

Between Brazilian Arbitration and European Arbitration: A study about the National Telecommunications Agency (ANATEL) and the Office of Communications (OFCOM)

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Abstract

The search for arbitration as a means of resolving disputes is important due to the large volume of cases submitted to the judgment of the State - judge, in a number inversely proportional to the technical preparation of those who are invested in the jurisdictional function by state act. Currently, talking about extrajudicial settlement of conflicts in the field of regulation means entering a scenario of great discussions and debates. In this way, the text seeks to build reasons for the resolution of disputes in the field of telecommunications through arbitration, including, in view of the European experience, such as OFCOM. One of the duties of the regulatory agencies is precisely the solution of conflicts between players in the sector at the administrative level. When analyzing the forms of dispute resolution in the European Union, a peculiar behavior can be highlighted. In major disputes that occur on the continent, it is more common to use arbitration than the judiciary. In fact, arbitration can be used by ANATEL as an important tool to ensure a broad, free and fair competition between providers of telecommunications services, as it dodges the slowness of the judiciary and the possibility of sham litigations, enabling the rapid adoption of a decision that often affects the rights of a large number of users of telecommunications services. The high prestige enjoyed by these methods of dispute resolution pays homage to their characteristic of being a neutral forum positioned far from a regulatory agency of a specific country and close to referees chosen by common agreement, or even connected to international institutions that provide the arbitration services in commercial disputes.

Keywords: ANATEL, OFCOM, arbitration, dispute resolution, comparison.



A. INTRODUCTION

The article initially addresses arbitration as a consensual means of conflict resolution that is increasingly gaining strength. It also brings a critique of the methods of administering Brazilian justice, based on the slowness and complexity of the system. Its cost, as well as its ease of entry, makes its access indistinguishable to all, which does not necessarily mean adequate jurisdictional provision, much less the satisfactory implementation of constitutional values. Still at the beginning of the text, it will be

observed that the jurisdictional function of the Brazilian regulatory body is still little debated, in part because the General Telecommunications Law has not opened new and significant possibilities for the performance of the Public Administration in this sense. In this way, the article will analyze the Brazilian and European regulatory bodies that exercise the function of settling conflicts between telecommunications operators and, particularly, how arbitration is used for this. Based on this premise, the means that ANATEL and OFCOM have to act in the resolution of these disputes are critically analyzed, formulating questions so that this role of the national regulatory body can be improved, compared to the European regulatory body. At a later moment, the phenomenon of the Regulatory State will be dealt with, taking into account the manifestation of the regulatory action as an action of political power, characterizing it as a project of public law. The text gravitates around the regulatory agencies, namely, the Brazilian National Telecommunications Agency (ANATEL) and the European Office of Communication (OFCOM), detailing the legal instruments of their creation, specificities and legal nature of the same. Finally, the text deals with litigation involving agents of the regulated sector or one of them and the regulatory agency.

For this, it appears that the possibility of using consensual means of dispute resolution embodies the adoption of a tool to overcome this crisis, reinforcing the coherence of the system. State action in the sense of enabling alternative means of dispute resolution, including arbitration, translates into regulatory action by the State. Arbitration began to take on the contours of a means that, alongside state jurisdiction, represents a heterocompositional form of conflict resolution. The capable parties, by mutual agreement, in the face of a dispute, or by means of a contractual clause, establish that a third party, or collegiate, will have powers to resolve the controversy, without state intervention, and the decision will have the same effectiveness as a Judicial sentence. In the search for the best alternative to the parties, in essence we have in arbitration the most appropriate model for different situations, such as complex conflicts, involving in-depth analysis of specific matters, and requiring a more dedicated structure and treatment, difficult to obtain in the Judiciary due to its features and colossal workload. With regard to discussions on arbitration as an “alternative” means of conflict resolution, CARMONA (2009, p.31) prefers to call arbitration an “appropriate means” of dispute resolution. In our country, arbitration was provided for in the Civil Code of 1916 among the indirect means of payment, under the title of “commitment” (arts. 1037 to 1048), but it did not find wide use as a means of conflict resolution, in view of that, in art. 1,085 to 1,102, the Code of Civil Procedure required the homologation of the so-called “arbitration award” (today equivalent to the arbitral award), by court decision with all the inherent appeals. As a result, the Judiciary became the “second level of jurisdiction” for arbitration. Law 9,307, of September 23, 1996, ended the need for judicial ratification of the arbitral award and equated the arbitrator with the judge in the performance of the arbitration (art. 18),

