International Commercial Arbitration in Brazil

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Introduction

Within the international community, Brazil has long had a reputation for hostility toward the enforcement of foreign international arbitration awards. Over the last two decades, however, the legal framework of international commercial arbitration in Brazil has seen dramatic improvement. Since the late 1990s, Brazil has emerged as a significant player in the arena of international commercial arbitration.

The New York Convention\(^1\) plays a central role in international commercial arbitration as one of the principal mechanisms for the recognition and enforcement of foreign arbitral awards. Brazil has been referred to as the “black sheep” of Latin American arbitration, because it did not become a signatory member of the New York Convention until 2002 and has still not ratified the Convention on the Settlement of Investment Disputes (ICSID Convention, also known as the Washington Convention).\(^2\)

Despite Brazil’s late adoption of the New York Convention, its failure to ratify the ICSID Convention, and the fact that it has not ratified any of the bilateral investment treaties (BITs) it has signed, Brazil’s adoption and practice of arbitration has moved it to center stage in the field of international commercial arbitration.

This chapter explains the historical and current legal framework for international commercial arbitration in Brazil. It examines the changes introduced by the Brazilian Arbitration Act,\(^3\) the international

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2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 17 UST 1270, TIAS Number 6090, S-75 UNTS 159.
conventions ratified by Brazil, and the body of case law that is being developed in the country in relation to arbitration.

**History of Hostility to International Commercial Arbitration**

Like many of its Latin American neighbors, Brazil embraced the Calvo Doctrine in the nineteenth century. Under the Calvo Doctrine, Brazil and other Latin American countries, their courts, and their governments adhered to the view that international investment disputes must be adjudicated in the courts of the country where the investment is made. Thus, foreigners investing in Brazilian companies were required to adjudicate their disputes in Brazilian courts, considered to be favorable to the local Brazilian companies and hostile to foreign investors.

The Calvo Doctrine was followed by the Drago Doctrine, which stated that no foreign state could use force or coercion to collect debts from a Latin American nation. It was a continuation of the Calvo Doctrine, and equally hostile and adverse toward foreign investors.

However, with Latin American countries experiencing stagnant economies and inflation in the mid-1980s, the need for foreign investment and foreign trade credits increased. Accordingly, Latin American countries, including Brazil, began to open their economies to more foreign direct investment (FDI). Prospective European, American, and Asian investors sought more security for their investments.

By the late 1980s, after a series of foreign debt defaults — and a new Constitution in Brazil — Latin American nations began to reconsider their juridical attitudes toward international arbitration, gradually moving away from the Calvo Doctrine and becoming more open to the idea of submitting investment disputes to international commercial arbitration.

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5 Calvo was an Argentinian scholar who advocated that in investment disputes and as a matter of sovereignty, foreign nationals should submit themselves to the jurisdiction of the state where the investment has been made.

6 The Drago Doctrine was presented by Drago, Minister of Foreign Affairs of the Argentine Republic, in 1902 as a reaction against attempts by several European countries to collect on defaulted loans to Venezuela.
Brazil ratified the Panama Convention in 1995; a year later, it enacted a modern national arbitration law: the Brazilian Arbitration Act of 1996. While the Arbitration Act did not remove all the obstacles to arbitration, it significantly improved the standing of commercial arbitration in the country.

**Emergence as Economic and Industrial Power**

Brazil became a Portuguese colony in the sixteenth century and remained such until its independence in 1822. Historically, the economy of Brazil, which was heavily dependent on African slave labor until the late nineteenth century, also was the Portuguese colony with the largest number of European settlers, including Spanish, English, French, German, Flemish, Danish, Scottish settlers and Sephardic Jews who arrived as refugees.

Since then, Brazil has experienced a strong economic and demographic population growth, accompanied by mass migration from southern and northern European countries, the Middle East, Japan, the United States, and South Africa. Between 1882 and 1934, approximately 4,500,000 people emigrated to Brazil.

Today, the economy of Brazil is the sixth largest by nominal gross domestic product (GDP). Its economy is the largest in Latin America and the second largest in the Western Hemisphere. Predicted to become one of the five largest economies in the world in the coming decade, Brazil has become one of the top countries for competitiveness, with a thriving business sector and a very sophisticated technological center. Together with Mexico, Brazil has moved to the forefront in

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7 Inter-American Convention on Commercial Arbitration (Panama Convention) 30 January 1975, OASTS, Number 42 (1975) 14 ILM 336.
9 “Brazil overtakes UK as the sixth biggest economy”, *Riort* (6 March 2012), at http://ritort.org/bloc/2012/03/06/brazil-overtakes-uk-as-the-sixth-biggest-economy/.
10 According to the Global Competitiveness Report, 2012–2013, Brazil is currently in a state of transition between an efficiency-driven and an innovation-driven economy, with a Global Competitive Index (GCI) of 5.63 (out of 7) in terms of market size. The Report is available on the World Economic Forum at http://www.weforum.org/issues/global-competitiveness.
Latin America in creating multinationals. Brazil has become a pioneer in the field of deepwater oil research. As reported recently:

“Sub-salt reserves of petroleum, found thousands of meters below layers of sand, rocks, and salt, have transformed Brazil into one of the highest potential investment acreages on the globe. Tupi Field is the largest discovery in the Americas since 1970, . . . singlehandedly increasing Brazil’s recoverable reserves of crude oil by 50 per cent.”

In June 2014, Brazil will host the FIFA World Cup, and in the summer of 2016 it will play host to the Olympics, two events that will focus worldwide attention on Brazil and will generate hundreds of millions of Brazilian reals.

With the growth of its economy and high levels of foreign investment, Brazil has moved rapidly to update its courts and legal system to facilitate dispute resolution. International arbitration is now a highly used mechanism. Brazil has experienced very rapid expansion in the use of arbitration as a method of dispute resolution and has become one of the key business centers for arbitrations in Latin America.

One of the primary drivers behind this expansion of the arbitration system has been the growth of the Brazilian economy over this period. Along with this growth and expansion beyond its borders, Brazil has seen an unprecedented surge in foreign investment and foreign acquisitions made by Brazilian multinational companies. These transactions almost invariably involve arbitration agreements between the parties.

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**Implementation of Arbitration Act**

**Enactment and Constitutional Challenge**

In September 1996, the national legislature enacted the Arbitration Act. Several sets of institutional arbitration rules were drafted or renewed in the wake of this Act. While the Arbitration Act was inspired by the Model Law of the United Nations Commission on International Trade (UNCITRAL Model Law on International


Commercial Arbitration), by the Spanish legislation on arbitration, and by the New York Convention, it also contained elements of the Brazilian legal culture and traditions.

When Brazil enacted this law, the expectation was that it would facilitate the use of arbitration as a fast and efficient alternative method of dispute settlement and would therefore boost both national and international arbitration. The enactment of the Arbitration Act, however, was met with opposition and a lengthy constitutional challenge in the Brazilian courts.

The Brazilian Federal Supreme Court (Supremo Tribunal Federal — STF) challenged the constitutionality of the Arbitration Act, questioning the enforceability of an arbitration clause agreed to by both parties to a contract. Article 7 of the Arbitration Act called for national courts to compel specific performance of an arbitration clause to resolve disputes if there was an arbitration clause and if one of the parties is unwilling to cooperate in adjudicating in arbitration.

Although the STF’s view was not universally accepted, it was sufficient to stall the development of arbitration in Brazil for the next five years. In fact, during the time of the constitutional challenge to the Arbitration Act, arbitration clauses were treated by courts as mere contractual promises. The only way a party could remove the jurisdiction of the Brazilian state courts was by signing a compromisso — a second affirmation of their desire to have an arbitral tribunal adjudicate a dispute and effectively waiving their right to use the courts.

Despite the STF’s review of the Arbitration Act, the Arbitration Act was not amended accordingly, evidencing the Brazilian arbitration community’s satisfaction with its provisions and the ease of its application. Finally, in December 2001, in the landmark case of M.B.V. Commercial and Export Management Est. vs. Resil Indústria e Comércio Ltda., the STF declared that the Arbitration Act was constitutional, after lengthy attempts to dispute its adequacy in light of the 1988 Brazilian Constitution.

The STF had found that Article 7 was an unconstitutional violation of Article 5(XXXV) of the Brazilian Federal Constitution, which guarantees the right of access to the state courts. After the landmark decision in M.B.V. Commercial Export and once the Arbitration Act was affirmed, a noticeable growth occurred in use of arbitration clauses in commercial contracts. In that same year, a group of scholars and practitioners launched the Brazilian Arbitration Committee

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14 STF, SE 5206 AgR, Relator: Min. Sepulveda Pertence, 12 December 2001, DJ 30 April 2004, STFJ.
Comitê Brasileiro de Arbitragem — CBAr), an institution which plays a vital role in raising awareness about arbitration in Brazil. Since its inception, the CBAr has organized and co-sponsored major and minor seminars and conferences on arbitration and related topics and publishes the quarterly Brazilian Arbitration Review.15

Following the STF decision in M.B.V. Commercial Export, parties to an arbitration agreement could fully rely on Article 7, which states that if there is an arbitration clause in a contract, a party can request the intervention of a judge, if necessary, to compel arbitration. Just as in the practice of the United States under the Federal Arbitration Act, the Arbitration Act authorizes the judge to rule that the parties have waived their rights to submit their dispute to state courts, and the judge must enforce the arbitration clause, regardless of whether the other party is unwilling to cooperate.

