

# ARBITRATION IN BRAZIL

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## 1. Historical background and overview

- 1.1.1 Historically, Brazil was well known within the international community for its hostility towards the enforcement of foreign awards. However, over the last two decades, the legal framework of international commercial arbitration in Brazil has improved remarkably. The enactment of a modern arbitration law in 1996, the Federal Supreme Court's judgment confirming the constitutionality of that new arbitration law in 2001,<sup>1</sup> and the ratification of the New York Convention in 2002 were all key milestones in making Brazil a more arbitration-friendly jurisdiction.<sup>2</sup>
- 1.1.2 Brazil has experienced a very rapid expansion in the use of arbitration as a method of dispute resolution and has become one of the key centres for arbitration in Latin America. One of the main drivers behind this expansion has been the growth of the Brazilian economy over this period. With it, there has been an unprecedented surge in foreign investment and foreign acquisitions made by Brazilian multinational companies. These transactions almost invariably involve arbitration agreements.
- 1.1.3 Another important factor behind the growth in arbitration in Brazil is the crisis in the Brazilian judiciary. In 2010, some seventy million cases were pending before the Brazilian courts (one for every three people in Brazil). As a result of the backlog of pending cases, it currently takes, on average, ten years for a case to be finally decided by the Brazilian courts.<sup>3</sup> Faced with the prospect of such delays, it is unsurprising that commercial parties are increasingly opting to have their disputes resolved through arbitration.

## 2. Legislative framework

- 2.1.1 Arbitration in Brazil is governed by Law no. 9307 of 23 September 1996 (**Brazilian Arbitration Act**), which is based on the UNCITRAL Model Law (1985)<sup>4</sup> and various provisions of the Brazilian Code of Civil Procedure that relate to the enforceability and challenge of awards.

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<sup>1</sup> *MBV Commercial and Export Management Establishment v Resil Indústria e Comércio Ltda*, December 2001, Federal Supreme Court (full court), Procedure for the Recognition and Enforcement of Foreign Award no. 5206–712.

<sup>2</sup> Over this period, Brazil also approved and brought into force a number of other international treaties which enhanced its reputation as an arbitration-friendly jurisdiction, including the Panama Convention in 1996, the 1992 Protocol on Jurisdictional Assistance in Civil, Commercial, Labour and Administrative Matters (*Las Leñas Protocol*) in 1996 and the Mercosul Protocol on International Commercial Arbitration in 2003.

<sup>3</sup> Arnaldo Wald, "Brazil", *The Arbitration Review of the Americas 2011*, Global Arbitration Review.

<sup>4</sup> See CMS Guide to Arbitration, vol II, appendix 2.1.

- 2.1.2 Arbitration in Brazil may be conducted on an ad hoc basis or under the auspices of arbitral institutions. The main Brazilian arbitral institutions are the São Paulo Chamber of Mediation and Arbitration (**FIESP/CIESP**), the Getúlio Vargas Foundation Chamber of Conciliation and Arbitration (**FGV**), the Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce (**CCBC**), the Corporate Chamber of Commerce in Brazil (**CAMARD**) and the Arbitration and Mediation Centre of the American Chamber of Commerce in São Paulo (**AMCHAM**).
- 2.1.3 Since the enactment of Law No. 9307/96 (**Brazilian Arbitration Act**), the number of domestic and international arbitrations has increased significantly, with the full support of the Brazilian courts.

### 3. Scope of application and general provisions of the Brazilian Arbitration Act

#### 3.1 Subject matter

- 3.1.1 The provisions of the Brazilian Arbitration Act apply to all kinds of arbitration including institutional and ad hoc arbitration, arbitration at law and arbitration *ex aequo et bono*, provided that the seat of the arbitration is in Brazil.<sup>5</sup>
- 3.1.2 The provisions of the Brazilian Arbitration Act apply both to domestic and to international arbitration and include rules for the enforcement of foreign awards.<sup>6</sup>
- 3.1.3 Parties may choose arbitration as a dispute resolution mechanism for disputes relating to freely transferable rights.<sup>7</sup> Under Brazilian law, transferable or disposable rights are rights that the parties can freely negotiate, transfer, assign, waive or settle.
- 3.1.4 Disputes relating to family law issues, tax, criminal cases and testamentary matters, for example, do not arise out of freely transferable rights and may not be submitted to arbitration.<sup>8</sup>

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<sup>5</sup> Brazilian Arbitration Act, art 2.

<sup>6</sup> *Ibid*, art 34 to 40.

<sup>7</sup> *Ibid*, art 1.

<sup>8</sup> *Ibid*, art 1.

### 3.2 Structure of the law

- 3.2.1 The Brazilian Arbitration Act is divided into seven chapters:
- Chapter I – general provisions;
  - Chapter II – the arbitration agreement and its effects;
  - Chapter III – the arbitrators;
  - Chapter IV – the arbitral proceedings;
  - Chapter V – the award;
  - Chapter VI – recognition and enforcement of foreign awards; and
  - Chapter VII – final provisions.