thus stating that the arbitrator is a judge in fact and in law, and the judgment it renders is not subject to appeal or ratification by the Judiciary. Clarifying, therefore, that its decision is a sentence and, as such, constitutes a judicial enforcement order (CPC, art. 475-N, IV, included by Law 11.232/2005), making *res judicata* material when deciding the merits of the conflict. It is worth adding the information that the new civil procedural code (2015) adopts the jurisdictional duality, establishing in parallel the state jurisdiction and the arbitration jurisdiction, observed in articles 3 and 42. It is observed in article 3 that it will not be excluded from the appreciation jurisdictional threat or injury to the right, as well as arbitration will be allowed under the law. The text of Article 42, on the other hand, conveys the idea that civil cases will be processed and decided by the judge within the limits of its competence, with the parties having the right to institute arbitration, in accordance with the law.

As for the limits imposed on the possibility of an arbitration solution, pursuant to art. 1 of the Arbitration Law (Law 9.307/1996), arbitration is limited to the ability to contract and to property and available rights. Let's see: "Persons capable of contracting may use arbitration to resolve disputes relating to available property rights". Therefore, it is sufficient for the person to have legal personality to submit to arbitration. Remember that, pursuant to art. 1 of the CC, legal personality is the capacity to be the holder of rights and obligations, acquired by the natural person with live birth (art. 2 of the CC).

B. LITERATURE REVIEW

Some traits are common to regulatory agencies, such as the independence of leaders from political power, their sectorization as well as the legal nature of autarchy in a special regime. We include here the normative power and the power to settle conflicts, since it synthesizes these two that are limited to the sectors that they aim to regulate. Independence, of course, does not mean that they are free from control or supervision. In order to implement public policies proposed democratically by the Legislative Power, the agencies must remain independent from the latter and from the Executive Power itself, so that it can implement them in the most efficient way possible. Thus, this independence aims, in the view of Alexandre Santos de Aragão, to compensate for some of the inconveniences of the majority principle, correcting eventual distortions for the parts of the population that do not agree with the postures adopted by the majority (ARAGÃO, 2009, p.88). This independence has several facets, namely: a) independence of directors from the Executive Power, by means of mandates for a determined period, not coinciding with the mandates of the Executive Power, being prohibited free exoneration; b) economic and administrative independence, with the agencies having their own

revenues, generally coming from the regulated sector itself, as well as freedom to hire their staff, under the statutory and CLT regime (depending on the position); c) procedural independence, improper hierarchical appeal being inadmissible .

This independence cannot be taken literally and understood as if they could primarily innovate the legal order. The normative power of these is undeniable; however, they can only exercise it with a view to complementing the framework norms (or Standards) imposed by the Legislative Branch. The principle of legality must be understood broadly – the principle of legality, write some (MORAES, 2004) in such a way that the acts of the agency are understood as exercising an administrative function, and must respect not only the Constitution, but the law that authorized the issuance of these acts. Moreover, the supremacy of these entities is not a general supremacy, such as that of the State over its subjects, but a special supremacy, where a characteristic (or a set of characteristics) brings together a group of people under the same condition, demanding different treatment who does not have such characteristics (FIGUEIREDO, 2005, p.285). Regulatory agencies exercise state supremacy activities, as typical police practices, which is why they must enter the national legal system as a subject of public law, constant in the indirect Administration. Because they demand a certain autonomy, regulatory agencies assume the status of autarchy which, conceptually, means self-government, in the sense of an administrative legal entity with the capacity to manage its own interests (CARVALHO FILHO, 2009, p.444). However, the independence common to all autarchy is not enough, the agencies demand a more intensified degree of autonomy, such as the impossibility of dismissing directors *ad nutum* (with mandates in a time different from the mandates of the heads of the Executive), lack of inappropriate administrative resources, among other features. Thus, it is said that regulatory agencies have, in Brazilian law, the legal nature of autarchy in a special regime. Although the expression “special autarchy” or “autarchy under a special regime” is multifaceted, as it encompasses several possibilities (the independence conferred may be greater or lesser, according to the law that created the agency), it is important to emphasize that only through the analysis of the specific legal instrument for creating the agency, we can verify with greater precision the degree of independence of a given agency. Recently, the methods of administering Brazilian justice have been the target of several criticisms, which are based, above all, on their slowness and the complexity of the system. Its cost, as well as its ease of entry, makes its access indistinguishable to all, which does not necessarily mean adequate jurisdictional provision, much less the satisfactory implementation of constitutional values. The use of arbitration in disputes involving the State still encounters difficulties based on the principle of unavailability of the public

interest. The application of this extrajudicial means of resolving disputes between the regulatory agency and the concessionaire and between concessionaires and users would be impossible, given the administrative nature of these relationships and the public interest involved in them.