Adoption of International Conventions

Following the STF’s judgment confirming the constitutionality of the new arbitration law in 2001,16 the Brazilian Congress ratified the New York Convention in 2002. These were key milestones in making Brazil a more arbitration-friendly jurisdiction.

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. These treaties included the Panama Convention (in 1995),17 the Las Leñas Protocol (in 1996),18 the Montevideo Convention (in 1997),19 and the Mercosur Olivos Protocol for the Settlement of Disputes (in 2003).

Role of Superior Court of Justice and Judiciary

Since 2005, the Superior Court of Justice (Superior Tribunal de Justiça — STJ) has been developing an important set of precedents

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15 Additional information available on the CBAr’s website at http://cbar.org.br/site/eng/.
which bolster the advance of Brazilian courts’ friendly stance toward arbitration. STJ precedents are not binding on lower courts, but are regarded with deference and are becoming very influential sources for courts and commentators. In 2010, an empirical survey conducted under the auspices of the CBAr and of GVLaw law school found that, for the most part, the Brazilian court system, with no exception made for the STJ, had so far applied the Arbitration Act in a technical fashion, overturning former misconceptions about the Brazilian judicial system being hostile to arbitration.

Another important factor behind the growth in arbitration in Brazil was the crisis in the Brazilian judiciary. In 2010, some 70,000,000 cases were pending before the Brazilian courts (one for every three people in Brazil). As a result of the backlog of pending cases, it took, on average, ten years for a case to be finally decided by the Brazilian courts. Faced with the prospect of such delays, commercial parties began increasingly opting to have their disputes resolved through arbitration.

In 2010, the International Council for Commercial Arbitration (ICCA) held its biennial conference in Rio de Janeiro. Approximately 1,000 attendees from every corner of the globe participated, thus affirming Brazil’s central role in promoting international arbitration.

**Affirming Multi-Party Arbitration**

On 1 January 2012, the new arbitration rules of the International Chamber of Commerce (ICC) entered into force, updating the 1998 rules. The ICC’s Commission on Arbitration updates the ICC Court’s rules periodically, as a result of a worldwide consultation in which the opinion of lawyers, arbitrators, users, and national committees of the ICC have been taken into account.

The circumstances of international arbitration have changed since 1998. At that time, the ICC Court received 450 new cases per year, while in 2011 the figure had increased to 796. Case administration has doubled annually. The demographics of arbitration also have changed. In 1998, the majority of arbitrations originated from the classic developed countries such as France, Germany, England, Switzerland, or the

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20 On 31 December 2004, Amendment Number 45 to the Brazilian Constitution transferred the competence to adjudicate requests for the recognition and enforcement of foreign arbitral awards from the STF to the STJ.

United States, while in 2010 Turkey and Brazil stood out as countries that increasingly use international commercial arbitration within the ICC community. In 1998, it would have been unimaginable that these countries would become international arbitration protagonists.

In June 2012, the STJ issued a ruling in a case involving provisional measures as intertwined with arbitral jurisdiction. *Itaruma v. PCBIOS* evidences the current stage of development of arbitration in Brazil as supported by the courts, especially by the STJ. It also is a clear demonstration of the STJ’s favorable endorsements of arbitration as a valuable dispute resolution method.

### Reluctance to Sign International Conventions

Before the enactment of the Arbitration Act, Brazilian law required the so-called “double-exequatur”—that is, court recognition of foreign awards by the courts of the forum and by Brazilian courts—but it precluded enforcement of pre-dispute arbitration agreements. Despite having affirmed the constitutionality of the Arbitration Act, Brazil has nevertheless declined to ratify other important international conventions related to international arbitration.

While Brazil ratified the Panama Convention in 1995 and the Montevideo Convention in 1997, it was not until 2002 that Brazil finally took the necessary step to become a real player in international commercial arbitration, when the Brazilian Congress approved the ratification of the New York Convention.

Among the reasons identified for Brazil’s long delay in adopting the New York Convention are the archaic nature of the Brazilian legislation, which was not favorable to arbitration until the Supreme Court affirmed the Arbitration Act. Absent the STJ’s affirmance of the Arbitration Act and the mandatory nature of arbitration clauses, the Brazilian Congress was slow to ratify the New York Convention that provided a mechanism for the international recognition and enforcement of arbitral awards.

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enforcement of arbitral awards from other countries and involving citizens of other countries.

The ICSID Convention, which established the International Center for Settlement of International Disputes, entered into force in 1966, after which time approximately 159 countries became signatories. From the time the ICSID Convention was first drafted, Brazil demonstrated resistance toward it, and Brazilian officials raised serious objections to its adoption. Brazilian legislators and several members of the legal community claimed that the ICSID Convention raised constitutional problems, that it contradicted Brazilian law, and argued that it was unnecessary for Brazil to be party to the ICSID Convention.

Additionally, it was widely argued that the motivation for capital-exporting nations to enter into BITs and to sign the ICSID Convention was quite transparent — to protect their overseas and foreign-based investments. The motivation for capital-importing countries to enter into those treaties is usually the hope that investment treaties might promote new investment. It is undisputed that investment treaties ensure a more predictable environment for foreign investors.

Therefore, most countries in Latin America have ratified the ICSID Convention or entered into BITs, or both, hoping to attract FDI. While investment treaties might encourage FDI, studies show that the relation between BITs and the flow of FDI is weak, and it is usually agreed that investment treaties do not themselves attract investment, but merely complement the main determinants of FDI flows.

25 A detailed explanation of the objections raised at the time is provided in Kalicki and Medeiros, “Investment Arbitration in Brazil: Revisiting Brazil’s Traditional Reluctance Towards ICSID, BITs, and Investor–State Arbitration”, 24/3 Arbitration International (2008), at pp. 423–446.


Many Brazilian legal scholars and economists also argue that investment treaties, such as BITs and the ICSID Convention, are not necessarily a beneficial policy that ultimately encourages FDI and development in the Third World, but actually amount to economic imperialism, tying the hands of developing nations.\(^\text{30}\) To emphasize the point, several Latin American countries have denounced the ICSID Convention.

For example, Bolivia was the first country to denounce the ICSID Convention, in May 2007. In that same year, Venezuela threatened to leave the International Monetary Fund, the World Bank, and the ICSID Convention, but has not yet done so. In December 2007, the ICSID received notification from Ecuador indicating that it would not consent to ICSID arbitration of disputes pertaining to investments in natural resources such as oil and minerals. Subsequently, in June 2009, Ecuador also denounced the ICSID Convention.

But Brazil alone presents the paradox. Brazil is the largest recipient of FDI in Latin America,\(^\text{31}\) even though Brazil is not a signatory to the ICSID Convention and has not ratified any of the BITs it has entered into. This Brazilian conundrum shows that, despite its reluctance to completely join the international investment community, Brazil can still attract foreign investment at a level no other Latin American nation has attained.

Brazil is the largest economy in Latin America, and its economic engine and increasing importance as an international arbitral center outweigh its relative lack of legislation favoring investment and arbitration of foreign investment disputes. Despite the fact that Brazil might attract even further FDI and also could benefit from being an exporter of FDI,\(^\text{32}\) Brazil does not seem to be interested in joining the ICSID Convention, as the current government does not consider the advantages of joining the ICSID that attractive.

Thus, despite Brazil’s late ratification of the New York Convention and its non-ratification of the ICSID Convention, it is clear that since the 1990s, and especially after the events of 2001–2002, Brazil has


\(^{32}\) Kalicki and Medeiros, “Investment Arbitration in Brazil: Revisiting Brazil’s Traditional Reluctance Towards ICSID, BITs, and Investor-State Arbitration”, 24/3 Arbitration International (2008), at pp. 423–446 (arguing that Brazil could benefit from revisiting its position toward investor-state arbitration).
been taking a number of very positive steps to develop an effective framework for international arbitration.

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**Brazilian Arbitration Act**

**Legislative Framework**

The Arbitration Act has brought the legal framework of arbitration in Brazil closer to the “internationally accepted standards of arbitration”. Arbitration in Brazil is governed by the Arbitration Act, which is based on the UNCITRAL Model Law on Commercial Arbitration (1985), and by various provisions of the Brazilian Code of Civil Procedure that relate to the enforceability and challenge of awards.

Arbitration in Brazil may be conducted on an ad hoc basis or under the auspices of arbitral institutions. The leading Brazilian arbitral institutions are the São Paulo Chamber of Mediation and Arbitration (Federação das Indústrias do Estado de São Paulo/Centro das Indústrias do Estado de São Paulo — FIESP/CIESP), the Getúlio Vargas Foundation Chamber of Conciliation and Arbitration (Fundação Getulio Vargas — FGV), the Arbitration and Mediation Center of the Brazil–Canada Chamber of Commerce (Centro de Arbitragem e Mediação da Câmara de Comércio Brasil–Canadá — CCBC), the Corporate Chamber of Commerce in Brazil (Câmara de Arbitragem Empresarial Brasil — CAMARD), the Arbitration and Mediation Center of the American Chamber of Commerce in São Paulo (AmCham), and the Brazilian Center of Mediation and Arbitration (Centro Brasileiro de Mediação e Arbitragem — CBMA).