## 4. The arbitration agreement

### 4.1 Formal requirements

- 4.1.1 In order to be valid, the arbitration agreement must be in writing.<sup>9</sup> The agreement must be contained in the contract itself or in a separate document.
- 4.1.2 The arbitration agreement may consist of a separate agreement or form part of a clause within the relevant contract. An arbitration agreement will be valid and binding, even where it is included in agreements that were executed prior to the enactment of the Brazilian Arbitration Act in 1996.<sup>10</sup>
- 4.1.3 In a *contrato de adesão* (an “adhesion” or standard form contract), the arbitration agreement will only be valid if:
- the weaker party initiates the arbitral proceedings or agrees expressly to the initiation of the proceedings;
  - the arbitration agreement is in a separate document or is marked in bold in the *contrato de adesão*; or
  - the arbitration agreement is specifically signed or endorsed by the weaker party.<sup>11</sup>
- 4.1.4 The Brazilian Code of Civil Procedure provides that a valid and enforceable arbitration agreement deprives the courts of any jurisdiction to determine the dispute.<sup>12</sup> In the event that a party to an arbitration agreement commences proceedings in the courts, the other party will be able to rely on the existence of

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<sup>9</sup> *Ibid*, art 4(1).

<sup>10</sup> Conflict of Jurisdiction (cc) no. III230/DF.

<sup>11</sup> Brazilian Arbitration Act, art 4 (2).

<sup>12</sup> Subject to the Brazilian Code of Civil Procedure, art 267 VII.

the arbitration agreement to persuade the court to dismiss those proceedings for lack of jurisdiction to hear the merits of the dispute.<sup>13</sup>

- 4.1.5 Even where there is an arbitration agreement, the parties are required to execute a submission to arbitration (**Compromisso Arbitral**) prior to the commencement of any arbitral proceedings. The *Compromisso Arbitral* is a commitment by the parties to grant effectiveness to the arbitration agreement.
- 4.1.6 The *Compromisso Arbitral* will contain all of the specific provisions necessary to give effect to the arbitral proceedings, including provisions dealing with the appointment of arbitrators, the selection of any institutional rules (if any) and a statement of the issues to be submitted to the arbitral tribunal.<sup>14</sup>
- 4.1.7 If a party refuses to execute the *Compromisso Arbitral*, the other party may apply to the relevant court for an order for specific performance to that effect.<sup>15</sup> At the hearing, the court will first attempt conciliation, failing which it will try to convince the respondent to sign the *Compromisso Arbitral*, ruling as to any issues on which parties may still disagree and appointing a sole arbitrator if the clause does not specify otherwise. The order made at this hearing will take effect as a valid and binding *Compromisso Arbitral*, even if not signed by the respondent. A judgment of this nature may be appealed, but the arbitration will proceed while the appeal is pending.<sup>16</sup>

## 4.2 Special tests and requirements of the jurisdiction

- 4.2.1 Only disputes relating to parties' freely transferable rights, that is "patrimonial rights" (i.e. pecuniary or economic rights) that are capable of being negotiated and agreed by parties, are capable of being determined by arbitration.<sup>17</sup> No guidance is given as to what exactly is meant by "patrimonial rights". In practice, most commercial disputes will be arbitrable, including most disputes relating to industrial property (patents, trademarks, etc).
- 4.2.2 It is well established that the state government and other public bodies may agree to resort to domestic or international arbitration, provided that the dispute relates

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<sup>13</sup> *Ibid*, art 301 IX.

<sup>14</sup> Brazilian Arbitration Act, art 10.

<sup>15</sup> *Ibid*, art 6 and 7. The relevant court is stated in the Brazilian Arbitration Act, art 6 as the State Court originally competent to decide the case.

<sup>16</sup> Subject to the Brazilian Code of Civil Procedure, art 513 and 520.

<sup>17</sup> Brazilian Arbitration Act, art 1.



to patrimonial rights of which they may dispose.<sup>18</sup> However, where the government or a government controlled entity enters into a contract representing the authority of the state, the arbitrability of the dispute may, under certain circumstances, be challenged or subject to additional formal requirements (such as local venue and language: see section 12.3 below).

- 4.2.3 Family matters, certain public law matters and possibly individual employment-related matters are not capable of being determined by arbitrations. Similarly, disputes involving issues of “massive public interest”, such as cases involving antitrust and unfair competition issues or those relating to environmental regulations, are not arbitrable.
- 4.2.4 The procedure of officially declaring a bankruptcy is a privilege reserved to the courts. In contrast, a bankrupt estate, acting through its legal representative or “administrator” (*Síndico*) may engage in arbitrations dealing with patrimonial rights over which the estate may dispose.

### **4.3 Separability**

- 4.3.1 The arbitration agreement is considered separate from the main contract. The validity and enforceability of the arbitration agreement will be assessed independently of the validity and enforceability of the main contract. The arbitral tribunal should decide on the existence and validity of the arbitration agreement and whether or not it is binding.<sup>19</sup>

### **4.4 Legal consequences of a binding arbitration agreement**

- 4.4.1 If the parties have concluded a valid and enforceable arbitration agreement, they are required to arbitrate all disputes that fall within the scope of that agreement and cannot submit such disputes to the Brazilian courts. If, notwithstanding the existence of a valid arbitration agreement, court proceedings are initiated, the Brazilian courts are required to refer the case to arbitration and dismiss the court proceedings without hearing the merits of the dispute.<sup>20</sup>

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<sup>18</sup> See, for example, *Agravo de Instrumento* no. 52.181 of 14 November 1973; Federal Supreme Court; and Statutory Instrument no. 1312 of 15 February 1974.

<sup>19</sup> Brazilian Arbitration Act, art 8.

<sup>20</sup> Brazilian Code of Civil Procedure, art 267 VII.

