

ARBITRATION AND THE NORMATIVE APPLICABILITY OF BINDING JUDICIAL PRECEDENTS IN THE BRAZILIAN MODEL: A SEARCH FOR LEGAL UNITY

Antônio Pereira Gaio Júnior

Postdoctoral Fellow in Law at the University of Coimbra – POR. Postdoctoral Fellow in Democracy and Human Rights at Ius Gentium Conimbrigae – Faculty of Law, University of Coimbra-POR. Doctor of Law at UGF. Master of Law at UGF. Postgraduate in Procedural Law at UGF. *Visiting Professor* at *Ius Gentium Conimbrigae* – FDUC-POR. Associate Professor of Civil Procedural Law and General Theory of Procedure at the Federal Rural University of Rio de Janeiro – UFRRJ. Coordinator of the *Lato Sensu* Postgraduate Program in Contemporary Procedural Law – UFRRJ. Member of the *International Association of Procedural Law*-IAPL. *Member of the International Bar Association* – IBA. Member of the Ibero-American Institute of Procedural Law – IIDP. Member of the Brazilian Institute of Procedural Law – IBDP. Member of the Association of European Law and Economics (ADEE). Full member of the Permanent Civil Procedure Commission of the Brazilian Bar Association (IAB NACIONAL). Deputy Secretary of the Brazilian Institute of Procedural Law (IBDP). Member of the Civil Procedure Commission – OAB/MG. Leader of the Civil Procedure and Development Research Group (UFRRJ/CNPq). Lawyer, Legal Consultant, and Legal Advisor. Email: www.gaiojr.com. jgaio@terra.com.br.

Summary: Introductory note. 1. Unity of Law. 2. Binding Judicial Precedents. 3 Arbitration. 3.1 Brief necessary notes. 3.2 Respect for the application of precedents in arbitration. Final considerations. Bibliographical references.

INTRODUCTORY NOTE

The normative applicability in the resolution of disputes in a legal system—and especially here in Brazil—is not a given. It is a set of legal possibilities based on an understanding of substantive law combined with the prospects required by the method of dispute resolution.

This text aims to unveil the dogma and pragmatism that is intended to be presented around Arbitration as a means conducive to conflict resolution and the necessary or unnecessary incidence of judicial precedents considered binding in its scope, i.e., the requirement that the arbitrator, as a judging body, must carry out the

respect and apply the aforementioned precedents (binding effect of judicial decisions) when the issue brought before the arbitral tribunal has already been the subject of a qualified judgment by the Brazilian courts.

Respect for the principles of legal certainty, predictability, equality, and trust, combined with the necessary unity of law, must be considered in light of any extrajudicial method of dispute resolution, with the aim of observing the degree of independence and freedom they have in relation to the legal framework that applies at a given time and place.

1. UNITY OF LAW

The idea of unity of law or of the legal system in a given time and space is a phenomenon related to the legal experience itself as a normative experience.

In fact, as Bobbio¹ rightly notes, legal systems are composed of an infinite number of norms, like stars in the sky, that is, new norms are always being created in an attempt to satisfy all the needs of a complex society.

The difficulty in identifying which and/or how many rules constitute a legal system stems from the fact that there may be several sources. Therefore, simple or complex legal systems vary according to the rules that compose them, i.e., from a single source or more than one, which is why "the image of a legal system composed of only two characters, the legislator who sets the rules and the subjects who receive them, is purely scholastic. The legislator is an imaginary character who hides a more complicated reality."⁽²⁾

A society considered complex arises from an overly stratified social fabric, distributed across various social strata, as well as the mutual relationships established between the state and the citizen, the citizen and the state, and citizen and citizen, dictating everything from access to minimum rights and guarantees, through the notion of coexistence amid adversity, to the most diverse distortions in income and its distribution, fraying identities and weakening informal mechanisms of social control.⁽³⁾

¹ BOBBIO, Norberto. *Theory of Legal Order*. 6th ed. Brasília: University of Brasília, 1995, p.37.

² Ibid.

³ Campilongo is quite right in asserting that "the economic crisis fragments society into countless factions and sectors, which breaks with both the notion of a unified society and the image

In this regard, law, also conceived as the science of life,⁴ plays an essential role in building social temperance and establishing dialogue among a diversity of interests, desires, and achievements.

Restlessness, an inseparable feature of social relations established in an environment of legal tensions, recognized in spaces ranging from normative vacuums to contradictory decision-making frameworks, has in the figure of law as a social science the ability to establish, with its own instruments, the binomial of predictability and legal certainty, capable of granting the stability necessary for the establishment of social and economic health, basic foundations for the achievement of well-being and quality of life, that is, development.⁵

It therefore sounds tautological that the unity of law should be based on a logical and coherent unity of dialogue between the most diverse sources of law.