In this way, the liberalization of markets for the provision of telecommunications services worldwide from the last decade of the 20th century demanded the creation of regulatory bodies in the sector that sought to safeguard the public interest amidst the actions of private entities. Brazil proceeded to create the National Telecommunications Agency (ANATEL), which is an autonomous body whose duty is to regulate and supervise the sector based on two principles of action: the universalization of basic telecommunications services and broad and fair competition in exploitation of services (OLIVEIRA, 2009, p.112). Among the burdens arising from the duty to ensure competition is the role of resolving conflicts between operators. The role of the regulator is very important in this sense, especially when it comes to the need for asymmetric competition regulation, in which established operators enjoy high market power by virtue of having most of the telecommunications networks (OLIVEIRA, 2009, p. .112). Initially, it is worth mentioning that unavailable is the primary public interest and not the interest of the administration (GRAU, 2016) The former is the result of the union of individual complexes in a given society whereas the latter. It is the interest of the organizational structure of Public Administration guided by the principle of legality. Thus, since there is the legal possibility for any person capable of using arbitration to resolve disputes relating to available property rights (art. 1st Law 9.307/96, and its paragraphs included by Law 13.120/2015), normative space is opened for the Public Administration to use this mechanism in favor of its own interests. By opting for arbitration, the Public Administration does not neglect a public interest; on the contrary, a faster and more specialized way of resolving technical conflicts is chosen, which deviates from the standard of conflicts subject to the Judiciary and which, for this very reason, will be more subject to pronounce decisions that do not please either party (PEREIRA; CAVALCANTE , 2010). The use of arbitration in regulated economic sectors must be expressed in the contracts signed between the granting authority and the concessionary companies, in an arbitration clause. Therefore, except in cases of express prohibition for the use of this medium, or in cases of goods of common use by the people and of special use, any other causes involving patrimonial rights are arbitrable (BINENBOJN, 2015).

One of the crucial points of arbitration is the fact that it results in the resolution of disputes more quickly, in a shorter time compared to the judicial process, marked by

slowness and the possibility of delaying compliance with the judgment. This point is important, as large telecommunications operators can use their economic strength to prevent the implementation of a court decision, or even the success of an agreement on which the smaller operator depends for the provision of its services, violating free competition in the sector. Perhaps the greatest concern on the part of telecommunications is the way of dealing with controversy, notably due to the projection of its effects on competition between operators and on the provision of services. Any regulatory action in the sector must, in addition to identifying this challenge, prioritize new ways to combat it, which involves recognizing that the Judiciary cannot be the only actor in the composition of these conflicts. Therefore, it is necessary to analyze the background for the use of extrajudicial means of dispute resolution in the sphere of telecommunications, in order to verify that some aspects of regulation, the legal regime and the characteristics of the sector are in full harmony with the extrajudicial composition of disputes and, consequently, with arbitration (SANTIAGO, 2014, p.183). The introduction of the model of regulatory agencies in the Brazilian Public Administration would have resulted from the identification of a regulation deficit translated into the following aspects, whose implementation it pursues: defined and stable tariff policy; clearer regulatory frameworks, which detail the relationships between the various actors in each sector, their rights and obligations; agile and efficient mechanism for the resolution of divergences and conflicts between the granting authority and the concessionaire; guarantees against the economic and political risks of investments in economic sectors (ARANHA, 2005, p.57).

In Brazil, there is no single procedure for resolving disputes between regulatory agencies that encompasses all types of conflict. The main characteristics of this process are: the impossibility for the parties to choose the "arbiters", insofar as article 10 of Joint Resolution 2/2001 establishes that the Commission is composed of two representatives from each agency (ANEEL, ANATEL and ANP); (legal nature of an administrative procedure, as expressly defined in article 19 of the aforementioned Resolution; the Commission's decision cannot be appealed only at the administrative level (art. 36 of Resolution No. 2/2001), and, therefore, judicial review is possible on the merits; and the possibility of only one of the parties requesting the action of the agencies (Resolution no. 1/1999, art. 14, paragraph 2). With regard to the conflict being resolved through the intervention of a third party, in a procedure whose beginning is optional, there is, in general, no choice by both parties, nor a prior agreement that removes state jurisdiction, making it impossible to review the merits of the Judiciary. Disputes arising between telecommunications operators are not subject to the Regulation Set previously

mentioned, but to the compositional forms provided for in the infrastructure sharing regulation itself, approved by Resolution No. 274. These forms are arbitration and mediation administrative.

