10th
Anniversary
Edition

2016-2017

The Baker McKenzie **International Arbitration Yearbook**

Brazil

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A. Legislation and rules

A.1 Legislation

In the last 10 years, the main legislative changes relating to arbitration were the reforms to the Brazilian Arbitration Act, the New Civil Procedure Code, the new Mediation Law and the execution of new Bilateral Investment Treaties.

A.1.1 Reform of the Brazilian Arbitration Act

A bill reforming the Brazilian Arbitration Act was approved on 26 May 2015 (Law 13.129/2015), entering into force on 26 July 2015. The amendments were very limited, seeking only to clarify controversial issues and to deal with matters not previously regulated.

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The main provision confirmed that governmental entities can submit disputes to arbitration. Although there were many specific laws with similar authorizations on specific economic areas, such as the Petroleum Law, the Telecommunications Law, the Concessions Law and the Electric Power Law, which was the first broad legal permission for the state to arbitrate, another provision was inserted, clarifying that an arbitration clause included in the bylaws of a corporation is binding upon all shareholders, including the ones that did not expressly approve such clause. The main change in this regard is that the shareholders that vote against the arbitration clause may withdraw from the corporation, unless the shares are liquid and dispersed in the stock market, or if the inclusion of the arbitration clause was required for listing in a stock exchange or OTC market with a minimum 25% free float (eg, the "New Market" from the São Paulo Stock Exchange - BOVESPA).

The reform also ratified that the limitation period of a claim will be interrupted by the filing of the request for arbitration, as it is the case for judicial lawsuits. Provisions regulating interim and urgent measures in arbitration were inserted. Last but not least, the reform provides for the "arbitration letter," whereby an arbitral tribunal can request and obtain court support in favor of arbitration, as it will be further explained in A.2.

Three provisions were vetoed, two of which would have allowed arbitration in disputes involving consumer-related issues, provided that the consumer brought the arbitration or otherwise agreed with it. The third one would have authorized arbitration in employment-related issues, provided that the employee was an administrator of the company and they brought the arbitration or consented to it.

A.1.2 New Civil Procedure Code

A new Code of Civil Procedure (Law 13.105/2015) entered into force on 16 March 2016. It does not regulate arbitral proceedings, which continue to be subject to the Brazilian Arbitration Act. Nonetheless, it

has some provisions regarding cooperation between the arbitration and judicial processes.

The most important change was the arbitral letter. The new Code of Civil Procedure adopted the suggestions of a working group, convened by the Rio de Janeiro Section of the Brazilian Bar, chaired by Joaquim de Paiva Muniz, and by the Pontifical University of São Paulo, chaired by Professor Francisco Cahali, regulating cooperation between arbitration panels and state courts, through the "arbitral letter" (*carta arbitral*). This instrument is analogous to rogatory letters exchanged between judges from different jurisdictions. Similar letters to be issued by arbitrators will enable them to request and obtain court support in favor of arbitration.

Another relevant provision concerns confidentiality. The former Brazilian Code of Civil Procedure did not specifically require that court proceedings deriving from confidential arbitrations must remain confidential. The new Code provides that lawsuits ancillary to confidential arbitrations should also remain confidential, respecting the private character of the arbitral proceedings.

Treaties such as the New York Convention will prevail over local procedural law. Some favorable provisions were inserted, such as that allowing the Superior Court of Justice (STJ) to grant injunctions in procedures for recognition of foreign awards.

A.1.3 The Mediation Act

The "Mediation Act" (Law No 13.140/2015), which entered in force on 26 December 2015, aims to regulate and foster ADR in Brazil. Its main chapters deal with procedural aspects of mediation as well as mediation involving state entities.

On arbitration, the most relevant point of the Mediation Act is Article 23, which prevents the claimant from bringing an arbitration or a judicial proceeding in cases where the parties undertook to perform mediation prior to the commencement of any action.

A.1.4 New bilateral investment treaties

During the 1990s, Brazil signed 14 bilateral investment protection treaties, but never ratified them. Yet, as from 2015, Brazil signed new BITs with Angola, Chile, Colombia, Malawi, Mexico and Mozambique, and five of these have already been submitted to the Brazilian House of Representatives for ratification. Such treaties include relevant investment protections (albeit they do not provide for investor-state arbitration), requiring investors to negotiate potential disputes with local authorities with the help of an ombudsman or of a joint committee composed of representatives of the contracting states. These new Brazilian BITs provide for substantial protections such as "most favored nation treatment" and protection against expropriation.