More precisely, with regard to judicial or arbitral decisions as a source of law, their reasoning and grounds must be capable of interpreting the static rule of law, giving it normative life, since norms result from interpretation and the text, statement, or provisions only signify the potential legal order, i.e., a set of interpretative possibilities or a complex of potential norms.⁶

That said, the responsibility of the jurisdiction in the interpretative construction of the law is undeniable, both in terms of adherence to the norm itself, applied in harmony with the social fabric that receives its command, and in terms of consistency⁷ with the normative complex in its broadest and most general sense, so as to allow for the constant construction of the unity of law, which, as agreed elsewhere, is the faithful repository of the predictability and legal certainty inherent in qualitative social and economic relations.

of the unified State." CAMPILONGO, Celso Fernandes. *Law in a complex society*. São Paulo: Max Limonad, 2000, p.55.

⁴ "The origin of law is therefore found in the very nature of man, understood as a social being.

And it is to protect the personality of this being and discipline its activity, within the social whole of which it is a part, that law seeks to establish, among men, a proportion tending to create and maintain harmony in society." RÃO, Vicente. *Law and the Life of Rights*. 6th ed. São Paulo: RT, 2005, p.53. (⁵) On Process and Development as an improvement in quality of life, cf. GAIO JÚNIOR, Antônio Pereira. *Civil Procedure, Fundamental Procedural Rights, and Development. Flexos e reflexos de uma relação*. 2 n d ed. Londrina: Thoth, 2023, p. 97 et seq.

⁶GRAU, Eros. *The double destructuring and interpretation of law*. Trans. Barbara Rosenberg. Barcelona: Bosch, 1996, pp. 69-70.

⁷CPC/2015, art. 926: "The courts must standardize their jurisprudence and keep it stable, consistent, and coherent."
consistent."

With regard to Judicial Precedents—the binding effect of judicial decisions—their practice and adoption clearly and unambiguously demonstrate the intention to achieve equality with the aforementioned predicates—predictability and legal certainty—which are essential and justify their existence, a fundamental expression of institutional trust. This will be discussed below.

2. BINDING JUDICIAL PRECEDENTS

2.1 Conceptual notion, object, and applicability in CPC/2015

It is an indisputable fact that predictability is a prerequisite in any relationship that is valued or deserves attention, whether social, economic, legal, or political in nature, and without any effort, it is the permanent desire of the litigant that both the legal system to which he is subject and the public justice service offered by the state are able to provide the necessary legal certainty, the direct reflection of which encompasses the fundamental right to a stable daily life.⁸

As is well known, the Brazilian Code of Civil Procedure of 2015 (Law No. 13,105 of March 16, 2015), among numerous innovations and changes of direction in relation to its predecessor, the CPC/1973, had the objective and purpose of regulating more closely the system of binding effects of judicial decisions, notably referred to here as Normative Precedents⁹ Normative Precedents, compliance with which is mandatory in the field of Brazilian civil procedure today.

In fact, the term Precedent should be noted here, even though it does not effectively translate into the conceptual and interpretative assumption of what can be understood as such, as it is based on the importance of ensuring equal treatment in the face of judicial decisions within a Constitutional State, since nothing denies equality more than giving someone whose rights have been violated or who is under imminent threat of having their rights violated a decision that is inconsistent with the standard of rationality already defined by the Judiciary in truly identical disputes.⁽¹⁰⁾

⁸ On stability and the right to a stable daily life as intrinsic values and, therefore, inseparable from the notion of human dignity, see FONTES, José. *The Right to a Stable Daily Life. A Human Rights Issue*. Coimbra: Coimbra Editora, 2013, pp. 19-24.

⁹ On the conceptual issue, more precisely what is referred to as "Precedents" in CPC/2015, see GAIO JÚNIOR, Antônio Pereira. *The Concept of Precedents in the New CPC*. Available at: https://www.gaiojr.adv.br/artigos/o_conceito_de_precedentes_no_novo_cpc; Accessed on 01.27.2023. (¹⁰) On the historicity and ideological assumptions of the construction of the Theory of Precedents in both Common Law and Civil Law, see, among many others, DUXBURY, Neil. *The Nature and Authority of Precedent*. Cambridge: University Print House, 2008; MELLO, Patrícia Perrone Campos. *Precedents. O Judicial Development of Law in Contemporary Constitutionalism*. Rio de Janeiro

In this regard, in a relevant consideration of the various ways in which precedent operates, Cross and Harris¹¹ point out that "*it may simply be a certain inclination to repeat what others have done before, or it may be the result of a positive obligation imposed on judges according to which they must follow previous decisions in the absence of a justification for departing from them,*" standardizing not only its construction and representation, but also the forms of self-control by the judicial bodies themselves regarding its respect and application, with the aim of making it not only a means, but also a rational end for the establishment and fulfillment of the binding model in the verticalization of decisions, promoting equality and predictability in decision-making.