In order to use these means of dispute resolution, the negotiation between the parties must have been unsuccessful. The Regulation refers to the arbitration and mediation procedures approved by the Agency. However, there are no general procedures for any of these DRs within the scope of ANATEL: there is no mediation procedure approved by the Agency and the existing “arbitration” procedure refers to “interconnection arbitration”, which has already been discussed. In addition to these means of dispute resolution, arbitration and mediation of conflicts between operators by ANATEL are also mentioned in its Internal Regulations and in the concession contracts, lacking the same regulation. Under the concession contracts, the parties are entitled to submit to ANATEL, through a dispute resolution meeting, mediation process or arbitration process, any conflicts arising from the interpretation and application of the regulation. As demonstrated with the mapping carried out in the previous subsection, there is no arbitration procedure and mediation procedure regulated by ANATEL that are widely applicable. Thus, it will be a question here of the use of comparative law to illuminate the concept of mediation and arbitration that the Brazilian Agency carries and, based on that, to indicate possible ways that are consistent with the position of a regulatory body in relation to a liberalized market (OLIVEIRA, 2009, p. 143).

C. METHOD

When observing conflict resolution in the European Community, a favorable reality is perceived, that is, in numerous disputes that occur in Europe, the use of arbitration is common rather than the Judiciary itself. This is because major European disputes, not just in the telecommunications sector, but in electricity, transport and commercial sectors in general, often involve more than one country, as most large companies are transnational. There is a great appreciation for dispute resolution methods, insofar as they provide forum neutrality. The decision is not given to the Judiciary or to the regulatory body of a specific country, but arbitrators are chosen based on the common agreement of the parties or, even, institutions of international scope are appointed that provide the service of arbitration in commercial disputes. This is particularly important when the dispute concerns two or more companies based in different countries. In the resolution of telecommunications disputes by regulatory authorities, this tradition is not overlooked. In Europe, there are rules of continental scope

enacted by the respective DGs of the European Union (Europe Union Framework Directives). The sector of electronic communication networks and services is governed by Directive 2002/21/EC, of March 7, 2002. This rule addresses, in its articles 20 and 21, the position of regulatory bodies in the resolution of disputes between telecommunications operators in countries governed by the Directive (OLIVEIRA, 2009, p. 144).

According to this normative instrument, the national regulatory authority must decide in a binding manner for the parties, within a maximum period of four months, when one of them requests a solution to a dispute referring to any norm or directive of the sector – including Directive 2002/21/ EC. However, it is the duty of Member States to ensure the ability of regulatory authorities to decline to resolve the dispute when other mechanisms – including mediation – exist and contribute more effectively to the resolution of the dispute within an acceptable time frame. Thus, if arbitration or mediation is applicable in the case, the regulatory authority informs the parties that it will not resolve the dispute. If these dispute resolution mechanisms do not bring results within four months, the regulatory authority must commit to deciding the issue (OLIVEIRA, 2009, p. 145). In the event of a dispute arising between two companies domiciled in different countries, a decision may be requested from any of the national regulatory authorities involved. They will, however, work together to reach a decision on the case. In this type of conflict, the possibility for the regulatory authorities to decline, if other dispute resolution methods exist, also applies. This being the case, they will only decide after four months have not achieved results with these methods (OLIVEIRA, 2009, p. 145). The decisions of Organs regulatory bodies are public, in fact, characteristics common to consensual means of conflict resolution, respecting, however, the requirements of the parties for the confidentiality of business aspects of the companies. This decision does not preclude the access of the parties to the Judiciary, and they may seek a judicial review of the merits already analyzed. In view of this European directive, the United Kingdom enacted the Communications Act of 2003, creating the Office of Communications (Ofcom), a regulatory body for the telecommunications sector, which brought new attributions to regulatory activity. Among such attributions is the competence to resolve disputes between telecommunications operators. The Communications Act is a lengthy document and deals in detail with this role for Ofcom. Firstly, in order to have a dispute resolved by Ofcom, it is sufficient that one of the parties requests it. In line with the directive of the European Union, the dispute will only be resolved by the regulatory body if there are no alternative means to resolve the dispute, if these alternative means are applicable to the type of dispute. Whatever the position of

the body, the parties are notified. In the event that Ofcom declines and, after initiation of the alternative dispute resolution procedure, a conclusion cannot be reached within four months, one of the parties has the right to request that the body resolve the dispute and it is obliged to do so. . In this case, the previous process will be continued (OLIVEIRA, 2009, p. 146).