Since the enactment of the Arbitration Act, the number of domestic and international arbitrations has increased significantly, with the full support of the Brazilian courts.

**Government Participation in Arbitration**

Historically, the rights of the government were non-disputable under Brazilian law and, accordingly, government or state-owned entities could not be compelled to arbitration. Over the last decade, however, legislative changes have made it possible for parties contracting with

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public authorities to provide for arbitration (or other private dispute resolution methods) as a means of resolving disputes.

One of the most important laws for foreign investors in Brazil is the Public-Private Partnerships Act of 2004, which sets out the general rules for bidding and contracting in relation to public-private partnerships. Parties to contracts entered into under the auspices of the Public-Private Partnerships Act are allowed to resolve disputes arising under or out of such contracts using alternative dispute resolution methods, including arbitration.

Similarly, the General Law on Concessions was amended in 2005 to allow for the use of alternative dispute resolution methods, including arbitration, to resolve disputes arising out of concession agreements.

However, both the Public-Private Partnerships Act and the General Law on Concessions stipulate that any such arbitral proceedings must be held in Brazil, that the language of the arbitration must be Portuguese, and that the arbitration must be conducted in accordance with the Arbitration Act.

Except for a few isolated cases, many Brazilian courts have revealed a friendly approach toward arbitration. This is especially true for the STJ, which is the court designated to rule on the recognition and enforcement of foreign arbitral awards under the New York Convention. The STJ also plays a leading role as a federal review court, being the second appellate court in lawsuits stemming from both state and federal lower appellate courts.

Scope of Application and General Provisions

Subject Matter

The provisions of the 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. The provisions of the Arbitration Act apply to both domestic and international arbitration and include rules for the enforcement of foreign awards.

Law Number 11079 of 30 December 2004.
Law Number 8987 of 13 February 1995.
By Law Number 11196 of 21 November 2005, Article 120.
Public-Private Partnerships Act, Article 11(III); General Law on Concessions, Article 23-A.
Arbitration Act, Article 2.
Arbitration Act, Articles 34–40.
Parties may choose arbitration as a dispute resolution mechanism for disputes relating to freely transferable rights. Under Brazilian law, transferable or disposable rights are rights that the parties can freely negotiate, transfer, assign, waive, or settle. 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.

Structure

The Arbitration Act is divided into seven chapters. The structure is:

1. Chapter I — General Provisions;
2. Chapter II — The Arbitration Agreement and its Effects;
3. Chapter III — The Arbitrators;
4. Chapter IV — The Arbitral Proceedings;
5. Chapter V — The Award;
6. Chapter VI — Recognition and Enforcement of Foreign Awards; and

Arbitration Agreement

Requirements for Validity

In order to be valid, the arbitration agreement must be in writing. The agreement must be contained in the contract itself or in a separate document. 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 when it is included in agreements that were executed before the enactment of the Arbitration Act in 1996.

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

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42 Arbitration Act, Article 1.
43 Arbitration Act, Article 1.
45 Arbitration Act, Article 4(1).
46 Conflict of Jurisdiction (cc) Number III230/DF (10 July 2010).
the proceedings; when the arbitration agreement is in a separate document or is marked in bold in the *contracto de adesão*; or when the arbitration agreement is specifically signed or endorsed by the weaker party.\(^47\)

The Code of Civil Procedure provides that a valid and enforceable arbitration agreement deprives the courts of any jurisdiction to determine the dispute.\(^48\) 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 the arbitration agreement to persuade the court to dismiss those proceedings for lack of jurisdiction to hear the merits of the dispute.\(^49\)

### Submission to Arbitration

Even when there is an arbitration agreement, the parties are required to execute a submission to arbitration (*compromisso arbitral*) before the commencement of any arbitral proceedings. The submission to arbitration is a commitment by the parties to grant effectiveness to the arbitration agreement. The submission to arbitration must 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 applicable), and a statement of the issues to be submitted to the arbitral tribunal.\(^50\)

If a party refuses to execute the submission to arbitration, the other party may apply to the relevant court for an order for specific performance.\(^51\) At the hearing, the court will first attempt conciliation and will try to convince the respondent to sign the post-dispute submission to arbitration, ruling on any issues on which parties may still disagree and appointing a sole arbitrator if the arbitration clause does not specify otherwise. The order made at this hearing will take effect as a valid and binding submission to arbitration, 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.\(^52\)

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\(^47\) Arbitration Act, Article 4(2).
\(^48\) Code of Civil Procedure, Article 267(VII).
\(^49\) Code of Civil Procedure, Article 301(IX).
\(^50\) Arbitration Act, Article 10.
\(^51\) Arbitration Act, Articles 6 and 7. The relevant court is stated in the Arbitration Act, Article 6, as “the state court originally competent to decide the case”.
\(^52\) Code of Civil Procedure, Articles 513 and 520.
Arbitrable and Non-Arbitrable Disputes

Only disputes relating to parties’ freely transferable “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.\(^{53}\) 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 such as patents and trade marks.

It is well established that the state government and other public bodies may agree to resort to domestic or international arbitration, provided the dispute relates to patrimonial rights of which they may dispose.\(^{54}\) However, when 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.

Family matters, certain public law matters, and individual employment-related matters are not capable of being determined by arbitration. 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.

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 arbitration in matters related to disposal of patrimonial rights held by the estate.

Separability and Severability

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.\(^{55}\)

\(^{53}\) Arbitration Act, Article 1.

\(^{54}\) For example, Agravo de Instrumento (Interlocutory Instrument) Number 52.181 of 14 November 1973, STF; Statutory Instrument Number 1312 of 15 February 1974.

\(^{55}\) Arbitration Act, Article 8.
An arbitration agreement which is part of another agreement is treated as an independent (and severable) arbitration agreement. The invalidity of the agreement containing the arbitration agreement will therefore not automatically affect the validity of the arbitration agreement.

Arbitral Tribunal and Arbitrators

In General

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 authorized to nominate a further arbitrator.\(^{56}\)

The arbitral tribunal may be appointed by any method agreed to by the parties or in accordance with the rules of the arbitral institution chosen by them.\(^{57}\) 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 will decide how many arbitrators will constitute the arbitral tribunal and will have the authority to appoint those arbitrators.\(^{58}\)

Once the arbitrators have been appointed, they will elect, by majority, the president of the arbitral tribunal. Failing consensus, the seniormost will become the president.\(^{59}\)

Any individuals who are capable of exercising their civil rights may be appointed as arbitrators. However, once appointed, an arbitrator has a duty to behave competently and to act independently and impartially at all times.\(^{60}\) Under the Brazilian Civil Code, in general terms, persons less than 18 years of age, persons of unsound mind, and persons who have been declared legally incompetent by a judge because of drug or alcohol abuse or a temporary mental illness and similar forms of impaired judgment cannot exercise their civil rights.

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56 Arbitration Act, Article 13(1).
57 Arbitration Act, Article 13(4).
58 Arbitration Act, Article 13.
59 Arbitration Act, Article 13(4).
60 Arbitration Act, Article 13(6).
61 Law Number 10406 of 10 January 2002.
Challenge and Substitution

Prior to accepting an appointment, an arbitrator must disclose to the parties any facts that may be deemed to affect his impartiality or independence.\textsuperscript{62} Arbitrators may be challenged by the parties on the same grounds as judges.\textsuperscript{63} These grounds are when an arbitrator:

1. Is a party to the dispute;
2. Has acted as legal counsel or given testimony in the dispute;
3. Has rendered a decision as a judge of first instance in the same dispute;
4. Has a personal or business relationship with one of the parties or their lawyers; or
5. Is a member of the board of a corporation that is a party to the dispute.\textsuperscript{64}

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.\textsuperscript{65}

In the event of a successful challenge against an arbitrator, that arbitrator’s position will be filled by the alternate member nominated by the parties prior to the constitution of the arbitral tribunal, if one has been nominated.\textsuperscript{66} If such a nomination has not occurred, the agreed procedure for nominating arbitrators should apply.\textsuperscript{67}

Responsibilities

Arbitrators who breach the duties of impartial, independent, competent, diligent, and discreet conduct have a general obligation to compensate third parties for damages caused by negligence or willful misconduct.\textsuperscript{68}

\textsuperscript{62} Arbitration Act, Article 14(1).
\textsuperscript{63} Arbitration Act, Article 14.
\textsuperscript{64} Code of Civil Procedure, Article 134.
\textsuperscript{65} Arbitration Act, Articles 20 and 33.
\textsuperscript{66} Under the Arbitration Act, Article 13(1), when appointing an arbitrator, parties also may nominate an alternate arbitrator.
\textsuperscript{67} Arbitration Act, Articles 16 and 20(1).
\textsuperscript{68} Brazilian Arbitration Act, Article 14; Code of Civil Procedure, Article 133.
As well as civil liability for breaching these duties, the criminal law provisions that specifically apply to public servants apply to arbitrators.\(^69\) For example, under the Penal Code,\(^70\) arbitrators who do not properly exercise their function or illegally delay their duties to satisfy their interests may be penalized with a prison term of three months to one year, plus fines.\(^71\)

Fees and Immunity

The 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 their rendering the award. In practical terms, payment of a part of the arbitrators’ 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.