The concern with the rationality and consistency of judicial decisions is one of the characteristic points of the text of the Code of Civil Procedure of 2015, which tends to favor the unity of law to the extent that the same treatment or decision-making standard is given to the same legal situation.

It is clear that the lack of control over highly divergent judgments, especially in matters of law, undeniably constitutes an affront to the principles of equality and legal certainty.

We have already had the opportunity to address the issue of disrespect for the reasonable consistency of the judicial system in the context of jurisprudential divergence¹³ and, although it is a Herculean task still in progress, it is necessary to equip ourselves with instruments aimed at fully achieving the above-mentioned objective, that is, to build foundations for the stability of social relations when they depend on them.

Renovar, 2008; GAIO JÚNIOR, Antônio Pereira. *Institutions of Civil Procedural Law*. 5th ed. Londrina: Thoth, 2023, pp. 622- 641; CROSS, Rupert; HARRIS, J.W. *Precedent in English Law*. Madrid: Marcial Pons, 2012; MARINONI, Luiz Guilherme. *Mandatory Precedents*. São Paulo: RT, 2010; NOGUEIRA, Gustavo Nogueira. *Binding Precedents in Comparative and Brazilian Law*. 2nd ed. Salvador: JusPodivm, 2016; MITIDIERO, Daniel. *Precedents. From persuasion to binding*. São Paulo: RT, 2017; CRAMER, Ronaldo. *Judicial Precedents. Theory and Dynamics*. Rio de Janeiro: Forense, 2016; PEIXOTO, Ravi. *Overcoming Precedent and Legal Certainty*. 3rd ed. Salvador: JusPodivm, 2018.

¹¹ CROSS, Rupert; HARRIS, J.W. *Precedent in English Law*. Madrid: Marcial Pons, 2012, p.23.

¹²Therefore, Dennis Lloyd's statement seems irrefutable: "The usefulness of rationalized systematization seems indisputable when it comes to law, since one of its vital purposes is to provide a tolerable measure of security and predictability to human social and economic life." (The *Idea of Law*. São Paulo: Martins Fontes, 1985, p. 258.)

¹³ GAIO JÚNIOR, Antônio Pereira. Incidents of resolution of repetitive demands in the draft of the new CPC – Brief notes. In: *Revista de Processo*, Vol. 199, September 2011, São Paulo: RT, pp. 247-256.

Notoriously, the judicial decision itself, which is stabilizing in nature in terms of its essence, should provide security and predictability in matters within its jurisdiction.

The CPC/2015, in order to properly record the complexity of the problem of jurisprudential divergences in our time,¹⁴ chose to state at the outset of Book III of the Special Part, entitled "Proceedings in the Courts and Means of Challenging Judicial Decisions," a provision capable of guiding the necessary stability of decisions.

Thus, the *heading* of Article 926 prescribes:

"The courts must standardize their jurisprudence and keep it stable, complete, and consistent."

The adjectives stability, integrity, and consistency are of paramount importance.

Stability is truly directly related to previous judgments, insofar as there should be "no surprises" at any cost and in times when the very unpredictability of judgments, even under the same legal matter, is very costly to us.

Unlike stability, however, Streck makes a very apt point:

"Consistency means that, in similar cases, the guarantee of equal application of principles must be provided. Consistency will exist if the same principles that were applied in decisions are applied to identical cases; but, more than that, the integrity of the law will be ensured based on the normative force of the Constitution. Consistency ensures equality, that is, that different cases will be given equal consideration by judges. This can only be achieved through interpretive holism, based on the hermeneutic circle. Integrity, on the other hand, is twofold, according to Dworkin: a legislative principle, which requires legislators to try to make

¹⁴ "There is no constitutional state and there is no law when identical cases receive different decisions from the judiciary. It defies common sense that judicial decisions can treat people in the same situation unequally." MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *The CPC Project. Criticisms and proposals*. São Paulo: RT, 2010, pp. 17-18.

a morally coherent set of laws, and a jurisdictional principle, which demands that the law, as far as possible, be seen as coherent in this sense.”⁽¹⁵⁾

With regard to integrity, this "requires judges to construct their arguments in a manner that is consistent with the body of law. It is a guarantee against arbitrary interpretations. Integrity limits the actions of judges; more than that, it places effective restraints, through these communities of principles, on solipsistic-voluntarist attitudes. Integrity is a form of political virtue. Integrity means rejecting the temptation of arbitrariness.”⁽¹⁶⁾

It should also be noted that precedent, in the Anglo-Saxon tradition, is based on the rejection of casuistry, having the power to preserve the integrity of the law, as Dworkin illustrates well, according to the image of a chain novel, where each judge is the writer of a portion or chapter under construction.¹⁷ In these terms, every writer is bound to create a text that is consistent with what their predecessors have already written, respecting the institutional history of the application of that precedent.