## 5. Composition of the arbitral tribunal

### 5.1 Constitution of the arbitral tribunal

- 5.1.1 The Brazilian Arbitration Act sets forth that parties are free to decide how many arbitrators will constitute the arbitral tribunal, provided that it is an odd number (usually three). Should the parties indicate an even number of members, the arbitrators are automatically authorised to nominate a further arbitrator.<sup>21</sup>
- 5.1.2 The arbitral tribunal shall be appointed by any method agreed to by the parties or in accordance with the rules of the arbitral institution chosen by them.<sup>22</sup> The usual practice for appointing an arbitral tribunal comprising of three arbitrators is for each of the parties to nominate one arbitrator and mutually agree upon the third. Alternatively, the parties may agree that the two arbitrators can appoint the third arbitrator. In the event that the parties fail to reach an agreement on this process, the court shall decide how many arbitrators may constitute the arbitral tribunal and will have the authority to appoint those arbitrators.<sup>23</sup>
- 5.1.3 Once several arbitrators have been appointed they shall elect, by majority, the chair of the arbitral tribunal. Failing consensus, the eldest shall become the chair.<sup>24</sup>
- 5.1.4 Anyone can be appointed as an arbitrator so long as they are capable of exercising their civil rights. However, once appointed, an arbitrator has a duty to behave competently and to act independently and impartially at all times.<sup>25</sup> Pursuant to the Brazilian Civil Code,<sup>26</sup> in general terms people under the age of 18, unsound mind and persons who have been declared unable to exercise their rights by a judge because of an abuse of drugs, alcohol, temporary mental illness, etc can not exercise their civil rights.

### 5.2 Procedure for challenging and substituting arbitrators

- 5.2.1 Arbitrators may be challenged by the parties on the same grounds as judges.<sup>27</sup> Those grounds include if the arbitrator:
- is a party to the dispute;
  - has acted as legal counsel or given testimony in the dispute;

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<sup>21</sup> Brazilian Arbitration Act, art 13(1).

<sup>22</sup> *Ibid*, art 13(4).

<sup>23</sup> *Ibid*, art 13.

<sup>24</sup> *Ibid*, art 13(4).

<sup>25</sup> *Ibid*, art 13(6).

<sup>26</sup> Law no. 10406 of 10 January 2002.

<sup>27</sup> Brazilian Arbitration Act, art 14.

- has rendered a decision as a judge of first instance in the same dispute;
  - has a personal or business relationship with one of the parties or their lawyers;
  - or
  - is a member of the board of a corporation that is a party to the dispute.<sup>28</sup>
- 5.2.2 Prior to accepting an appointment, an arbitrator must disclose to the parties any facts that may be deemed to affect his or her impartiality or independence.<sup>29</sup>
- 5.2.3 In principle, challenges may only be raised against party-appointed arbitrators for reasons arising after their appointment. In the event that the reason for the challenge against the arbitrator only became apparent after the appointment, an arbitrator may be challenged for a reason that occurred prior to the appointment.<sup>30</sup>
- 5.2.4 Arbitrators are competent to rule upon any challenge, which must be filed at the first hearing after the constitution of the arbitral tribunal.<sup>31</sup> If the challenged arbitrator refuses to hear the challenge, a judge is entitled to determine the issue and his or her decision cannot be appealed. In these circumstances, the arbitral proceedings will be suspended pending the resolution of the challenge.
- 5.2.5 If the arbitral tribunal rejects the challenge against the arbitrator, the arbitration will proceed as normal. However, once the outcome of the arbitration is known, the challenging party may, on the basis of the rejected challenge, make an application to the courts to set aside the award rendered by the arbitral tribunal. If the court finds that the arbitral tribunal should have accepted the challenge, the award will be set aside.<sup>32</sup>
- 5.2.6 In the event of a successful challenge against an arbitrator, that arbitrator's position shall be filled by the alternate member nominated by the parties prior to the constitution of the arbitral tribunal, if any.<sup>33</sup> If such a nomination has not occurred, the agreed procedure for nominating arbitrators should apply.<sup>34</sup>

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<sup>28</sup> Code of Civil Procedure, art 134.

<sup>29</sup> Brazilian Arbitration Act, art 14(1).

<sup>30</sup> *Ibid*, art 14(2).

<sup>31</sup> *Ibid*, art 15.

<sup>32</sup> *Ibid*, art 33 and 20; see also appeal no. 70005797774, 12th Civil Chamber of the Rio de Janeiro Court of Appeal.

<sup>33</sup> Pursuant to Brazilian Arbitration Act, art 13(1), when appointing an arbitrator, parties may also nominate an alternate arbitrator.

<sup>34</sup> Brazilian Arbitration Act, art 20(1) and 16.

### **5.3 Responsibilities of an arbitrator**

- 5.3.1 Arbitrators who breach the duties set out above have a general obligation to compensate third parties for damages caused by negligence or wilful misconduct.<sup>35</sup>
- 5.3.2 As well as civil liability for breaching these duties, the criminal law provisions that specifically apply to public servants apply to arbitrators.<sup>36</sup> For example, arbitrators who do not properly exercise their function, or illegally delay their duties to satisfy their interests, may be subject to the penalty of prison from three months to one year, plus fines.<sup>37</sup>

### **5.4 Arbitration fees**

- 5.4.1 The Brazilian Arbitration Act contains no express provisions on arbitrators' fees. Arbitrators may only secure payment of their fees if the arbitration agreement establishes this possibility. Generally, payment of arbitrators is contingent on rendering the award.
- 5.4.2 In practical terms, payment of a part of the arbitrator's fee is used as a guarantee. If no specific amount is agreed upfront, the parties and the arbitrators can set the amount based on the number of hours that the arbitrators are expected to work.
- 5.4.3 In respect of institutional arbitral proceedings, each arbitral institution has its own rules governing the payment of administrative fees and the remuneration of arbitrators. For ad hoc arbitrations, there will be no administrative fees payable and the remuneration of the arbitrators will be agreed between the parties and the arbitrators (usually in the *Compromisso Arbitral*).

