450-4/6 – ANEL EMPREENDIMENTOS PARTICIPAÇÕES E AGROPECUÁRIA LTDA. vs. TRELLEBORG DO BRASIL LTDA. et al. – Judge Constança Gonzaga – 7th Panel – decided on May 24, 2006.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

SUASSUNA, Marcela Melichar. The quest for consent in BIMCO standard form contracts: a Brazilian perspective. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 02, n. 03, p. 261-274, jan./jun. 2020.