On the other hand, in a pragmatic sense, it is well known that such a guideline will not be sufficient to achieve what is intended, namely, the virtue of respect for the verticality of decisions.

To this end, the legislator may then direct responsibility for respecting the decisions of higher bodies in the following terms:

“Art. 927. Judges and courts shall observe:

I – the decisions of the Federal Supreme Court in concentrated constitutionality control;

II – binding summary statements;

III – judgments in incidents of assumption of jurisdiction or resolution of repetitive claims and in the judgment of repetitive extraordinary and special appeals;

IV – the statements of the summaries of the Federal Supreme Court on constitutional matters and of the Superior Court of Justice on infra-constitutional matters;

¹⁵ STRECK, Lênio Luiz. *Why now is the time to bet on the new CPC bill!* Available at: <<http://www.conjur.com.br/2013-out-21/lenio-streck-agora-apostar-projeto-cpc>>. Accessed on 03.21.2023.

¹⁶ Ibid.

¹⁷ DWORKIN, Ronald. *A Matter of Principle*. Cambridge: Harvard University Press, 1985, p. 159.

V – the guidance of the plenary or special body to which they are linked.”

Two observations are necessary.

The first, of an objective nature, refers to the command “duty” which, of course, can be inferred from the understanding of the provision in question, which states that judges and courts shall observe said decisions, statements, judgments, summaries, and guidelines to which the items of Article 927 themselves refer.

Logically, this respect is not blind! As stated in paragraph 1 of Article 927 itself, when deciding under the mantle of the provisions of the aforementioned items, the adjudicating body must comply with the requirements of Articles 10 and 489, paragraph 1, which are responsible for setting the guidelines for the correct validity of the grounds for decisions, providing for respect for the opportunity for the parties to express their views on what will form the basis of the reasoning during the course of the proceedings (Article 10), as well as preventing the judge from merely invoking precedent or summary statements without identifying their determining grounds or demonstrating that the case under judgment conforms to those grounds, and also failing to follow summary statements, case law, or precedents invoked by the party, without demonstrating the existence of a distinction in the case under judgment or the overcoming of the understanding, *pursuant* to art. 489, §1, V and VI).

In this complex control and application of precedents—here normative—it is important to highlight the importance of some elements that make up the centuries-old theory of judicial precedents.

In this regard, we have the concept of *Ratio Decidendi* or *Holding*, which, according to Tucci ¹⁸and in our view, correctly, "is the legal thesis sufficient to decide the specific case (rule of law), and not the operative part of the decision, which produces binding effect and should guide judicial interpretation at a later date."

¹⁸TUCCI, José Rogério Cruz e. Parameters of effectiveness and criteria for interpreting Judicial Precedent. In: WAMBIER, Teresa Arruda Alvim et. al (Coord.). *Jurisprudential Law*. São Paulo: RT, 2012, p.100-101.

It is, therefore, what should be considered as the driving force behind the effective decision, the reasons for deciding, that is, the legal reasons that can be considered for the purposes of substantiating the *decision*.¹⁹

With regard to *Obiter Dictum*, its indication is not entirely easy to understand, given its link to the *ratio decidendi*. However, the prevailing understanding is that it relates to secondary issues discussed in order to form the *ratio*. It can take various forms, e.g., those not necessary to the outcome of the decision or those that address a point that none of the parties sought to achieve, hence they are issues that, in fact, are not being decided or on which the Court was not called upon to decide, but which must be addressed in order to arrive at *the ratio*.⁽²⁰⁾

As for the distinction or overcoming of precedents, the central figures are *distinguishing* and *overruling*.²¹

Distinguishing seeks, by identifying the *ratio decidendi* of the precedent, to verify whether the previous decision would be applicable to the case under review. If not, it is incumbent upon the judge to specify the reasons why they are dealing with different cases, under penalty of not adequately substantiating the decision. Thus, the precedent continues to exist, but its non-application to the specific case is clarified.

Overruling, on the other hand, refers to the overturning (revocation) of a precedent, which is carried out through an appropriate comparison of basic requirements, i.e., the loss of social congruence and the emergence of systemic inconsistency, in addition to the criteria

¹⁹ In the same vein, see LIMA, Tiago Asfor Rocha. *Civil judicial precedents in Brazil*. São Paulo: Saraiva, 2013, pp. 171-172.