A.2 Institutions, rules and infrastructure

Several institutions revamped their arbitration rules in the last 10 years, such as the Market Arbitration Center of the São Paulo Stock Exchange (2010), the Brazil-Canada Chamber of Commerce (2012), the Arbitration and Mediation Center of the Federation of the Industries of São Paulo and the Brazilian Center of Mediation and Arbitration (2013).

B. Cases

B.1 Requirement of written form

Pursuant to Article 2 (1) and (2) of the New York Convention,[5] the treaty applies to cases in which there is a "written agreement" between the parties. This creates the issue of the validity of the choice of the arbitration forum in oral deals supported by standard agreements with

[5] Article II 1 – Each signatory State shall recognize a written agreement through which the parties undertake to submit to arbitration any disputes that have arisen or that may arise between them with regard to a defined legal relationship, whether contractual or not, related to a subject matter capable of settlement by arbitration. 2- "written agreement" shall be understood as an arbitral clause inserted in the agreement, or an arbitral agreement, signed by the parties or contained in an exchange of letters or telegrams.

an arbitration clause that have not been formally signed by the parties. An example of this is a sale of commodities in certain commodities exchanges. The deal is verbal, but usually a standard agreement applies, with an arbitration clause. The question is whether, in those cases, there is a "written agreement" to arbitrate.

This issue is controversial in Brazilian jurisprudence. On one hand, in the case of *L'Aiglon,*[6] the Brazilian STJ recognized an arbitral award from the London Cotton Association that had not been executed by the party that objected to the recognition. The rationale was that the objecting party had participated in the arbitration. On the other hand, at the time the Brazilian Supreme Court had the competence to recognize foreign awards, in *Plexus Cotton Limited*[7] it refused *exequatur* of an arbitral award from the Liverpool Cotton Association, based on the absence of the respondent's signature in the agreement. Later, in *Oleoginosa Moreno Hermanos,*[8] the Brazilian STJ refused recognition of an arbitral award from the Grain and Feed Trade Association, based on a telephone transaction ratified by the seller through telex with an arbitration clause. The ground for such refusal was the absence of execution of the arbitration agreement. The tendency of Brazilian law is to require the signature in a written agreement, though this has not yet been fully settled.

B.2 Arbitrability of labor disputes

Article 114, paragraphs 1 and 2 of the Brazilian Constitution expressively allow the referral of collective labor disputes to arbitration.[9] The main controversy lies in individual labor rights, where court jurisdiction cannot be waived. This triggers the issue of whether individual labor rights could be subject to arbitration or if the

[6] STJ, Special Court, SEC 856/EX, Reporting Justice Carlos Alberto Direito, j. on 18 May 2005.
[7] STF, Full Session, SEC 6753-7, Reporting Justice Maurício Corrêa, j. on 13 June 2002.
[8] STJ, Special Court, SEC 866/EX, Reporting Justice Félix Fischer, j. on 17 May 2006.
[9] Article 114, paragraph 1 of the Constitution.

submission to arbitration would be tantamount to an out-of-court settlement.

The prevailing case law of the Brazilian Superior Labor Tribunal ("TST") holds that individual labor rights cannot be resolved through arbitration, because such rights cannot be waived except in front of a labor judge. However, there is an isolated decision[10] allowing arbitration of individual labor rights. We believe that in the short and medium terms, case law will probably be against the arbitrability of labor disputes.

B.3 Arbitrability of disputes involving state-owned companies

The Brazilian STJ has so far issued three precedents recognizing the arbitrability of contracts entered into by and between state-controlled corporations and private entities. The first[11] concerns a contract for the sale of electricity entered into between a state-controlled electric power distributor, CEEE, and an independent producer, AES Uruguaiana. The second[12] refers to the leasing of a port area entered into between TMC Terminal Multimodal de Coroa Grande and the state-controlled company, Nucleobrás Equipamentos Pesados – NUCLEP. The third[13] precedent refers to the case *Compagás v. Consórcio Carioca Passarelli*, which involved a construction agreement. It is worth emphasizing that in the third case, the STJ recognized the effectiveness of an arbitral clause that was inserted in a contract, but which was not in the draft agreement sent to the parties in the invitation to bid.