### **5.5 Arbitrator immunity**

- 5.5.1 There are no specific legal provisions dealing with the immunity of arbitrators. However, as the function of an arbitrator is equivalent to that of a judge, the legal principles applying to the immunity of judges will, by analogy, be applicable to arbitrators.

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<sup>35</sup> *Ibid*, art 14 and Brazilian Code of Civil Procedure, art 133.

<sup>36</sup> Brazilian Arbitration Act, art 17.

<sup>37</sup> Law-decree no 2848, 7 December 1940, art 319.

## 6. Jurisdiction of the arbitral tribunal

### 6.1 Competence to rule on jurisdiction

6.1.1 The arbitral tribunal is entitled to rule on its own jurisdiction, including on the existence and validity of the arbitration agreement.<sup>38</sup>

6.1.2 An arbitration agreement which is part of another agreement is treated as an independent (and severable) arbitration agreement (see paragraph 4.3.1 above). The invalidity of the agreement containing the arbitration agreement will therefore not automatically affect the validity of the arbitration agreement.

### 6.2 Power to order interim measures

6.2.1 Unless the parties have agreed otherwise, the arbitral tribunal is empowered to grant any interim measures to protect the parties' rights and the integrity of the arbitral proceedings.<sup>39</sup>

6.2.2 However, no decision or order on interim measures by the arbitral tribunal is directly enforceable. Instead, the competent state court must order the enforcement of the interim measures granted by the arbitral tribunal.<sup>40</sup>

6.2.3 The Brazilian Arbitration Act does not expressly deal with the situation where parties may wish to apply directly to the state courts for interim measures, including any urgent interim measures of protection that may be necessary before an arbitral tribunal can be constituted (see paragraph 9.4.1 below).

## 7. Conduct of proceedings

### 7.1 Commencing an arbitration

7.1.1 Arbitral proceedings are deemed to commence when all of the arbitrators have accepted their appointment.<sup>41</sup>

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<sup>38</sup> Brazilian Arbitration Act, art 8.

<sup>39</sup> *Ibid*, art 22.

<sup>40</sup> *Ibid*, art 22(4).

<sup>41</sup> *Ibid*, art 19.

## 7.2 General procedural principles

- 7.2.1 Parties are free to choose the procedure to be followed by the arbitral tribunal.<sup>42</sup>
- 7.2.2 If the parties do not agree upon the procedure to be applied – and unless the parties have agreed otherwise – the arbitral tribunal may choose the rules of procedure it considers most appropriate under the Brazilian Arbitration Act.<sup>43</sup>
- 7.2.3 However, it should be noted that there is a tension between the unfettered discretion accorded by the Brazilian Arbitration Act and the provisions of the Panama Convention, which stipulate that, absent an express choice of procedural rules by the parties, the rules of procedure of the Inter-American Commercial Arbitration Commission shall apply.<sup>44</sup>
- 7.2.4 Strictly speaking, the provisions of the Brazilian Arbitration Act prevail over those of the Panama Convention.<sup>45</sup> It follows that, in an arbitration seated in Brazil to which the Panama Convention applies,<sup>46</sup> the arbitral tribunal may choose the rules of procedure that it considers appropriate. Nevertheless, in such circumstances, arbitral tribunals may well elect to exercise their discretion in favour of adopting the rules of procedure of the Inter-American Commercial Arbitration Commission.

## 7.3 Seat and language of the arbitration

- 7.3.1 In general, parties are free to choose the seat and language of the arbitration. However, disputes arising under or out of certain types of contracts entered into with public bodies or government entities may only be resolved by arbitration if the seat of the arbitration is in Brazil and the language of the arbitration is Portuguese (see paragraph 12.3.4 below for further details).
- 7.3.2 The seat of the arbitration must be set out in the *Compromisso Arbitral* and stated in the award.<sup>47</sup>

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<sup>42</sup> *Ibid*, art 21.

<sup>43</sup> *Ibid*, art 21(1).

<sup>44</sup> Panama Convention, art 3.

<sup>45</sup> International treaties ratified by Brazil have the same status as internal laws in Brazil and are subject to the principle *lex posterior derogat priori* (the later law abrogates the inconsistent earlier law): see RE 80.004-SE. The Brazilian Arbitration Act was passed after the presidential decree bringing the Panama Convention into force in Brazil (Statutory Instrument no 1902 of 9 May 1996).

<sup>46</sup> The Panama Convention applies to international commercial arbitrations between parties of the following signatory States: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay and Venezuela.

<sup>47</sup> Brazilian Arbitration Act, art 10 and art 26, IV respectively.