On the same issue, it is worth emphasizing that, except for a few points where there is some agreement, "the doctrine diverges—and greatly—in the definition of what *ratio decidendi* is and in the choice of the most effective method to identify it in the body of a judicial precedent." (SOUZA, Marcelo Alves Dias de. *From Judicial Precedent to Binding Precedent*. Curitiba: Juruá, 2006, p.125).

²⁰ For Marinoni, pronouncements that concern an unformulated request and an uninvoked cause of action are undeniably *obtaining dicta*. Cf. MARINONI, Luiz Guilherme. *Precedentes Obrigatórios*. São Paulo: RT, 2010, p.279.

²¹ On other forms derived from the distinction and/or overcoming of Precedents, such as *signaling*, *overriding*, and even *transformation*, see, among many others, SESMA, Victoria Iturralde. *El precedente en el common law*. Madrid: Civitas, 1995; MELLO, Patrícia Perrone Campos. *Precedentes. O desenvolvimento Judicial do Direito no Constitucionalismo Contemporâneo*. Rio de Janeiro: Renovar, 2008; GAIO JÚNIOR, Antônio Pereira. *Institutions of Civil Procedural Law*. 5th ed. Londrina: Thoth, 2023, pp. 595-618; CROSS, Rupert; HARRIS, J.W. *Precedent in English Law*. Madrid: Marcial Pons, 2012; MARINONI, Luiz Guilherme. *Mandatory Precedents*. São Paulo: RT, 2010.

which dictate the reasons for stability or for the preservation of precedent – basically, justified trust and prevention against unfair surprise.

It is necessary to understand that the adjudicating body, as a matter of course, has determining guidelines to adequately and specifically justify whether or not to respect the binding effects of existing normative precedents.

The second observation concerns the substantive nature, that is, the content that both judges and courts must observe when handing down their judgments, as represented by the aforementioned items of Article 927.

All in all, it is not a mere option, but a duty of judges and courts to follow *the decisions of the Federal Supreme Court in concentrated constitutionality control, binding summary statements, judgments in incidents of assumption of jurisdiction or resolution of repetitive claims and in the judgment of repetitive extraordinary and special appeals, the statements of the summaries of the Federal Supreme Court in constitutional matters, of the Superior Court of Justice in infra-constitutional matters, and the guidance of the plenary or special body to which they are bound.*

It should be noted that the link to the precedents listed in Article 927, therefore, of an unquestionably normative nature, truly joins the list of procedural appeal filters, so that the force of the command "must" translates into the vertical establishment of rational uniformity that realizes *the decision*, which without empirical exercise for certainty in the functioning of the system, despite the virtues of stabilizing judgments and the predictability of reasons and decisions, which are catalysts in this area for the principles of legal certainty, trust, and equality, in addition to the principle of reasonable duration of proceedings, a series of pragmatic improvements must still be envisaged within the courts in order to favor the exact and repeated compliance of the judicial bodies involved, from those responsible for setting the precedent, through the hierarchically inferior courts, to the single judges of the first instance. This is arduous work and, if not carried out intermittently, will often encounter obstacles to its fulfillment, given the very culture of the Brazilian judiciary, where it is well known that judges know little and/or are not interested in

positions judicial of courts which, hierarchically, above
established.

3. ARBITRATION

3.1 Brief necessary notes

Conflict politics is an undeniable reality in Brazilian society, which ultimately leads to millions of lawsuits being filed with the Judiciary each year.²² Nevertheless, there is a growing awareness, albeit at a slower pace than desired, that it is essential to bring about peace, even if this does not result from eminently state-led efforts, provided that it is achieved through efficient methods that protect the fundamental freedoms of citizens.

Arbitration is a technique for resolving disputes through the intervention of one or more persons who derive their powers from a private agreement, deciding on the basis of this agreement and without state intervention, with the solution intended to have the effect of a court judgment.

It is important to note that there are optional or mandatory arbitrations, depending on whether the legal system determines their indispensability for certain conflicts; however, in both cases, the arbitrator will be freely elected by the parties.

Currently in Brazil, arbitration is governed by specific legislation – Law No. 9,307/96, dated September 23, 1996 – drafted in accordance with and adherence to important international regulations, such as the UNCITRAL Model Law (United Nations Commission on International Trade Law).

²² For an approximate idea of the litigation rate that plagues the Public Justice System, see the report “Justice in Numbers 2022” available at: <https://www.cnj.jus.br/wp-content/uploads/2022/11/justica-em-numeros-2022.pdf>.