After these precedents, Brazilian law was reformed to expressly allow arbitration with public entities, comprising not only stated-controlled

[10] TST-RR-144300-80.2005.5.02.0040, Reporting Justice Barros Levanhagen, j. on 15 December 2010.
[11] STJ, REsp. 612.439-RS, 2nd Chamber, Reporting Justice João Otavio de Noronha, j. on 25 October 2005.
[12] STJ, MS 11.308-DF, Reporting Justice Luiz Fux, j. on 9 April 2008.
[13] *Compagás v. Consórcio Carioca-Passarelli.* The other precedent in this sense is *Copel v. Energia Rio Pedrinho*.

corporations, but also state entities such as the Federal Union, member states and municipalities. This resolved the controversy on subjective arbitrability (ie, whether the state has standing to participate in arbitrations). Note however that there are still issues on objective arbitrability; that is to say, which matters may be resolved through arbitration has not yet been settled by case law.

B.4 Pathological arbitration agreements

Brazilian courts have also dealt with pathological arbitration agreements, in which the reference to arbitration lacks some of the requirements for the commencement or development of the arbitral proceeding. The trend of the STJ (the highest court for non-constitutional matters) was in favor of the validity of arbitration agreements, trying to make them work even in cases of contradictory provisions. For instance, in a case where it was not possible to interpret with certainty which arbitral court the parties selected due to similar names and two arbitration centers deemed themselves to be competent, the STJ nonetheless considered that the arbitration agreement remained effective.[14] The STJ has also ruled that a contractual provision contemplating both a judicial venue and arbitration was valid and the choice of arbitration should prevail, being the choice of judicial venue applicable only to non-arbitrable matters.[15] In the famous *Gradin* case, where the dispute resolution provision envisaged alternatively "mediation or arbitration," the STJ ruled that the agreement to arbitrate remained binding.[16]

[14] STJ, Conflict of Jurisdiction No. 113.260-SP. Reporting Justice Nancy Andrighi, j. on 8 September 2010.
[15] STJ, 3rd Section, Especial Appeal No. 904813, Reporting Justice Nancy Andrighi, j. on 20 October 2011.
[16] STJ, 4th Section, Especial Appeal No. 1.331.100, Reporting Justice Maria Isabel Galotti, j. on 17 December 2015.

B.5 Effects of an arbitration agreement *vis-à-vis* third parties

Brazilian courts have also dealt with the subjective reach of arbitration agreements, paying heed to a non-signatory party's involvement in the performance of the arbitration agreement.

In *Anel – Empreendimentos, Participações e Agropecuária Ltda. v. Trelleborg Industri AB and Trelleborg do Brasil Ltda.*, the Court of Appeals of the State of São Paulo ("TJSP") allowed the extension of the arbitral agreement to another company that belonged to the same corporate group as one of the parties, and which was not an original signatory thereof, because it was clear from the third party's conduct that its true intent was to be bound by the undertaking to arbitrate.[17] Although the TJSP's decision does not make express reference to the group of companies doctrine, as developed in the seminal *Dow Chemical v. Isover Saint-Gobain* case,[18] it dwelled on the same grounds according to which a non-signatory party must actively participate in the contract's execution, performance and termination for the arbitration provision to apply.

B.6 Arbitration in judicial reorganization and bankruptcy proceedings

Given the Brazilian economic crisis of 2015, many companies filed for bankruptcy or judicial reorganization (analogous to the US concept of Chapter 11), thereby triggering discussions on the enforceability of arbitration clauses to insolvent parties.

Case law in Brazil tends to show that the judicial reorganization or even the bankruptcy of a party will not hamper the validity of the arbitration agreement.[19] Note however that, in case of judicial reorganization, all proceedings, including arbitrations, in course

[17] TJSP, 7th Private Law Chamber, Appeal No. 267.450.4/6-00, Reporting Justice Constança Gonzaga, j. on 24 May 2006.
[18] ICC Award 5721/1982. *Dow Chemical v. Isover Saint-Gobain* (extratos) in http://translex.uni-koeln.de/touch/document.php?docid=204131.
[19] Please see, for instance, TJSP, interim appeal No 531.020-4/3-00, Reporting Justice Pereira Calças, j. on 25 June 2008.

against the debtor seeking the collection of a certain amount will be stayed for a period of at most 180 days, until the reorganization plan is approved.[20]

One of most recent cases on judicial reorganization deals with Oi, one of the largest Brazilian telecommunication companies, under judicial reorganization, and its shareholder Société Mondiale,[21] which filed a conflict of jurisdiction case before the STJ, with a request for a preliminary injunction, to decide whether the Business Court of the State of Rio de Janeiro (which processes the judicial reorganization) or the Business Arbitration Chamber (BM&F BOVESPA), was competent to decide on a request to call a shareholders' meeting that sought to change the members of the board of directors of Oi. The STJ ruled that, in this case, the Business Court should decide on the issue, because a change of this nature could result in the change of control of a corporation under judicial reorganization, thereby triggering collective rights issues.