## 7.4 Multi-party issues

7.4.1 There are no specific rules under the Brazilian Arbitration Act regarding the effects of an arbitration agreement on third parties. As a matter of doctrine, third parties cannot be included in arbitrations, even in cases of compulsory joinder, permissive joinder or third party intervention. However, the jurisprudence on this issue is not unanimous. The courts have been prepared to accept third party intervention in certain limited circumstances, such as where the third party is an interested member of one of the party's corporate groups,<sup>48</sup> or where there is commonality of issues.<sup>49</sup>

## 7.5 Oral hearings and written proceedings

7.5.1 The Brazilian Arbitration Act provides that the parties are free to decide whether to hold an oral hearing or whether to conduct the arbitration on a documents only basis.<sup>50</sup>

7.5.2 The arbitral tribunal must hear the parties and give them the opportunity to make oral submissions, if so requested. The arbitral tribunal must also hear all the witnesses and experts (if they are called by the arbitral tribunal upon the request of the parties to explain their written reports). The parties are to be given sufficient prior notice of any hearings and any procedural action of the arbitral tribunal which involves the inspection of property or documents.<sup>51</sup>

## 7.6 Default by one of the parties

7.6.1 Where there is an arbitration agreement but one of the parties shows resistance as to the initiation of arbitration, the interested party may apply to court for an order that the other party shall appear in court in order to prepare the *Compromisso Arbitral*. Depending on the wording of the arbitration agreement, the judge may then appoint a sole arbitrator to decide the merits of the case.<sup>52</sup>

7.6.2 When a respondent fails to participate in an arbitration, the respondent's default will not prevent the award being issued.<sup>53</sup>

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<sup>48</sup> Appeal no. 267450.4/6-00, 7th Chamber of Private Law of the São Paulo Civil Court.

<sup>49</sup> REsp no. 653733.

<sup>50</sup> Brazilian Arbitration Act, art 21.

<sup>51</sup> *Ibid*, art 22(1).

<sup>52</sup> *Ibid*, art 7.

<sup>53</sup> *Ibid*, art 22(3).

## **7.7 Evidence generally**

- 7.7.1 Any evidence lawfully obtained may be disclosed during the production of evidence stage of the arbitral proceedings.<sup>54</sup> Apart from the principles of due process, equal treatment of the parties and ensuring the independence of the arbitrators,<sup>55</sup> there are no mandatory rules of evidence.
- 7.7.2 Nevertheless, arbitration in Brazil continues to be strongly influenced by the local civil procedure rules. Many local arbitrators and counsel adopt the methods for taking evidence used before the state courts.
- 7.7.3 The arbitral tribunal may hear the testimony of parties and witnesses, request expert opinions or the production of evidence, either at the request of one of the parties, or of its own initiative. If an arbitrator is substituted during the arbitral procedure, his or her substitute may, at his or her discretion, determine what evidence shall be repeated.<sup>56</sup>
- 7.7.4 Finally, it should be noted that the cross-examination of witnesses in Brazil, whilst possible, is different from the concept of cross-examination, as understood in common law jurisdictions. Based on the civil court's approach to the examination of witnesses, the standard procedure in arbitral proceedings is for parties to seek the permission of the arbitral tribunal to ask the witness a particular question, with the arbitral tribunal freely deciding whether the question is justified or not.

## **7.8 Appointment of experts**

- 7.8.1 The parties may rely on expert evidence in support of their case. Subject to any procedural rules agreed by the parties, an independent expert witness may also be appointed by the arbitral tribunal, at the request of the parties or of its own initiative.<sup>57</sup>
- 7.8.2 There is no need for the arbitral tribunal to consult with the parties as to the questions to be submitted to experts. Arbitral tribunals will usually give the parties the opportunity to make their own observations on any expert report.
- 7.8.3 Where the arbitral tribunal appoints its own independent expert, the parties may also appoint "technical assistants" to that expert. The technical assistants may also produce reports, which will be taken into consideration by the arbitral tribunal.

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<sup>54</sup> *Ibid*, art 21.

<sup>55</sup> *Ibid*, art 21(2).

<sup>56</sup> *Ibid*, art 22(5).

<sup>57</sup> *Ibid*, art 22.



Alternatively, the arbitral tribunal's expert and the parties' technical assistants may decide to issue a collegiate decision. Both the arbitral tribunal's expert and/or any technical assistants appointed by the parties may be obliged to appear in hearings to answer questions from the arbitral tribunal and/or the parties.

## **7.9 Confidentiality**

- 7.9.1 Brazilian law does not expressly deal with the confidentiality of arbitral proceedings. However, the general consensus is that awards are confidential and may only be published with the consent of the parties.
- 7.9.2 There are also no rules that prevent a party from using and referring to information disclosed in other arbitral proceedings.
- 7.9.3 The parties are free to provide for confidentiality themselves through a confidentiality agreement. Many of the institutional arbitration rules in Brazil include confidentiality obligations.<sup>58</sup>

## **7.10 Court assistance in taking evidence**

- 7.10.1 The arbitral tribunal may request the assistance of the state courts to obtain evidence. For instance, they may ask the court to summon witnesses that have refused to attend voluntarily and give evidence. If a witness fails, without good cause, to comply with the arbitral tribunal's request to give oral testimony, the arbitral tribunal may take such behaviour into account when determining the weight to be given to that witness's evidence.<sup>59</sup>

# 8. Making of the award and termination of arbitral proceedings

## **8.1 Choice of law**

- 8.1.1 Parties are free to choose the rules that shall be applied to the arbitration procedure, provided that they do not violate Brazilian public policy. Parties may also agree that the award shall be granted based on basic principles of law, common practice, or rules of international commerce.<sup>60</sup>

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<sup>58</sup> See, for example, the São Paulo Chamber of Mediation and Arbitration Rules, the Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce Rules or the Corporate Chamber of Commerce in Brazil Rules.

<sup>59</sup> Brazilian Arbitration Act, art 22(2) and 22(4).

<sup>60</sup> *Ibid*, art 2.