In institutional arbitral proceedings, each arbitral institution has its own rules governing the payment of administrative fees and the remuneration of arbitrators. For \textit{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 submission to arbitration).

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.

Competence to Rule on Jurisdiction

The arbitral tribunal is entitled to rule on its own jurisdiction, including on the existence and validity of the arbitration agreement.\(^72\) A party has ninety days from the date of receipt of the arbitral tribunal’s ruling on jurisdiction in which to request that the competent court render a decision on whether or not the arbitral tribunal has jurisdiction.\(^73\)

\(^69\) Arbitration Act, Article 17.
\(^70\) Law-Decree Number 2848 of 7 December 1940.
\(^71\) Penal Code, Article 319.
\(^72\) Arbitration Act, Article 8.
\(^73\) Arbitration Act, Articles 20 and 33(1).
Powers to Order Interim Measures

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.\(^\text{74}\) 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.\(^\text{75}\)

The Arbitration Act does not expressly deal with the situation where parties may wish to apply directly to the state courts for interim measures. It also does not expressly address any urgent interim measures of protection that may be necessary before an arbitral tribunal can be constituted.

Arbitral Proceedings

General Procedural Principles

Arbitral proceedings are deemed to commence when all the arbitrators have accepted their appointment.\(^\text{76}\) Parties are free to choose the procedure to be followed by the arbitral tribunal.\(^\text{77}\) If the parties do not agree on the procedure to be applied and have not agreed otherwise, the arbitral tribunal may choose the rules of procedure it considers most appropriate.\(^\text{78}\)

There is, however, tension between the unfettered discretion accorded by the 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 will apply.\(^\text{79}\)

The provisions of the Arbitration Act prevail over those of the Panama Convention. While international treaties ratified by Brazil have the same status as internal laws in Brazil, they are subject to the principle \textit{lex posterior derogat priori} (the later law abrogates the inconsistent earlier law).\(^\text{80}\) The national Arbitration Act was passed

\(^{74}\) Arbitration Act, Article 22.
\(^{75}\) Arbitration Act, Article 22(4).
\(^{76}\) Arbitration Act, Article 19.
\(^{77}\) Arbitration Act, Article 21.
\(^{78}\) Arbitration Act, Article 21(1).
\(^{79}\) Panama Convention, Article 3.
\(^{80}\) Recurso Extraordinário (Extraordinary Appeal) Number 80004 SE, Relator: Min. Xavier de Albuquerque, 1 October 1977, DJ PP-09433, 29 December 1977, STJJ.
after the presidential decree bringing the Panama Convention into force in Brazil.\textsuperscript{81}

Thus, in an arbitration seated in Brazil to which the Panama Convention applies,\textsuperscript{82} the arbitral tribunal may choose the rules of procedure that it considers appropriate. Nevertheless, in such circumstances, arbitral tribunals may well elect to adopt the default rule established by Article 3 of the Panama Convention and choose to adopt the procedural rules of the Inter-American Commercial Arbitration Commission.

**Seat and Language of Arbitration**

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. The seat of the arbitration must be set out in the submission to arbitration and stated in the award.\textsuperscript{83}

**Legal Consequences of Binding Arbitration Agreement**

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. Notwithstanding the existence of a valid arbitration agreement, if 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.\textsuperscript{84}

**Evidence**

As in arbitration proceedings in the United States, Brazil continues to be strongly influenced by the local civil procedure rules.

\textsuperscript{81} Statutory Instrument Number 1902 of 9 May 1996.
\textsuperscript{82} The Panama Convention applies to international commercial arbitrations between parties of the signatory states: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela.
\textsuperscript{83} Arbitration Act, Articles 10(IV) and 26(IV), respectively.
\textsuperscript{84} Code of Civil Procedure, Article 267(VII).
Consequently, many local arbitrators and counsel adopt the methods for taking evidence used before the state courts. Generally, any evidence lawfully obtained may be disclosed during the production of evidence stage of the arbitral proceedings. Apart from the principles of due process, equal treatment of the parties, and ensuring the independence of the arbitrators, there are no mandatory rules of evidence.

The arbitral tribunal may hear the testimony of the parties and witnesses and may request expert opinions or the production of evidence, either at the request of one of the parties or on its own initiative. If an arbitrator is substituted during the arbitral procedure, his substitute may, at his discretion, determine what evidence will be repeated.

Unlike general witness cross-examinations in common law practices, the standard procedure in Brazilian 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 or not the question is justified. There is no general right to conduct a full examination of a witness.

Appointment of Experts

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 also may be appointed by the arbitral tribunal, at the request of the parties or on its own initiative.

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. When the arbitral tribunal appoints its own independent expert, the parties also may appoint “technical assistants” to that expert. The technical assistants also may produce reports, which will be taken into consideration by the arbitral tribunal.

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

86 Code of Civil Procedure, Article 21(2).
87 Code of Civil Procedure, Article 22(5).
88 Code of Civil Procedure, Article 22.
may be obliged to appear in hearings to answer questions from the arbitral tribunal and/or the parties.

Confidentiality

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. There also are no rules that prevent a party from using and referring to information disclosed in other arbitral proceedings.

The parties are free to provide for confidentiality themselves through a confidentiality agreement. Many of the institutional arbitration rules in Brazil include confidentiality obligations.  

Court Assistance in Taking Evidence

Arbitral tribunals may request the assistance of the state courts to obtain evidence. For instance, an arbitral tribunal 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 behavior into account when determining the weight to be given to that witness’s evidence. 

Choice of Law

Parties are free to choose the rules that will be applied to the arbitration procedure, provided that they do not violate Brazilian public policy. Parties also may agree that the award shall be granted based on basic principles of law, common practice, or rules of international commerce. Alternatively, the parties may authorize the arbitral tribunal to decide *ex aequo et bono* (instead of pursuant to the applicable law).

89 For example, the São Paulo Chamber of Mediation and Arbitration Rules, the Arbitration and Mediation Center of the Brazil–Canada Chamber of Commerce Rules, or the Corporate Chamber of Commerce in Brazil Rules.

90 Arbitration Act, Articles 22(2) and 22(4).

91 Arbitration Act, Article 2(1).

92 Arbitration Act, Article 2(2).
Arbitral Award

Time, Form, Content, and Notification

The parties can stipulate the time frame within which the award is to be issued in the submission to arbitration. In the absence of such provision, the award is required to 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.

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. When there are several arbitrators, the decision will be reached by a majority vote. When a majority vote cannot be reached, the decision of the president will prevail.

The award itself must be in writing and must contain 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 fulfillment of obligations imposed on the parties; and the date and place of making the award.

The award must be signed by all the arbitrators. If one or more arbitrators cannot or do not wish to sign the award, the president of the arbitral tribunal must certify this fact.

Termination of Proceedings

The arbitral proceedings will terminate when the parties settle their dispute. At the request of the parties, the arbitral tribunal will record the settlement in the form of an award on agreed terms. An award on agreed terms has the same effect as any other award made by an arbitral tribunal and must comply with the requirements set out for the granting of an arbitral award.

93 Arbitration Act, Article 11.
94 Arbitration Act, Article 23.
95 Arbitration Act, Article 27.
96 Arbitration Act, Article 24(1).
97 Arbitration Act, Article 26.
98 Arbitration Act, Article 26, Sole Paragraph.
99 Arbitration Act, Article 28.
The arbitral proceedings will 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, when an arbitrator dies or excuses himself prior to being appointed and cannot be replaced).

Power to Award Interest and Costs

In the submission to arbitration, the parties can decide how future costs of the arbitration will be borne (including the arbitrators’ fees and the parties’ legal fees).

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.

The arbitral tribunal may order the parties to make deposits to cover expenses and actions as it deems necessary. 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 of costs may be limited to those costs attributable to the extent of its success.

Effect of Award

The award is effective and binding on the parties to the arbitration, as well as on their successors, in the same way as if the award were a court judgment. Under the Code of Civil Procedure, once approved, a foreign award has the same effect as a Brazilian court judgment.

The courts do not have the power to re-hear and re-decide findings of fact and law in matters between the parties that have been previously determined by an arbitral tribunal.

Correction, Clarification, and Issuance of a Supplemental Award

Within five days of receipt of an award, an interested party may file a motion for the arbitral tribunal to clarify the terms of the award. The

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100 Arbitration Act, Article 11.
101 Arbitration Act, Article 27.
102 Arbitration Act, Article 13(7).
103 Code of Civil Procedure, Article 484.
104 Arbitration Act, Article 30.
motion may request that the arbitral tribunal correct any material error and/or clarify the grounds on which the award has been determined. Less commonly, the motion may be used to request that the arbitral tribunal decide a claim presented in the arbitral proceedings that it has failed to determine in its award.