B.7 Arbitration with consumers

It is quite controversial in Brazil whether it is possible to hold arbitrations between consumers and businesses, considering that Article 51, VII of the Code for the Protection of Consumers prohibits mandatory arbitration with consumers. The most recent precedent of the STJ shows that an arbitration clause inserted in an agreement with a consumer will only be enforceable if the consumer brings the claim or otherwise expressly agrees with the arbitral proceeding.[22]

C. Trends and observations

Arbitration in Brazil has significantly evolved in the last 10 years. In 2015, 96 Brazilian parties were involved in proceedings administered

[20] Article 6, *caput*, S.1 and S.4, of Law No 11.101/2005.
[21] STJ, 4th Section, Conflict of Jurisdiction No 148728, Reporting Justice Marco Buzzi, j. on 6 September 2016.
[22] STJ, 4th Section, Special Appeal REsp 1.189.050, Reporting Justice Luis Felipe Salomão, j. on 1 March 2016.

by the ICC, as Brazil is the sixth largest ICC client in terms of nationality.[23] That is a significant increase compared to 2005, when there were only 35 Brazilian parties involved in ICC arbitrations.[24] The increasing global significance of Brazil is shown by fact that the ICC will establish offices in São Paulo in 2017 to handle Brazilian-related arbitration.

We anticipate the following tendencies in the years to come. First, the Brazilian government will grow increasingly reliant on arbitration, since the revised Brazilian Arbitration Act states that state entities can resort to arbitration.[25] In 2015, the Brazilian president issued Decree No. 8,465 of 2015, laying down the procedure for arbitration in port-related disputes. Meanwhile, in 2016, a provisional measure was issued providing for arbitration to define certain terms and conditions for the renewal or termination of public concession agreements.[26]

Second, the Court of Arbitration for Sport (CAS) set up its *ad hoc* division in Rio de Janeiro to resolve sport disputes during the Rio 2016 Olympic Games. The Brazilian arbitration community played an important role in offering *pro bono* counselling to athletes in need. In March 2016, the Brazilian Football Confederation elected the Brazilian Center for Mediation and Arbitration, with headquarters in Rio de Janeiro, to judge any appeal from the decisions rendered by its internal dispute resolution board. The tendency therefore is to use more arbitration to resolve sport-related disputes.

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[23] International Chamber of Commerce. ICC Bulletin: 2015 ICC dispute resolution statistics. Paris: ICC, 2016, p. 4.
[24] CONEJERO ROOS, Cristian; GRION Renato Stephan. Arbitration in Brazil: the ICC experience. Revista de Arbitragem e Mediação, Vol. 10/2006, July - September 2006, p. 93.
[25] Law No. 13,129 of 26 May 2015 altered some of the provisions of the original Brazilian Arbitration Act, Law No. 9,307 of 23 September 1996.
[26] Provisional Measure 752/2016, commented on by Joaquim Muniz and Luis Peretti: *The new rule on the Brazilian privatization program provides for arbitration*, Global Arbitration News, available at: https://globalarbitrationnews.com/20161125-new-rule-brazilian-privatization-program-provides-arbitration/

Third, corporate disputes, especially in publicly traded corporations, are being increasingly referred to arbitration. This trend is also evident in the reform of the Brazilian Arbitration Act, which expressly provides that any shareholder is bound by the arbitration clause inserted in the bylaws, even if they voted against the insertion of such clause.

Last but not least, in view of the current economic downturn, the relationship between insolvency and arbitration is yet to be tested. The Center for Judiciary Studies of the Council of the Federal Court issued an interpretation — which bears only persuasive authority — stating that, "the commencement of reorganization or bankruptcy proceedings does not authorize the court administrator to deny the effect of the arbitration clause, nor prevents the commencement of arbitration proceedings nor suspends the proceedings in course."[27] Nonetheless, since the Brazilian constitution provides that any party will always be entitled to a court to resolve disputes, parties suffering from a lack of funds might attempt to avoid arbitration agreements that call for the payment of high fees, which they cannot afford. The enforceability of arbitration clauses in case of impecuniosity is an issue that will soon be addressed by Brazilian courts.

[27] Interpretation No. 6 approved by the Center for Judiciary Studies of the Council of the Federal Court during the First Journey for Prevention and Extrajudicial Solution of Lawsuits, held on 22 and 23 August 2016.