²³ For a more in-depth look at the conceptual extensions of the term “Arbitration,” see GAIO JÚNIOR, Antônio Pereira. *General Theory of Arbitration*. 3rd ed. Londrina: Thoth, 2022.

²⁴ It should be noted that, at the constitutional level, the 1988 Constitution took a significant step toward reintroducing mandatory arbitration in Brazil as an authentic procedural requirement by establishing in Article 217: “§ 1 The Judiciary shall only admit actions relating to sports discipline and competitions after the sports justice instances, regulated by law, have been exhausted. § 2 Sports justice shall have a maximum period of sixty days, counted from the initiation of the proceedings, to render a final decision.”

On this subject, see GAIO JÚNIOR, Antônio Pereira; MAGALHÃES, Rodrigo Almeida (Coords.) *Arbitration. 15 Years of Law No. 9,307/96*. Belo Horizonte: Del Rey, 2012.

²⁵ On the Arbitration Law in Brazil and, more specifically, the Arbitral Award as a judicial enforcement order, see Chapter 17, item 6.2.

Regarding the applicability of Arbitration in specific contexts, more precisely in consumer relations and in the arid field of labor rights, see the important work by SANTANA, Maria Aparecida. *Democratization of Justice and Arbitration in kind*. Belo Horizonte: Líder, 2009.

United Nations Commission on International Trade Law)²⁶ and the New York Convention.²⁷

Although, in summary, it should also be emphasized that this law not only sought to replace the inefficient model of "arbitral judgment" previously provided for in our legislation (Articles 1,072 to 1,102 of the Code of Civil Procedure/1973), but also to grant qualitative treatment within current standards to issues such as, for example, arbitration agreements and the prestige of the expression of will, logically respecting good customs and public order (Article 2, Paragraph 1 of the LA), adaptation to related legal texts (Articles 41 and 42 of the LA), publicity of access to the Judiciary for those who may be harmed by defects arising from the arbitral award (Article 33 of the LA), effectiveness of international treaties on the matter in question (Article 34 of the LA), advancing, including on the subject of the ethical stance of arbitrators, equating them in the exercise of their judicial functions and, even because of them, to a public servant, for the purposes of criminal law, *ex vi* Article 17 of the LA.

It is worth noting, therefore, that Arbitration, in view of the provisions of Article 1 of the aforementioned Arbitration Law, acts in the context of available, tradable property rights, including the option of two or more expressions of will, with the objective of resolving conflicts of interest based on greater speed and expertise on the part of the judge – the arbitrator with regard to adherence to the matter under discussion, the possibility of reducing costs, and the option of absolute confidentiality, which may even be established during or outside the proceedings, both of which are governed in Brazil by the same legal system, all based on Law No. 9,307/96.

On the other hand, it is worth noting that the institution of Arbitration received attention from CPC/2015 with provisions regulating its practice, especially in view of the possible need for participation by the state judiciary.

Among these provisions, the following stand out:

²⁶ The United Nations Commission on International Trade Law (UNCITRAL) developed a Model Arbitration Law, aiming to harmonize the laws of various countries around the world, which was effectively accepted. It is important to note that this is not an international convention, but a model law to be adopted voluntarily by states that are in agreement with its provisions. See, among many others, LEMES, Selma M. Ferreira *et al.* *Aspectos Fundamentais da Lei de Arbitragem [Fundamental Aspects of Arbitration Law]*. Rio de Janeiro: Forense, 1999, p. 103.

²⁷Regarding the aforementioned arbitration models and their respective legislation, as well as important legal texts relating to arbitration around the world, see GAIO JÚNIOR, Antônio Pereira; GOMES, José Maria Machado. *Compêndio de Direito Econômico (Compendium of Economic Law)*. Rio de Janeiro: América Jurídica, 2005.

a) The extension known as "Itinerant Enforcement" to the practice in the "Arbitral Award," as dictated by art. 516, sole paragraph of CPC/2015.

b) The regulation of the so-called Arbitration Letter.

Item IV of Article 237 of CPC/2015 states that the letter shall be issued:

IV – arbitral, so that the Judiciary may practice or determine compliance, within its territorial jurisdiction, with an act that is the subject of a request for judicial cooperation formulated by an arbitral tribunal, including those that involve the implementation of provisional relief.

With regard to its formalities, CPC/2015 states in Article 69, §1 that letters of order, letters rogatory, and arbitration letters shall follow the rules set forth in the Code itself, notably with specific issues relating to the scope of their objectives, without contradicting content relating to their particular qualities and competences.

c) Preservation of the "confidentiality" of Arbitration when necessary support for the exercise of acts by the Judiciary (Cooperation between arbitrators and judges) is required, pursuant to Article 189, IV of CPC/2015, which reads as follows:

Article 189. Procedural acts are public. However, the following proceedings are conducted in secret:

(...)