8.1.2 As an alternative, the parties may authorise the arbitral tribunal to decide *ex aequo et bono* (instead of pursuant to the applicable law).<sup>61</sup>

## 8.2 Time, form, content and notification of the award

8.2.1 The parties can stipulate the timeframe within which the award is to be issued, in accordance with the *Compromisso Arbitral*. In the absence of such provision, the award shall be rendered in writing within six months of the constitution of the arbitral tribunal. However, during the course of the arbitration, the parties and the arbitral tribunal may agree to extend this period.<sup>62</sup>

8.2.2 Any award based on law (rather than *ex aequo et bono*) must be properly reasoned both in fact and in law. It must deal with all the issues submitted to arbitration as well as ancillary matters such as the costs of the arbitral proceedings.<sup>63</sup> Where there are several arbitrators, the decision shall be reached by a majority vote. Where there is no majority, the decision of the chair shall prevail.<sup>64</sup>

8.2.3 The award itself must be in writing and must contain the following:

- a report containing the names of the parties and a summary of the dispute;
- the reasoning of the decision, including the reasons for an award made by an arbitral tribunal acting as *amiable compositeur*;
- the actual decision, or *dispositive*, including the time limit for the fulfilment of obligations imposed on the parties; and
- date and place of making the award.<sup>65</sup>

8.2.4 The award must be signed by all of the arbitrators. If one or more arbitrators cannot or do not wish to sign the award, the chair of the arbitral tribunal must certify this fact.<sup>66</sup>

## 8.3 Settlement

8.3.1 Where the parties settle their dispute, the arbitral proceedings will terminate. At the request of the parties, the arbitral tribunal shall record the settlement in the form of an award on agreed terms.<sup>67</sup> An award on agreed terms has the same

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<sup>61</sup> *Ibid*, art 2.

<sup>62</sup> *Ibid*, art 11.

<sup>63</sup> *Ibid*, art 27.

<sup>64</sup> *Ibid*, art 24 (1).

<sup>65</sup> *Ibid*, art 26.

<sup>66</sup> *Ibid*, art 26, sole paragraph.

<sup>67</sup> *Ibid*, art 28.

effect as any other award made by an arbitral tribunal and must comply with the requirements set out in paragraph 8.2.3 above.

#### **8.4 Power to award interest and costs**

- 8.4.1 The parties can decide in the *Compromisso Arbitral* how future costs of the arbitration will be borne (including the arbitrators' fees and the parties' legal fees).<sup>68</sup>
- 8.4.2 In the absence of any prior agreement between the parties on this issue, the arbitral tribunal will determine the costs of the arbitration and allocate the responsibility for paying such costs between the parties.<sup>69</sup> The arbitral tribunal may order the parties to make deposits to cover expenses and actions as it deems necessary.<sup>70</sup>
- 8.4.3 As a general rule, the winning party is entitled to recover its costs from the losing party. However, if the winning party is only partly successful, its recovery may be limited to those costs attributable to the extent of its success.

#### **8.5 Termination of the proceedings**

- 8.5.1 The arbitral proceedings terminate when the final award is issued. In certain limited circumstances, the arbitral proceedings may terminate before the rendering of the final award (for example, where an arbitrator dies or excuses him or herself prior to being appointed and cannot be replaced).

#### **8.6 Effect of an award**

- 8.6.1 The award is effective and binding on the parties to the arbitration, as well as their successors, in the same way as if the award was a court judgment. Once approved, a foreign award has the same effect as a Brazilian court judgment (for further details of the approval process, please see section 11.2 below).<sup>71</sup>
- 8.6.2 The courts do not have the power to re-hear and re-decide as between the parties findings of fact and law previously determined by an arbitral tribunal.

#### **8.7 Correction, clarification and issuance of a supplemental award**

- 8.7.1 Any party may, within five days of receipt of an award, file a motion for the arbitral tribunal to clarify the terms of the award.<sup>72</sup> Such motion may request that the

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<sup>68</sup> *Ibid*, art 11.

<sup>69</sup> *Ibid*, art 27.

<sup>70</sup> *Ibid*, art 13 (7).

<sup>71</sup> Law no. 5869 of 11 January 1973, art 484.

<sup>72</sup> Brazilian Arbitration Act, art 30.

arbitral tribunal correct any material error and/or clarify the grounds on which the award has been determined. Less commonly, such motion may be used to request that the arbitral tribunal decide a claim presented in the arbitral proceedings that it had failed to determine in its award. Such motions may be submitted even where the party expressly confirms that it will not be appealing the award. If accepted, the arbitral tribunal shall issue the corrected award or addendum to the parties within ten days of the request.<sup>73</sup>

## 9. Role of the courts

### 9.1 Jurisdiction of the courts

- 9.1.1 The courts are excluded from assuming jurisdiction over disputes that the parties have agreed to submit to arbitration (as explained in paragraph 4.1.4 above).
- 9.1.2 However, the Brazilian Arbitration Act gives the courts limited jurisdiction to provide legal assistance to the arbitral process in certain circumstances.
- 9.1.3 In addition to the courts' powers to enforce interim measures in relation to the appointment and challenge of arbitrators (as discussed above), the courts have the power to determine whether the agreement is null and void, inoperative, or incapable of being performed.
- 9.1.4 The courts may also assist in the enforcement of interim measures rendered by the arbitral tribunal.