Such motions may be submitted even when the party expressly confirms that it will not be appealing the award. If the motion is accepted, the arbitral tribunal must issue the corrected award or addendum to the parties within ten days of the request.105

**Challenging and Appealing Award**

**Jurisdiction of Courts**

After the award is made, a party has ninety days from the date the award is rendered or modified to apply to the court for an order nullifying the award.106

The 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.

**Appeals**

Arbitrators act as judges of fact and law. Awards are not generally subject to appeal to the courts.107 An award may, however, be annulled under one of the limited grounds set out in Article 32 of the Arbitration Act.

**Conformity with International Practice**

**In General**

Since the constitutionality of the Arbitration Act was affirmed, Brazilian courts have emphasized that Article 7 of the Arbitration Act is not unconstitutional and have been upholding the enforcement of arbitration clauses.

105 Arbitration Act, Article 30, Sole Paragraph.

106 Arbitration Act, Article 33(1).

107 Arbitration Act, Article 18.
Once the constitutional debate was over, the Arbitration Act achieved its ultimate goal of improving the legal framework of arbitration in Brazil, but the next step is to determine whether the Arbitration Act conforms with internationally accepted standards of arbitration.

Arbitrability

The Arbitration Act provides for a wide scope of arbitrability. Article 1, which deals with arbitrability under the Brazilian law, states that persons capable of entering into contracts may avail themselves of arbitration in order to resolve disputes relating to freely transferable property rights.

Thus, anyone capable of contracting can have recourse to arbitration to resolve disputes involving rights that are deemed, under the national legal system, to be economic in nature and which may be disposed of by private persons and be subject to settlement. Under the Arbitration Act, controversies related to relevant property rights are arbitrable and, therefore, Article 1 of the Arbitration Act is in conformity with international practice.

Applicable Law

The Arbitration Act gives the parties autonomy to agree on the substantive and procedural rules that they wish to adopt. Under Article 2 of the Act, arbitration can be based on law or equity, and the parties are free to decide which legal rules will apply in the arbitration. Article 2 also states that the parties can agree that arbitration will be based on general principles of law, customs, and international commercial rules.

Nevertheless, there are two limits on the choice of applicable law: the law chosen must not violate public order, nor may it violate accepted customs and behavior. Thus, it is necessary to determine what would be considered to violate public order or accepted customs and behavior according to the Brazilian legal system.

Recognition and Enforcement of Awards

Domestic Awards

Awards rendered in Brazil are treated as domestic awards.¹⁰⁸ This is the case even when the parties have selected foreign

¹⁰⁸ Arbitration Act, Article 34, Sole Paragraph.
arbitration rules, such as the rules of the International Chamber of Commerce (ICC Rules), to govern the procedure of the arbitration.¹⁰⁹

**Enforcement of Foreign Arbitral Awards** Before the enactment of the Arbitration Act, a party that wished to enforce a foreign award would need to first have the award confirmed before the local court of the state where the award was issued. Article 34 of the Arbitration Act improved the framework of enforcement of foreign awards, providing that arbitral awards would be recognized and enforced in Brazil in accordance with international treaties ratified by Brazil. Therefore, when enforcing a foreign-issued award in Brazil, a party can rely on the New York Convention.

In addition, Article 35 of the Arbitration Act provides that foreign arbitral awards are subject only to homologation (official confirmation) by the STF. However, since the enactment of the Judicial Reform of 2004,¹¹⁰ the power of homologation has been transferred from the STF to the STJ, in order to expedite the process of recognition and enforcement of arbitral awards.

The Arbitration Act improved the framework for recognition and enforcement of foreign arbitral awards in Brazil. Foreign awards can now be enforced in Brazil even if they were not confirmed before the local court of the state where the award was issued. Nevertheless, Article 35 imposes an unusual constraint on the enforcement of foreign arbitral awards (the homologation requirement), which is not in conformity with international practice.

Article 38 of the Arbitration Act on recognition or enforcement of a foreign arbitral award states that homologation can be denied only if the defendant proves that:

1. The parties to the agreement lacked capacity;
2. The arbitration agreement was not valid under the law to which the parties had subjected it or, if no law was agreed on, under the law of the country where the award was made;
3. Proper notice was not given of the appointment of the arbitrator or of the arbitral procedure, or there was a violation of the adversarial proceedings principle, rendering full defense by a party impossible;

¹⁰⁹ Judgment Number 1231554 REsp/RJ of the Superior Court, Third Division, 24 May 2011.
¹¹⁰ Constitutional Amendment Number 45 of 2004.
(4) The arbitral award exceeded the terms of the arbitration agreement, and it is not possible to separate the portion exceeding the terms from what has been submitted to arbitration;

(5) The commencement of the arbitral proceedings was not in accordance with the submission to arbitration or the arbitral clause; or

(6) The arbitral award is not yet binding on the parties, or has been set aside or has been suspended by a court of the country in which the arbitral award was issued.

Enforcement of Arbitration Agreements

Brazilian national courts still play a role in international arbitration, and it is therefore important to see how Brazilian courts are interpreting the Arbitration Act and whether they are following the internationally accepted standards of arbitration. The courts are excluded from exercising jurisdiction over disputes that the parties have agreed to submit to arbitration. However, the Brazilian Arbitration Act gives the courts limited jurisdiction to provide legal assistance to the arbitral process in certain circumstances.

In addition to the courts’ powers to enforce interim measures in relation to the appointment and challenge of arbitrators, the courts also have the power to determine whether the agreement is null and void, inoperative, or incapable of being performed. The courts also may assist in the enforcement of interim measures rendered by the arbitral tribunal.

Dismissal of Court Proceedings

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 issuing a decision on the merits.\textsuperscript{111}

If the court fails to terminate the proceedings, the respondent can raise the existence of the arbitration agreement as a defense.\textsuperscript{112} The court will terminate the proceedings unless it considers the arbitration agreement to be null and void, inoperative, or incapable of being performed.

\textsuperscript{111} Code of Civil Procedure, Article 267(VII).

\textsuperscript{112} Code of Civil Procedure, Article 301(IX).
Role of Courts and Evolving Case Law

Court Intervention in Arbitration

Under Brazilian law, there are three stages at which the courts could intervene in an arbitration. First, under Article 7 of the Arbitration Act, national courts could intervene at the beginning of the arbitral process to enforce the arbitration clause, provided that the arbitration agreement refers to an “empty arbitral clause”. 113

Second, a national court may intervene during the arbitral proceedings. This would be the case, for example, when the competent court is called upon to compel the attendance of a reluctant witness.

Third, the competent court may intervene after an award has been rendered. Article 33 of the Arbitration Act gives the courts a mechanism of control by granting to the interested party the right to apply to a state court to set aside the award. Nevertheless, Article 32, which deals with the grounds for setting aside an award, only deals with formal aspects related to the validity of the arbitral award, arbitral proceedings, or the arbitration agreement. Thus, the courts have no power to review the award on its merits.

Applications to Set Aside/Vacate Award

An application for setting aside an award must be submitted to the relevant court within ninety days of the award being granted. 114 An award may be challenged before the competent court and set aside for any one (or more) of several reasons. 115 The grounds for challenging or setting aside an award are:

1. The arbitration agreement is null and void, inoperative, or incapable of being performed;
2. The award has been issued by one or more individuals who are not capable of acting as arbitrators;
3. The award does not comply with the requirements provided in the Arbitration Act;
4. The award extends to issues that fall outside the scope of the arbitration agreement;
5. The award does not decide all the issues submitted to the arbitral tribunal for resolution;

113 An “empty arbitral clause” is open, vague, or fails to provide the details referring to applicable arbitral rules, appointment of arbitrators, and similar details.
114 Arbitration Act, Article 33(1).
115 Arbitration Act, Article 32.
(6) It can be proved that the award was rendered under illegal circumstances (such as extortion or corruption);
(7) The award was issued after the agreed time limit; or
(8) An arbitrator failed to act impartially or independently when rendering the award or disregarded the obligation to treat the parties equally.

The competent state court may either declare the award null and void in the case of grounds (1), (2), (6), (7), and (8), or order the arbitral tribunal to make a new award. An award has the same effect as a final, binding, and non-appealable court judgment. The court which has jurisdiction for enforcement is the local court where the arbitration procedure was held, except in the case of a foreign award.

**Enforceability of Foreign Awards**

Awards rendered outside Brazil are enforceable in Brazil according to the international treaties ratified by Brazil (principally, the New York Convention). The grounds for refusal set forth in the Arbitration Act 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.

The provisions of the New York Convention are in force in Brazil and apply to the recognition and enforcement of foreign awards. As Brazil has not made any reservations to the New York Convention, all foreign awards should, in principle, be recognized and enforced in Brazil under the New York Convention (even if made in the territory of a non-signatory state). In the absence of any applicable treaty, foreign awards will be recognized and enforced in accordance with the rules provided in the Arbitration Act.

Foreign awards are subject to approval by the STJ. The STJ will approve the award only when it can be confirmed that:

1. The parties to the arbitration agreement had legal capacity;
2. The award was rendered under legal circumstances; and
3. The award was issued within the agreed time limit.