V – that deal with arbitration, including compliance with arbitration awards, provided that the confidentiality stipulated in the arbitration is proven before the court.

As a final note, it should be emphasized that the institution of arbitration has also been the subject of legislative change. This is Law No. 13,129, of May 26, 2015, whose original draft was prepared by a commission of jurists, chaired by the Minister of the Superior Court of Justice (STJ), Luis Felipe Salomão, and which seeks to consolidate some of the practices already recognized by Brazilian courts as well as other controversial issues, such as, *for example*, the rules for the applicability of arbitration in public administration contracts.

In short, the text of the above bill includes in the Arbitration Law, among other topics, public administration contracts and corporate ownership disputes, while provisions relating to consumer relations and labor relations of executives and company directors were vetoed.

Still on the subject of arbitration, it is worth highlighting the enactment of Law No. 13,467, of July 13, 2017, which came into force 120 days after its official publication, amending a hundred articles of the Consolidated Labor Laws (CLT) and explicitly recognizing the applicability of arbitration in individual employment contracts.

3.2 Respect for the application of precedents in arbitration

As briefly outlined in previous items, the principles of legal certainty, predictability, equality, and trust are certainly dear to all who wish to live in a constitutional state governed by the rule of law.

The so-called "binding normative precedents" or even the "binding effects of judicial decisions," as seen elsewhere, are based on the importance of ensuring equal treatment in the face of judicial decisions within a constitutional state.

In fact, the unity of the legal system is an essential factor, both in its interpretation and application at a given time and place, so that conflicts whose nature and identity are identical, i.e., based on the same legal grounds, are not treated differently.

In this regard, in the case of arbitration, except for cases where the agreement is established by the applicability of equity, it would not be credible for the parties, freely choosing the rules of law to be observed in the resolution of the dispute, to opt for the domestic legal system and for the arbitrator to be able to limit it by not applying existing binding precedents.

Bringing up the idea of sources, Bobbio²⁸ clearly states that the sources of law "are those facts and acts on which the legal system depends for the production of legal norms," so that knowledge of any legal system necessarily involves listing its sources of law. From this, the role played by judicial precedents as binding is evident – because it is desired by the primary source par excellence in the *civil law* system: the Law (*ex vi* of art. 927 and even art. 332, IV).

²⁸ BOBBIO, Norberto. *Theory of the Legal System*. Trans. Ari Marcelo Salon. 2nd ed. São Paulo: Edipro, 2017. p. 55.

Once the application of Brazilian law in arbitration has been understood, it is necessary to take into account the legal framework set forth therein, avoiding, at all costs, any possibility of creating extra-legal jurisdictional environments, given the very nature of arbitration as a form of jurisdiction and even the discrepancy in the applicability of different rules for identical cases, where binding precedent serves as a guiding compass for *the ratio* to be observed.

It is a fact that the autonomy of arbitration in relation to the state judiciary must be preserved, but this does not mean that it will have a "letter of manumission" to disassociate itself from constitutional mandates.

Preserving public order is an inexorable factor in choosing the rules to be applied to the arbitration procedure (Article 2, §1 of Law 9307/96), and this same public order, although abstract and dynamic in nature,²⁹ can be understood as the preservation of essential values of a democratic state, such as legal certainty and equality, in order to demand respect for the circumstances that give rise to them.

Ruy Rosado de Aguiar clearly states that it is not possible for the arbitrator to ignore, for example, a binding statement by the Federal Supreme Court in concentrated constitutionality control, without offending public policy, since it is not reasonable for there to be two legal orders or extra-legal jurisdictional spaces.³⁰

Once the arbitrator fails to take into account, when applicable, a binding precedent, we believe that it would be entirely possible to file an action for annulment, not based on the provisions of Article 32 of the LA, but on

²⁹ As Ruy Rosado de Aguiar attests, public order "is not a static concept, but a dynamic and external one, which varies according to the circumstances of time and place. It is a conjunctural concept. Thus, currently, the protection of human dignity is a matter of public order, as is respect for the environment, new issues that can now be considered determinants of public order. What is not today may be tomorrow, such as the number of children, transgenics, the use of the internet, among others." AGUIAR, Ruy Rosado de. Arbitration, precedents, and public order. In: BRAZIL. Superior Court of Justice. *Doctrine: commemorative edition 30 years of the STJ*. Brasília: STJ, 2019, p.202. (³⁰) "The arbitrator is subject to the system of binding precedents originating from the Federal Supreme Court, based on the Constitution of the Republic. Thus, with regard to these statements, which exist to apply and respect the Constitution, which always have general repercussions (a prerequisite for hearing the appeal), I believe that arbitrators must respect them, under penalty of annulment. It does not seem reasonable to me that there are two legal systems in the country, one that stems from the decision of the STF, which is binding on everyone, judges and the Public Administration, and another that is freely established by the arbitrator, who resolves the case without examining the binding statement. A law declared unconstitutional in a concentrated review of unconstitutionality by the STF cannot be applied by the arbitrator without violating constitutional public policy. On the other hand, he cannot fail to do so" (AGUIAR, Ruy Rosado de. *Idem.*, p. 199).

