

The effects of setting aside an arbitral award

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Article 32 of Law 9307/1996, Brazil's Arbitration Law, sets out the grounds on which an arbitral award can be attacked. According to the Law, an arbitral award will be null if "(i) the arbitration agreement is null; (ii) it was rendered by someone who could not serve as arbitrator; (iii) it does not contain the requirements stated in article 26 of this Law; (iv) it exceeds the limits established in the arbitration agreement; (v) it is proven that the award was rendered by reason of willful neglect of duty, abuse of office, or bribery; (vii) it was rendered after the time period under article 12 (III) of this Law; or (viii) it violates the principles stated in article 21§2 of this Law."¹

Article 33 of the Arbitration Law governs the procedure for setting aside an award. Applications to set aside arbitral awards, in part or in full, follow the rules of common procedure under the Code of Civil Procedure, and must be made within 90 days from receipt of notice of the award, or of the arbitrators' decision on any request for clarification of the award (art. 33§1). Article 33§2 provides that "If the application is granted, the judgment shall declare the nullity of the arbitral award, in the cases set out in article 32, and shall, if applicable, order that the sole arbitrator or the arbitral tribunal issue a new award."

Article 33§2 was amended by Law 13.129/2015² to make setting aside the arbitral award the general rule, thus giving the courts greater flexibility to make a case-by-case of when the dispute should be remitted to arbitral jurisdiction for a new award. Arbitral awards can be set aside entirely or only partially, so that all or only part of the arbitration procedure is invalidated, although if the arbitration agreement itself is found to be void, then resolution of the dispute by arbitration is no longer an option. As a result, the parties will find themselves in a new legal position, which did not exist before the arbitral award was set aside. As one scholar puts it, "although the Law refers to a 'declaration of nullity', the judgment issued at the end of an application to set an arbitral award clearly extinguishes an existing legal situation."³

Unlike partial nullity of an arbitral award – where the award, once the defect is expunged, will still have existed and produced effects – nullity of the award in its entirety will bring about the extinction of the arbitration proceeding, without resolution of the merits.⁴ This will be the result when, for example, the arbitral award is set aside because it was issued by someone who could not serve as arbitrator, or the award was granted by reason of neglect of duty, abuse of office or bribery (art. 32(II) and (VI)). In these cases, the defect "is in the substance of the arbitration, and the arbitrator or arbitrators cannot issue another decision to replace the one that was set aside; instead, the entire arbitration proceeding must be repeated, if that is still possible, in order to cure the defect that caused the nullity."⁵

Thus, except in cases where the arbitration agreement itself is found to be

null, when an arbitral award is set aside the parties can, as a rule, commence a new arbitration proceeding obtain an arbitral award free of defects.⁶ As Carreira Alvim explains, the arbitration may be “initiated anew, provided the defect that contaminated the previous arbitration is cured, and the arbitration agreement is still in effect. Nothing in the previous proceeding will operate as a bar to the allegations and arguments the parties may make in the new proceeding.”⁷ In no circumstances, however, will the court deciding an application to set aside an arbitral award make a decision on the merits of the dispute originally submitted to arbitration.

While it is true that the effects of setting aside an arbitral award can vary, depending on the grounds of nullity, in general the legal situation as it stood prior to the time when the defect was detected will be restored, and the parties’ claims will proceed from that point. For example, “once the arbitrator who is under an impediment is removed, the proceeding may begin anew, by meeting the requirements for appointing his or her replacement. If a party’s right to make a full defense and answer has not been respected, then all subsequent acts are invalidated and the party must be given the opportunity to make its defense, but everything done up to that point is preserved.”⁸

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NOTES

¹ The English translation of provisions of the Arbitration Law is based on the translation of the Law made available by the Brazilian Arbitration Committee – CBAr at <https://cbar.org.br/site/legislacao-nacional/>. Accessed 5 March 2024.

² Formerly, article 33§2 read as follows: “If the application is granted, the judgment shall I – declare the arbitral award to be null, in the cases set out in article 32(I), (II), (VI), (VII) and (VIII); III – order the sole arbitrator or the arbitral tribunal to issue a new award.”

³ Hugo Tubone Yamashita, “Nulidade da sentença arbitral: as alterações introduzidas pela Lei nº 13.129, de 26.5.2015”. In: Flavia Holanda e Ricardo Medina Salla (Coords.), *A nova lei da arbitragem brasileira*. São Paulo: IOB SAGE, 2015, pp. 128, 135-6. My translation.

⁴ As Brazilian arbitration scholar Cândido Rangel Dinamarco explains (referring to article 33§2 of the Arbitration Law prior to its amendment), “once the arbitration proceeding has been extinguished, without prejudice, the parties are free to pursue their claims again, in a new arbitration proceeding, since their arbitration agreement will survive the vicissitudes of the first attempt, except in the case contemplated in art. 32(I), because if the arbitration agreement itself is null, then arbitral jurisdiction itself is negated.” (Cândido Rangel Dinamarco, *A arbitragem na teoria geral do processo*. São Paulo: Malheiros, 2013, p. 236. My translation.). Taking the same position: Hugo Tubone Yamashita, op. cit. Where a proceeding is extinguished without prejudice, procedural law specialists explain that “until the judgment extinguishing the proceeding without prejudice becomes final, the running of the limitation period is interrupted, since art. 202, sole paragraph, of the Civil Code suggests that the limitation period will only run anew after the last act in the application to set aside the award. Once judgment

has become final, the claim may be made again, after curing the defects that led to its extinction without a decision on the merits, and the limitation period will run anew, excluding the time period covered by the extinguished proceeding.” (João Paulo Hacker da Silva. In: Cassio Scarpinella Bueno (Coord.). *Comentários ao Código de Processo Civil*, v. 1. São Paulo: Saraiva, 2017, pp. 834-5. My translation.). This position finds broad support in the Superior Court of Justice (STJ – Superior Tribunal de Justiça): STJ, 3ª S., REsp 1091539/AP, Rel. Min. Maria Thereza de Assis Moura, j. 26.11.2008, DJe 30.03.2009; STJ, 3ª T., AgInt no AREsp nº 1.195.009/PR, Rel. Min. Moura Ribeiro, j. 15/3/2018, DJe 20/3/2018; STJ, 3ª T., AgInt nos EDcl no AREsp 1.727.748/MS, Rel. Min. Marco Aurélio Bellizze, j. 25.10.2021, v.u., DJ 28.10. 2021; STJ, 1º T., AgInt no REsp 1.879.793/CE, Rel. Min. Sérgio Kukina, j. 21.08.2023, v.u., DJ 21.08.2023.

⁵ J. E. Carreira Alvim, *Direito arbitral*. 3. ed. Rio de Janeiro: Forense, 2007, pp. 415-6.

⁶ As a rule, the parties cannot argue that the limitation period has expired. As Carmona explains, “even if the arbitration proceeding is extinguished for reasons other than lack of jurisdiction, as long as the arbitration is commenced (which presupposes the respondent’s participation in the proceeding – or at least the possibility of that participation), the limitation period will be interrupted, retroactively to the date on which the request for arbitration is filed.” (Carlos Alberto Carmona, *Arbitragem e processo: um comentário à Lei nº 9.307/96*. 4. ed. Barueri: Atlas, 2023, p. 287. My translation.).

⁷ J. E. Carreira Alvim, *op. cit.* My translation.

⁸ Francisco José Cahali, *Curso de arbitragem*. São Paulo: Revista dos Tribunais, 2011, pp. 322-33. My translation.

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