### 9.2 Dismissal of court proceedings

- 9.2.1 In the event that an action regarding a matter which is subject to an arbitration agreement is brought before a court, the court is required to immediately terminate the proceeding without decision on the merits.<sup>74</sup> If the court fails to terminate the proceedings, the respondent can raise the existence of the arbitration agreement as a defence.<sup>75</sup> The court will terminate the proceedings unless it considers the arbitration agreement to be null and void, inoperative, or incapable of being performed.

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<sup>73</sup> *Ibid*, art 30, sole paragraph.

<sup>74</sup> Brazilian Code of Civil Procedure, art 267 VII.

<sup>75</sup> *Ibid*, art 301 IX.

### 9.3 Preliminary rulings on jurisdiction

9.3.1 A party has 90 days from the date of receipt of the arbitral tribunal's ruling on jurisdiction in which to request that the competent court renders a decision on whether or not the arbitral tribunal has jurisdiction.<sup>76</sup>

### 9.4 Interim protective measures

9.4.1 The courts in Brazil have jurisdiction to grant interim measures in support of arbitral proceedings both before and after the constitution of the arbitral tribunal.<sup>77</sup> In practice, any decision or order on interim measures issued by the arbitral tribunal is not enforceable (only the final award is enforceable). The arbitral tribunal may, therefore, request any court having jurisdiction to assist with enforcing such interim measures.

### 9.5 Obtaining evidence and other court assistance

9.5.1 The local courts have jurisdiction to assist the arbitral tribunal in obtaining evidence.<sup>78</sup>

## 10. Challenging and appealing an award through the courts

### 10.1 Jurisdiction of the courts

10.1.1 After the award is made, a party has 90 days from the date the award is rendered or modified to apply to the court for an order nullifying the award.<sup>79</sup> Such application should be made to the court which would ordinarily have had jurisdiction over the substantive dispute in arbitration, were it not for the arbitration agreement.

### 10.2 Appeals

10.2.1 The arbitrator acts as judge of fact and law. Awards are not generally subject to appeal by the courts.<sup>80</sup> An award may however be annulled if one of the limited grounds set out in paragraph 10.3.1 below applies.

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<sup>76</sup> Brazilian Arbitration Act, art 20 and art 33 (1).

<sup>77</sup> Examples of such powers are discussed at paragraph 5.2.4 in relation to challenging the appointment of an arbitrator and paragraph 9.5.1 in relation to obtaining evidence.

<sup>78</sup> Brazilian Arbitration Act, art 22 (4).

<sup>79</sup> *Ibid*, art 33 (1).

<sup>80</sup> *Ibid*, art 18.

### 10.3 Applications to set aside an award

10.3.1 The award may be challenged before the competent court and set aside for any one or more of the following reasons:

- (i) the arbitration agreement is null and void, inoperative or incapable of being performed;
- (ii) the award is issued by one or more individuals who are not capable of acting as an arbitrator;
- (iii) the award does not comply with the requirements provided in the Brazilian Arbitration Act as set out in paragraph 8.2.3 above;
- (iv) the award extends to issues that fall outside the scope of the arbitration agreement;
- (v) the award does not decide all issues submitted to the arbitral tribunal for resolution;
- (vi) it is proved that the award was rendered under illegal circumstances (extortion, corruption, etc);
- (vii) the award was issued after the agreed time limit; or
- (viii) an arbitrator failed to act impartially or independently when rendering the award, or disregarded the obligation to treat the parties equally.<sup>81</sup>

10.3.2 The application for setting aside the award must be submitted to the relevant court within 90 days of receipt by the party of the award.<sup>82</sup>

10.3.3 The competent state court may either declare the award null and void in the case of grounds (i), (ii), (vi), (vii) and (viii) above, or order the arbitral tribunal to make a new award.<sup>83</sup>

## 11. Recognition and enforcement of awards

### 11.1 Domestic awards

11.1.1 Awards rendered in Brazil are treated as domestic awards.<sup>84</sup> This is the case even where the parties have selected foreign arbitration rules, such as the ICC Rules, to govern the procedure of the arbitration.<sup>85</sup>

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<sup>81</sup> *Ibid*, art 32.

<sup>82</sup> *Ibid*, art 33(1).

<sup>83</sup> *Ibid*, art 33(2) l.

<sup>84</sup> *Ibid*, art 34, sole paragraph.

<sup>85</sup> REsp 1231554.

11.1.2 An award has the same effect as a final, binding and non-appealable court judgment.<sup>86</sup> The court which has jurisdiction for enforcement is the local court where the arbitration procedure was held, except in respect of a foreign award, which shall follow the enforcement procedure set out below.

## 11.2 Foreign awards

11.2.1 Awards rendered outside of Brazil are enforceable in Brazil according to international treaties ratified by Brazil (principally the New York Convention – see paragraph 11.2.3 below). In the absence of any applicable treaty, foreign awards shall be recognised and enforced in accordance with the rules provided in the Brazilian Arbitration Act.

11.2.2 Foreign awards are subject to approval by the Superior Court of Justice.<sup>87</sup> The approval of the award by the Superior Court of Justice is subject to confirmation of:

- the capacity of the parties to the arbitration agreement;
- the validity of the arbitration agreement according to the law to which the parties have submitted it or, in the absence of an express choice of law, according to the law of the seat where the award was issued;
- the respondent having been given proper notice of the arbitration procedure, including the right to submit its defence;
- the award not exceeding the scope of the arbitration agreement (unless it is possible to sever those excesses from the valid part of the award);
- the award being duly enforceable and not having been set aside or suspended by a court of the jurisdiction in which it has been issued;
- the award not involving a dispute which, according to Brazilian law, may not be resolved by means of arbitration; and
- the award not being contrary to Brazilian public policy.