based on Article 2, § 1, of the aforementioned Law, a regulatory provision stating that the rules chosen by the parties may not violate public order.

In the same vein, and quite rightly, Salomão and Fux settle the issue as follows:

The Arbitration Law, including in a teleological interpretation of Article 32, must be read with an eye to the mens legis, which resides precisely in Chapter I of the general provisions of this important regulation. It is worth remembering that the Superior Court of Justice does not grant exequatur to foreign arbitral awards that violate public policy and national sovereignty.⁽³¹⁾ Thus, there seems to be an omission in the system in recognizing the violation of public policy when it arises from a foreign award, but ignoring it when it occurs in national territory.⁽³²⁾

On the other hand, Article 32 of the LA deals with situations that authorize the annulment of the arbitral award. Among them, item IV stands out, where annulment is authorized when "*it is rendered outside the limits of the arbitration agreement.*"

Once the parties have freely chosen the rules of Brazilian law to be applied in the resolution of the dispute in arbitration and this is not observed by the respective arbitrator, there is no doubt that we are faced with a violation of the arbitration agreement, given the very nature of binding precedent, which is part of the regulatory framework of the Brazilian legal system.

Although the arbitrator's independence from the Code of Civil Procedure is valued, we are dealing here with a regulatory environment that goes beyond ordinary law, insofar as binding judicial precedents, in the model adopted by the Brazilian system, in accordance with the Constitution, allow for the promotion of precepts that are inseparable from a democratic state governed by the rule of law, above all legal certainty and equality, and their disregard cannot be justified by any possible desired autonomy.

Rizzo Amaral confirms the above idea when he states that

the arbitrator is bound by judicial precedents to the extent that the parties choose arbitration under the law and that judicial precedents

³¹ Cf., for example, STJ, SEC 9.412/EX, rel. p/ judgment Min. João Otávio de Noronha, Special Court, j. 19.04.017; STJ, SEC 978/GB, rel. Min. Hamilton Carvalhido, Special Court, j. 17.12.2008.

³² SALOMÃO, Luis Felipe; FUX, Rodrigo. Arbitration and precedents: possible binding of the arbitrator and control mechanisms. Available at: <https://www.migalhas.com.br/depeso/335736/arbitragem-e-precedentes--possivel-vinculacao-do-arbitro-e-mecanismos-de-controle>. Accessed on 02.02.2023.

binding precedents are part of Brazilian law. In other words, the arbitrator is not bound by precedents due to the (non-existent) direct application of provisions of the CPC to arbitration, but by the will of the parties who gave the arbitrator the task of judging in accordance with the law.³³

Therefore, if the arbitral tribunal understands that the respective binding precedent does not apply, it must provide reasons and grounds for the arbitral award, including applying the distinctions and/or overrides that affect *the ratio decidendi* in question, as already discussed in item "a" above.

FINAL CONSIDERATIONS

The unity of law and predictability of decisions in any and all legal systems, whether arising from the exercise of state jurisdiction or other means conducive to conflict resolution, is vital to the prestige and accuracy of the principles of legal certainty, equality, and trust in institutions, which are inherent to a stable daily life and inseparable factors contributing to development as quality of life.

In this context, arbitration, like any other means of dispute resolution, must lend itself to the prestige of the chosen legal system and through which the normative incidences aimed at resolving the substantive law in dispute will be made.

There is no doubt that, under Brazilian law, the ascendancy and respect for the legal provisions contained therein will be undeniable for the validity of the decisions made there, including judicial precedents considered binding, which are part of the validity and effectiveness of the normative framework of the Brazilian legal system.

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³³ AMARAL, Guilherme Rizzo. Binding of arbitrators to judicial precedents. ConJur, 2017. Available at: [\[www.conjur.com.br/2017-out-03/guilherme-amaral-vinculacao-arbitros-aosprecedentesjudiciais\]](http://www.conjur.com.br/2017-out-03/guilherme-amaral-vinculacao-arbitros-aosprecedentesjudiciais). Accessed on: 03.28.2023.

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