The current status of the Convention is available at [http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html). Although jurisdiction to hear approval applications was transferred from the STF to the STJ under the Judicial Reform of 2004, the text of the Arbitration Act has yet to be amended to reflect this change.
(2) The arbitration agreement is valid according to the law to which the parties have subjected it or, in the absence of an express choice of law, according to the law of the place where the award was issued;

(3) The respondent was given proper notice of the arbitration procedure, including the right to submit its defense;

(4) The award did not exceed the scope of the arbitration agreement (unless it is possible to sever the part exceeding the scope from the valid part of the award);

(5) The award is duly enforceable and has not been set aside or suspended by a court of the jurisdiction in which it was issued;

(6) The award does not involve a dispute which, according to Brazilian law, may not be resolved by means of arbitration; and

(7) The award is not contrary to Brazilian public policy.

Once the award has been approved by the STJ, it will be enforced by a lower Brazilian federal court. The approval process renders the award public.

**Special Provisions and Considerations**

**Consumers**

Under Article 4(2) of the Arbitration Act, an arbitration clause in an adhesion contract will have effect if the weaker party initiates the arbitration. Accordingly, a consumer (as the weaker party) will not be bound by any arbitration agreement in an adhesion contract unless the consumer expressly agrees to arbitration by means of an attached written document, or if the consumer signs or initials the corresponding contractual clause, inserted in boldface type.\(^{121}\)

As established in *Companhia Paranaense de Gás (Compagas) vs. Consórcio Carioca-Passarelli*,\(^{122}\) the principle of legality will no longer be an obstacle to arbitration. In this case, the court held that the dispute could be arbitrated because there was a Brazilian law (Brazilian Petroleum Act 1997) which authorized Compagas to arbitrate disputes. This case also dealt with the principle of arbitrability, and it was held that the distribution of gas is an economic and commercial activity, governed by rules of private law, and did not involve the public interest. Thus, there was no obstacle to the arbitrability of the dispute.

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\(^{121}\) Arbitration Act, Article 4(2).

\(^{122}\) TACiv.PA, 3 RBA 170.
State-Owned Entities

Brazilian courts are now accepting arbitration clauses with state companies, even if there is no legislative authorization. In a landmark case regarding the validity of arbitration clauses with mixed-capital companies (i.e., companies with both private and public capital), AES Uruguaiana vs. Companhia Estadual de Energia Elétrica (CEEE), the STJ, for the first time, ruled in favor of the submission of claims involving mixed-capital companies to arbitration, rejecting the claim that these types of companies would require specific legislative authorization to enter into arbitration agreements.

On the one hand, international commercial arbitration involving a state entity is still a complex issue in Brazil, but this also is true in many countries around the world. On the other hand, Brazilian courts are now willing to recognize arbitration agreements with mixed-capital companies, even if there is no legislative authorization.

Enforcement of Arbitration Clauses

Brazil used to require a compromisso, which is a reaffirmation by the parties to submit their dispute to arbitration. Consequently, before the enactment of the Arbitration Act, an arbitral clause in any agreement between the parties would itself not be sufficient to ensure that arbitration would be the method of dispute settlement. Article 3 of the Arbitration Act clearly provides that parties may submit the settlement of their disputes to arbitration by virtue of an arbitration agreement, which may be in the form of either an arbitration clause or a submission to arbitration.

Nevertheless, because of the debate regarding the constitutionality of the Arbitration Act, the issue as to whether Brazilian law would still require a compromisso was not clear until the decision of the STF in 2001 upholding the constitutionality of the Arbitration Act.

Since this decision, the courts have, with few exceptions, consistently enforced arbitration clauses in commercial contracts. Hence,

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the Arbitration Act also is in conformity with internationally accepted standards on the enforcement of arbitration clauses.

Autonomy of Parties

Today, it is clear that the Brazilian courts recognize and respect the principle of autonomy of the parties. For example, in Total Energie, SNCD vs. Thorey Invest Negócios Ltda,¹²⁵ the Civil Court of Appeals of the State of São Paulo clarified that Article 2 of the Arbitration Act prevails over Article 9 of the Introductory Law to the Civil Code that establishes the conflict-of-law rules under the Brazilian legal system.

Article 9 of the Introductory Act to the Civil Code states that international contracts are subject to the law of the place in which they were formed (lex loci contractus). Accordingly, the conflict-of-law rules would apply only if the parties to an arbitration agreement do not choose the applicable law in their contract. The decision in Total Energie shows that the courts in Brazil are willing to respect the principle of autonomy of the parties, which will prevail over national conflict-of-law rules.

Other decisions from the STJ, as well as a number of decisions from different state courts throughout Brazil, demonstrate the positive attitude of Brazilian courts toward arbitration. In Unibanco União de Bancos Brasileiros SA (Brazil) vs. Dailby SA (Brazil),¹²⁶ the Court of Appeals of Rio Grande do Sul decided that it was not competent to hear the case because there was an arbitration clause and the Arbitration Act respected the will of the parties who voluntarily chose arbitration as a method of dispute resolution.

Similarly, in Carlos Alberto de Oliveira Andrade vs. Renault do Brasil Comércio e Participações Ltda,¹²⁷ the Court of Appeals of São Paulo emphasized that the existence of a valid arbitration clause is sufficient to compel the court to dismiss the action.¹²⁸ The STJ confirmed that the lawsuit could not continue due to the existence of an arbitration agreement. This case made it clear that there is no need to enter

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¹²⁵ Agravo de Instrumento Number 1.111.650-0 — 1 Tribunal de Alçada Civil de São Paulo.
¹²⁸ Also relevant is International Cotton Trading Ltd ICT vs. Odil Pereira Campos Filho, SEC 1.210/GB, Relator: Min. Fernando Goncalvez, 20 June 2007, STJJ.
into a *compromisso* when there is an arbitration clause which indicates the rules applicable to the proceedings.

In *Tractebel Energia SA vs. Petróleo Brasileiro SA Petrobrás*, the STJ again emphasized that whenever there is an arbitration clause, the courts must always make reference to the arbitration clause concluded by the parties and should refer the parties to arbitration.

**Retroactive Effect**

Furthermore, it is now widely accepted that the Arbitration Act has retroactive effect and applies to arbitration agreements signed before it entered into force in 1996. For example, in *Mitsubishi Electric Corp. vs. Evadin Indústrias Amazônia SA*, the Brazilian party argued that the arbitral agreement was concluded before the Arbitration Act entered into force and therefore a submission to the arbitration agreement was required to validly commence the arbitration proceedings.

The STJ dismissed the arguments of the Brazilian party and granted the request for homologation (official recognition) of the Japanese arbitral award, confirming that the Arbitration Act should be applied to arbitration agreements concluded before 1996.

**Interim Protective Measures**

Courts in Brazil have jurisdiction to grant interim protective measures in support of arbitral proceedings both before and after the constitution of the arbitral tribunal. 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 interim measures.

For example, the Rio de Janeiro Court of Appeals granted conservatory measures in support of the arbitration procedure when the tribunal was not yet constituted. In another case, the STJ granted an interim measure in order to suspend a Special Recourse until the

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129 STJ *Recurso Extraordinário* Number 954.065, Relator: Min. Ari Pargendler, 13 May 2008, STJJ.
decision of the court, holding that the competence to solve the dispute belongs to the arbitral tribunal.\textsuperscript{132}

In \textit{Itaruma vs. PCBIOS},\textsuperscript{133} the plaintiff, PCBIOS, sued the defendant Itaruma and made a motion for provisional relief before the first-instance judge, prior to the constitution of the arbitral tribunal. The first-instance judge denied the request. On appeal, the Court of Justice of Rio de Janeiro reversed and granted the injunction. However, the arbitral tribunal had by then already been constituted, with the terms of reference being signed by both parties under the ICC Rules. The Court stated:

\begin{quote}
\ldots the arbitration agreement \ldots has a relative nature with regard to measures of an urgent character as a consequence of the very will of the parties, and therefore does not deprive the co-contracting parties of their ability to seek resolution of those issues in the judicial forum, under penalty of violation of the \textit{pacta sunt servanda} principle and the right of access to the judiciary.\end{quote}

On further appeal to the STJ, the issue was whether the Court had concurrent jurisdiction to issue provisional interim measures regarding a dispute that was covered by an arbitration agreement. It is generally recognized that unless otherwise agreed, parties may resort to either the arbitrators or a court in order to obtain provisional relief as a safeguard to the arbitral process. Concurrent jurisdiction of courts to grant interim measures is justified on the following grounds:

\begin{quote}
\ldots parties to an arbitration agreement should not be deprived of the benefit of emergency measures available from the courts. It is considered more effective to apply to the courts where emergency measures are needed, both because the courts will hear an application as a matter of urgency, and because their decisions will be readily enforceable.\textsuperscript{134}\end{quote}

The STJ recognized the power of a court to issue provisional interim measures upon the request of a party to an arbitration agreement prior

\begin{itemize}
\item \textsuperscript{132} Lee, \textit{Petrobras vs. Tractebel Energia & MSGAS}, STJ, Case Number AgRg MC 19.226-MS (2012/0080171-0), 29 June 2012, in \textit{A contribution by the ITA Board of Reporters}, Kluwer Law International (31 October 2012).
\item \textsuperscript{133} STJ judgment of 12 June, Resp. 1.297.924-RJ (2011/0240991-9), Relator: Min. Nancy Andrighi.
\item \textsuperscript{134} Fouchard, Gaillard, \textit{Goldman on International Commercial Arbitration} (1999), at p. 711.
\end{itemize}
to the constitution of the arbitral tribunal, but not subsequently; the Court reserved the power of enforcement of any such measures to state courts. The Court has not mentioned the possibility of the parties entrusting an emergency arbitrator with the power to grant provisional relief, which is provided for in Article 29 and Appendix V of the ICC Rules 2012, unless the parties opt out, and was previously enshrined in the 1990 ICC Rules for Pre-Arbitral Referee Procedure.