11.2.3 The grounds for refusal set out above are virtually identical to those set out in the New York Convention and the Panama Convention, two treaties on the enforcement of foreign awards to which Brazil is a signatory party. Brazil has been a signatory to the New York Convention since 2002. The provisions of the New York Convention are in force in Brazil and apply to the recognition and enforcement of foreign awards. Brazil has not made any reservations to the New York

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<sup>86</sup> Brazilian Arbitration Act, art 18.

<sup>87</sup> *Ibid*, art 35. Jurisdiction to hear approval applications was transferred from the Brazilian Supreme Court to the Superior Court of Justice under Constitutional Amendment No.45 of 8 December 2004. However, the text of the Brazilian Arbitration Act has yet to be amended to reflect this change.

Convention,<sup>88</sup> therefore all foreign awards should in principle be recognised and enforced in Brazil under the New York Convention (even if made in the territory of a non-signatory State).

- 11.2.4 Once the award is approved by the Superior Court of Justice, it shall be enforced by a lower Brazilian federal court. It should be noted that the approval process renders the award public.

## 12. Special provisions and considerations

### 12.1 Consumers

- 12.1.1 The requirements set out in paragraph 4.1.3 above for an arbitration clause which appears in a *contrato de adesão* or adhesion/standard form contract are equally applicable where the weaker party is a consumer. As such, a consumer will not be bound by any arbitration agreement in a *contrato de adesão* unless the requirements set out in paragraph 4.1.3 above have been satisfied.<sup>89</sup>

### 12.2 Employment law

- 12.2.1 For the purposes of Brazilian labour law, a distinction is drawn between collective and individual labour disputes. Collective labour disputes (i.e. those involving a group of employees and an employer or a group of employers) may be submitted to arbitration.<sup>90</sup> In contrast, with limited exceptions, individual labour or employment disputes may not be resolved by arbitration.<sup>91</sup>

### 12.3 Government participation in arbitration

- 12.3.1 Historically, rights of the government were non-disputable under Brazilian law and, as such, could not be subject to arbitration. However, over the last decade, there has been a shift in this area. Legislative changes have made it possible for parties contracting with public authorities to provide for arbitration (or other private dispute resolution methods) as a means of resolving disputes.
- 12.3.2 One of the most important laws for foreign investors in Brazil is the 2004 Public Private Partnerships Law (**PPP Law**),<sup>92</sup> which sets out the general rules for bidding

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<sup>88</sup> See [[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)] (accessed 18 December 2011).

<sup>89</sup> Brazilian Arbitration Act, art 4(2).

<sup>90</sup> Brazilian Constitution, art 14(2).

<sup>91</sup> See, for example, Law Decree no. 5.452 of 1 May 1943, art 9; TST-RR-79500-61.2006.5.05.0028.

<sup>92</sup> Law no. 11079 of 30 December 2004.



and contracting public private partnerships (which are arrangements between public authorities and the private sector for the performance of large-sized works and utility services, by means of sponsored or administrative concessions, sharing the venture risks and primarily counting on private funding). Parties to contracts entered into under the auspices of the PPP Law are allowed to resolve disputes arising under or out of such contracts using alternative dispute resolution methods, including arbitration.<sup>93</sup>

12.3.3 Similarly, the law governing the concession of public services<sup>94</sup> was amended in 2005 to allow for the use of alternative dispute resolution methods, including arbitration, to resolve disputes arising out of this type of agreements.<sup>95</sup>

12.3.4 However, both the PPP Law and the law governing the concession of public services stipulate that:

- any such arbitral proceedings must be held in Brazil;
- the language of the arbitration must be Portuguese; and
- the arbitration be conducted in accordance with the Brazilian Arbitration Act.<sup>96</sup>

## 13. Concluding thoughts and themes

13.1.1 As noted in the introduction, arbitration has grown exponentially in Brazil over the last ten years and is now perceived as the natural method of dispute resolution among private contracting parties in Brazil.

13.1.2 Although the Brazilian Arbitration Act may not always have been applied uniformly by the courts in the 26 states of Brazil, the Brazilian judiciary has an excellent track record of upholding arbitration agreements and supporting the arbitral process, where called upon to do so.

13.1.3 These days, the vast majority of arbitral proceedings in Brazil run smoothly without any major obstacles, with the parties complying voluntarily with the award. Few awards are the subject of an application for annulment. On the rare occasion that an application for annulment is upheld by the state court, this tends to be for technical reasons, respecting the jurisdiction of the arbitral tribunal, the scope of the Brazilian Arbitration Act and of the arbitration agreement.

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<sup>93</sup> *Ibid*, art 11, III.

<sup>94</sup> Law no. 8987 of 13 February 1995.

<sup>95</sup> Law no. 11196 of 21 November 2005, art 120.

<sup>96</sup> See Law no. 11079 of 30 December 2004, art 11, III; and Law no. 8987 of 13 February 1995, art 23-A respectively.

13.1.4 Turning to future developments in arbitration procedure in Brazil, the Brazilian Senate passed the New Civil Procedure Code Bill on 15 December 2010. The bill is expected to be the subject of significant debate in the House of Representatives. The New Civil Procedure Code Bill includes certain provisions relating specifically to arbitration, such as the introduction of a complaints procedure to challenge the existence of arbitration agreements and a procedure for bringing interlocutory appeals.

## 14. Contacts

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