D. CONCLUSION

Recently, the methods of administering Brazilian justice have been the target of several criticisms, which are based, above all, on their slowness and the complexity of the system. Its cost, as well as its ease of entry, makes its access indistinguishable to all, which does not necessarily mean adequate jurisdictional provision, much less the satisfactory implementation of constitutional values. This text aims to discuss the use of arbitration as a dispute resolution technique in regulated economic sectors, along with decisions issued by regulatory agencies and court decisions. Regulatory agencies in Brazil, especially after the privatization phenomenon, enjoy increasing importance, serving as a consumer protection body, implementing sectoral public policies and monitoring and inducing the regulated economic environment. As a result, its competences multiply as the regulated sector grows. One of the main attributions of regulatory agencies is to arbitrate conflicts arising between the Public Power and concessionary companies and between these among themselves, as well as between concessionaires and consumers, with a view to issuing faster and more specialized decisions, especially in technical conflicts of a high degree of complexity that would hardly be resolved to the satisfaction of the Judiciary. Such decisions enjoy even greater legitimacy, since they are issued within the sectoral legal system, in a safe environment known by the parties.

The use of arbitration by the Government, as provided for by Law 9.307/96, was the target of severe objections, based especially on the unavailability of the public interest. This is because the two institutes – arbitration within the scope of regulatory agencies and *ex vi* of Law 9.307/96 – although they have the same legal nomenclature, are essentially different; while the former is an administrative decision, not enforceable and subject to judicial review, the latter constitutes an enforceable title and has the same effects as the judgment handed down by the Judiciary. The unavailable public interest is that primary interest, not distinguished from the secondary public interest, or interest of the Administration. The Government's desire to see its conflicts resolved quickly and in a specialized manner is undeniable, with a greater probability of a fair and legitimate decision, in the face of a long, time-consuming and expensive process by the Judiciary

and with a greater probability of ending with a decision that does not satisfy the parties. In this sense, Law 13,129 of May 26, 2015 tries to resolve this conflict, stating verbatim that the Public Administration may use arbitration to resolve conflicts related to available property rights.

It can be observed that, within the scope of regulatory agencies, two arbitrations are envisaged, namely, that issued by the agency itself, which constitutes an administrative decision, as well as that submitted to a court or arbitral chamber, in accordance with Law 9.307/96, whose decision will have the same effects as that issued by the Judiciary and, if condemnatory, will constitute an enforceable instrument. We can observe points in common with Brazil, since it follows the European technique for defining which matters can be resolved by ANATEL. Thus, arbitration must deal with pending matters relating to the recognition or attribution of rights between the parties, and arbitration, with “conflict of interests between telecommunications operators. It is a valid form, as there is no risk that a given case requires the intervention of the agency and this cannot occur because the dispute does not fit into the exhaustive list of hypotheses. It is possible to observe negative points as well. The main one is the possibility of diversion of purpose in the agency's performance. A dispute that does not exactly deal with the matter that is subject to regulation by the agency may have to be resolved by it. If a cable TV operator unduly exposes, in its advertising, the brand of an SMP operator, then there is a conflict of interest, which, in theory, can be brought before the agency. Thus, it is very unlikely that a conflict like this will harm competition between the parties to the point that the Agency needs to intervene. Therefore, the best way to predict the Agency's performance seems to be the analytical list of hypotheses. It is important, however, to also let the agency decide at its discretion whether or not to act in any other case not covered by the list of hypotheses, but which could be potentially harmful to broad and fair competition. Arbitration at ANATEL is always an option for the parties, who, before requesting the agency's action, must reach a consensus on this. The regulation of the procedure in England (Europe) does not bring this need.

In ANATEL's Internal Regulation, there is a requirement of consensus both for the initiation of arbitration by the Agency and for the initiation of mediation. It makes sense, as has been shown, to require the parties' consent for the Agency to mediate. In arbitration, on the other hand, demanding the parties' consensus can mean the unequivocal need for the requesting company to go to the Judiciary, frustrating the possibility of a quick and well-founded decision to the conflict.

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