The STJ decision in *Itaruma vs. PCBIOS* sets a benchmark for lower courts in matters concerning interim provisional measures in relation to arbitration. It reinforces the STJ’s reputation as an arbitration-friendly court and Brazil’s reputation as one of the friendliest jurisdictions for arbitration in Latin America.

*Itaruma vs. PCBIOS* affirms the jurisdiction of Brazilian courts to grant provisional measures before the arbitral tribunal is composed, subject to the latter’s ratification, while denying jurisdiction for the same purpose when the arbitral tribunal has been composed. While not completely in line with current international standards, the decision positively supports the jurisdiction of the arbitral tribunal to issue provisional measures in light of an all-but-clear provision of Brazilian law. The overall tone of the decision demonstrates that the STJ has kept an open mind to those legal scholars and practitioners who have promoted the growth of international arbitration in Brazil.

The approach adopted by the UNCITRAL Model Law on International Commercial Arbitration is in accordance with the principle of concurrent jurisdiction. Article 9 of the UNCITRAL Model Law states that a party does not waive its rights under an arbitration agreement by resorting to a court and seeking an “interim measure of protection”, either before or during the course of the arbitration. Article 17J of the UNCITRAL Model Law states that a court has the same power to issue an interim measure as it has in relation to court proceedings, but “shall exercise such power . . . in consideration of the specific features of international arbitration”.

Brazilian law, however, is not particularly clear on the power of either courts or arbitrators to issue interim relief measures in relation to matters the parties have agreed to submit to arbitration. Article 22(4) of the Arbitration Act states that “should there be need of coercive or protective measures, the arbitrators will be entitled to request them from the judicial court which would originally be competent to

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adjudicate the cause”. Article 22(4) also can be interpreted the other way around, as meaning that only the arbitrators are entitled to “request” interim measures to be enforced by a court, thereby excluding the jurisdiction of courts to issue provisional measures themselves in relation to arbitration.

The second interpretation also is incorrect in light of the internationally accepted principle of concurrent jurisdiction; while a lot less harmful to arbitration than the former interpretation, it can give rise to an alarming situation for parties whenever the arbitral tribunal is not in a position to grant urgent relief, particularly before its constitution.

There is a need for a high-ranking court to clarify the understanding of the provision of Article 22(4) in order to guarantee that arbitrators would not be deprived of their inherent power to issue interim measures in international arbitrations held in Brazil or in domestic arbitrations. Accordingly, the Arbitration Act should be interpreted as only requiring that the enforcement of such measures be conducted by a state court when they are granted by the arbitrators.

In addition, Article 39 of the Arbitration Act provides that the STJ may only homologate a foreign arbitral award when the subject matter can be resolved by arbitration in accordance with the Arbitration Act and when recognition or enforcement of the award would not be contrary to Brazilian public policy.

Recognition of Foreign Awards

In the majority of cases, the STJ has decided to recognize and enforce foreign arbitral awards. There are only a very limited number of...
cases in which the STJ has refused recognition and enforcement of an arbitral award, such as in a case where there was no signature on the arbitration clause, which was held to violate the principle of autonomy of the parties and was against the public order.\(^\text{137}\)

Nevertheless, a study on international arbitration prepared by PriceWaterhouseCoopers found that respondents experienced difficulties in the recognition and enforcement of foreign arbitral awards in Brazil,\(^\text{138}\) and the homologation requirement under the Arbitration Act unarguably makes the process of recognition and enforcement of arbitral awards more complicated.

In *Spie Enertrans SA vs. Inepar SA Indústria e Construções*,\(^\text{139}\) the Brazilian defendant argued that the arbitration agreement was entered into prior to the Arbitration Act coming into force and therefore the arbitral award should be homologated by the court of the place of arbitration. The STJ, once again, dismissed the party’s arguments and held that an arbitration agreement concluded prior to the enactment of the Arbitration Act need not meet the double homologation requirement. The court also held that an arbitration agreement survives a company’s acquisition, as the buyer acquires all rights and obligations of that company, including any arbitration agreements concluded before the acquisition.

In *L’Aiglon SA Textil União SA*,\(^\text{140}\) an arbitral award required a Brazilian company to pay US $90,000,000 to a Swiss company. When the Swiss company submitted a claim to the Brazilian court for recognition of the award, the Brazilian company raised the argument that it had not signed the relevant arbitration clauses. However, the STJ dismissed the argument of the Brazilian company because neither the Arbitration Act nor the New York Convention requires the signature of the parties in order to constitute a valid arbitration agreement.\(^\text{141}\)

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\(^{139}\) STJ, SEC 831/FR, Relator: Min Arnaldo Esteves Lima, 3 October 2007, DJ 19 November 2007, 396 REVFOR 333, STJJ.


\(^{141}\) This was the first case in which the New York Convention was applied since Brazil’s ratification of the Convention in 2002.
The participation of the Brazilian party in the arbitration process was sufficient to amount to acceptance of the arbitration clause. The Brazilian party could have invalidated the arbitral proceeding if it had objected to it at the inception of the case. These cases demonstrate that the Brazilian courts are not trying to find excuses to “protect” Brazilian parties.

Non-Signatories Bound to Arbitrate

Another issue that has been raised before Brazilian courts is whether a non-signatory to the arbitration agreement can be compelled to arbitrate. In this area, Brazilian courts have again demonstrated a favorable attitude toward arbitration.

_Trelleborg do Brasil Ltda vs. Anel Empreendimentos Participações e Agropecuaria Ltda_\(^\text{142}\) was the first case in which Brazilian courts dealt with the extension of arbitration clauses to a parent company that was a non-signatory to the agreement with its subsidiary. The Court of Appeals of São Paulo found that the arbitration agreement was binding on a Swedish parent company in light of its “active participation”, “clear involvement”, and “interest in the outcome” of the acquisition negotiations and therefore required its participation in the arbitral proceedings.

In _Chaval vs. Liebherr_,\(^\text{143}\) the STJ upheld the decision by the Court of Appeals of Rio de Janeiro dismissing a lawsuit and enforcing an arbitration agreement against a non-signatory to that agreement. Both decisions can be regarded as very pro-arbitration and might be regarded as a new trend in Brazilian jurisprudence.\(^\text{144}\)

Motions to Vacate Awards

Moreover, Brazilian courts are reluctant to interfere with the decisions of arbitral tribunals. For example, in _International Cotton Trading Ltd. vs. Odil Pereira Campos Filho_,\(^\text{145}\) the STJ held that it did not need...

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142 TJSP, Apelacao Civil Number 267.450.4/6-00, Relator: Des. Constança Gonzaga, 24 May 2006, TJSP.
143 STJ, Recurso Extraordinário Number 653.733, Relator: Min. Nancy Andrighi, 3 August 2006, STJ.
144 A discussion on the attitude of Brazilian courts regarding the enforcement of arbitration agreements involving non-signatories is provided in Gomm-Santos, “What’s New in Latin American ADR?”, 65/1 Disp. Resol. J. (2010) 17.
145 STJ, SEC 1.210/EX, Relator: Min. Fernando Gonçalves, 20 June 2007, STJ.
to review the merits of an arbitral award, but simply considered whether the formal requirements of the Arbitration Act were met. In *Bouvery International SA vs. Valex Exportadora de Café Ltda.*, the STJ again refused to review the merits of a foreign arbitration award. In *Grain Partners vs. Coopergrao*, the STJ also dismissed a claim to interfere with the merits of the award.

In *Kia Motors Corporation vs. Washington Armenio Lopes, et al.*, the STJ recognized an ICC award rendered in New York, despite two defendants’ objections over lack of notice of the arbitration.

### Recognition of Arbitrators’ Authority

Brazilian courts also recognize and respect the powers of arbitrators. For example, in *Mineração Gypsum Brasil Ltda vs. Focco Engenharia Meio Ambiente*, the Court of Appeals of Minas Gerais held that arbitrators have full jurisdiction to grant conservatory measures once the arbitral tribunal is constituted.

In *UNIBANCO União de Bancos Brasileiros S/A vs. IDAIBY S/A*, the Rio Grande do Sul Court of Appeals reversed a decision that had suspended an arbitral procedure, holding that the validity of an arbitration agreement is within the arbitral tribunal’s jurisdiction.

### Disputes Involving Bankrupt Entities

Brazilian courts now also accept the arbitrability of disputes involving bankrupt or insolvent companies. In *Interclínicas Planos de Saúde SA vs. Saúde ABC Serviços Médicos Hospitalares Ltda*, the STJ confirmed the arbitrability of disputes involving companies in liquidation.

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147 STJ, SEC 349/IT, Relator: Min. Gilson Dipp, 18 October 2006, DJ 13 November 2006, STJJ.
151 STJ, Medida Cautelar (Injunction) Number 14295, Relator: Min. Nancy Andrighi, 8 June 2008, STJJ.
and engaged in bankruptcy proceedings, provided that the parties had capacity under Article 1 of the Arbitration Act and that the arbitration agreement was executed before the liquidation.

Soon after this decision, the Court of Appeals of São Paulo stated that there was nothing prohibiting the submission of disputes involving bankrupt companies to arbitration, provided that the arbitration agreement was concluded before the declaration of bankruptcy.  

Arbitration Involving Sovereign Party

Arbitration involving a sovereign party has always been subject to considerable controversy. This is particularly true in Brazil, where there has been long-standing opposition in some quarters to the use of arbitration to settle disputes involving state companies or public utility concessionaries. Such opposition still exists in Brazil, but the law has continued to develop, particularly with the enactment of specific national laws related to state activities which provide for arbitration.

The Lage case was a landmark decision from the early 1960s regarding immunity of a state entity. In this case, the STF unanimously confirmed and validated an arbitration procedure in which the Federal Union was ordered to pay indemnification. Subsequently, at the end of the 1980s, Brazilian courts dismissed arguments based on jurisdictional immunity through a decision of the STF.

Thus, Brazil no longer takes an absolute approach toward immunity, but follows the restrictive doctrine of immunity, according to which a state or an entity owned or controlled by a state can only plead immunity for ius imperium acts (state governmental acts), but not for commercial activities.

However, the enforcement of an arbitration clause when the dispute involves the state or a state-owned or state-controlled entity is not straightforward. Since the decision in the 1980s, the immediate conclusion would be that if the state or state entity is not acting ius

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152 Jackson Empreendimentos Ltda vs. Diagrama Construtora Ltda, TJP. Ag.I. Number 531.020-4-3-00, Relator: Des. Pereira Calcas, 25 June 2008, TJSP.
imperium, it cannot rely on the doctrine of sovereign immunity to oppose the enforceability of an arbitration clause. Nevertheless, there are two principles present in the Brazilian Constitution that could hinder the enforcement of arbitration involving a state or a state entity: the principle of legality and the principle of arbitrability.\textsuperscript{156}

Article 37 of the Federal Constitution of Brazil, which provides for the principle of legality, states that the disposition of public assets and rights is always subject to prior legislative authorization. Accordingly, under the principle of legality, a state-owned company can only be a party to arbitration if there is a statutory provision by which it consents to the referral to arbitration. According to the principle of arbitrability, the government can agree to arbitration only with respect to “relevant assets”.

Prior case authority in Brazil indicates that the courts take a strict approach when applying these two principles in arbitration involving a state or a state-owned company. For example, in Companhia Estadual de Energia Elétrica (CEE) vs. AES Sul Distribuidora Gaúcha de Energia e Outros,\textsuperscript{157} the court held that a company controlled by the government could not be subject to arbitration because public-related matters are not “relevant assets” within the meaning of Article 1 of the Arbitration Act.

In Companhia Paranaense de Energia (Copel) vs. UEG Araucária Ltda,\textsuperscript{158} the Court of Appeals of Paraná applied both the principle of legality and the principle of arbitrability. The court held that, according to the principle of legality, Copel could not arbitrate disputes without express authorization, as it was a company controlled by the government. Applying the principle of arbitrability, the court held that contracts entered into with the public administration could not be arbitrated, as they involved the public interest and therefore the rights in question were not freely transferable rights within the meaning of Article 1 of the Arbitration Act.

Despite decisions demonstrating that the principles of legality and arbitrability can be barriers to arbitration, evolving legislation and case law also show that disputes involving a state-owned or a state-controlled company can be arbitrated. National laws expressly

\textsuperscript{157} JF 2 Porto Alegre, 18 RDBA 389. This case went to the STJ, but the parties agreed on a settlement and withdrew the case.
\textsuperscript{158} TJPR, Medida Cautelar Preparatória (Preparatory Injunction) 160213-7, Relator: Des. Ruy Fernando de Oliveira, 15 June 2004, DJ 22 June 2004 11, TJPRJ.

The Brazilian Public-Private Partnerships Act expressly authorizes the use of arbitration with public entities, provided that three requirements are met: the arbitration proceedings must be held in Brazil, must be conducted in Portuguese, and must comply with the Arbitration Act.

While these restrictions might not be ideal from the perspective of international arbitration, they also can be found in other jurisdictions. The amendment to the General Law on Concessions\(^\text{159}\) allowed the use of arbitration as a method of dispute resolution in concession contracts. The Law on the Restructuring of Water and Land Transport\(^\text{160}\) stipulates that concession contracts and bidding documents in this public sector should contain rules on the resolution of contractual disputes, including resolution through conciliation and arbitration.

When dealing with arbitration involving state entities, Brazilian courts are now willing to recognize arbitration agreements with mixed-capital companies, even if there is no legislative authorization.\(^\text{161}\)

**Current Status of Case Law**

In general, the Brazilian courts have adopted a very pro-arbitration approach, and most of the decisions respect the general principles of arbitration and reflect the internationally accepted standards of international commercial arbitration. While there will always be some unfortunate decisions handed down, these will, hopefully, be reversed as Brazilian judges become more familiar with the Arbitration Act and the practice of arbitration.

Nevertheless, there also have been some unfortunate decisions that hark back to the standards of the Calvo and Drago doctrines. For

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\(^{159}\) By Law Number 11196 of 2005.

\(^{160}\) Law Number 10223 of 5 June 2001.

example, in *Itiquira Energética SA vs. Inepar Indústria e Construções*, the Court of Appeals of Paraná decided that because the parties did not conclude a submission to arbitration, the arbitration agreement was not valid. The court made this ruling even though the Arbitration Act states that a submission to arbitration is no longer required if there is an arbitration agreement. This case has been widely criticized, as it goes against the established case law, which does not require a submission to arbitration if there is an arbitration clause indicating the procedural law.

**Current Arbitration Scenario in Brazil**

As discussed in this chapter, the legal framework of international commercial arbitration in Brazil has changed dramatically since 1996, particularly after 2001, when the constitutional validity debate was resolved, and after the Brazilian Congress approved the ratification of the New York Convention in 2002. Since then, arbitration has developed rapidly in Brazil, with a substantial growth in the number of arbitrations involving Brazilian parties. For example, the 2007 ICC Report showed that Brazilian and Mexican parties were once again the most prolific users of ICC arbitration in Latin America. Brazilian parties were involved in thirty-five arbitrations (seventeen as claimants and eighteen as respondents) in 2007, compared with only five in 1998. The same ICC study indicated that Brazil is now considered favorably as a place of arbitration.

The 2007 ICC Report also showed that there had been an increase in the number of arbitrators from Latin America in 2007, due to a significant increase in the number of Brazilian arbitrators. In fact, Brazilian arbitrators were ranked seventh in the list of the most frequently used arbitrators. Since then, there has been a steady increase in the use of commercial arbitration as an alternative means to solving complex international and domestic disputes in Brazil. A recent research report identifies twenty-eight “leading individuals who are commended both as arbitrator and as counsel” in commercial arbitration.

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The most commonly chosen places of arbitration in 2007 were France, Switzerland, the United Kingdom, and the United States. Brazil was ranked eighth in that list, demonstrating that Brazil is increasingly being considered as a place for international arbitration.\textsuperscript{164}

On 18 June 2013, the ICC International Court marked the growing importance of arbitration in Brazil by organizing the 2013 ICC Brazilian Arbitration Day in São Paulo. This conference was dedicated to arbitration in Brazil, with particular focus on Brazilian case law. As the program for the conference states:

“\textquote{The success of any country as a seat of international arbitration depends largely on the attitude of its judiciary toward arbitral work. Brazil has experienced a general progressive acceptance of arbitration by its courts, facilitating the blossoming of a more harmonious relation between the judiciary and arbitration in general. Evidence to this is the increase in recent years of Brazilian-related cases handled by the ICC International Court of Arbitration. The figures are quite impressive: in 2012, Brazil was the seventh most chosen seat in ICC arbitration. 82 Brazilian parties took part in these proceedings, which represents 42 per cent or all Latin American parties involved last year in ICC arbitration and ranks Brazil as the fourth country with more users of ICC arbitration, only behind USA, Germany, and France.\textsuperscript{165}}

Brazil has now opened its doors to arbitration. There are a number of arbitral institutions now established in Brazil, such as the CBAr, which is a respected institution comprising Brazilian and international arbitration specialists focused on the development of arbitration in Brazil, and the National Institute of Mediation and Arbitration.

Moreover, the Brazilian legal community is becoming more interested in learning about arbitration; a number of arbitration conferences have taken place in Brazil; and the legal scholarship in Brazil regarding arbitration is growing, all of which demonstrates that the prior hostility toward arbitration is no longer an issue in Brazil.

\begin{footnotes}
\item[164] Brazil was selected as the place of arbitration fourteen times during 2007.
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Conclusion

It is now clear that Brazil is no longer the “black sheep” of Latin America when it comes to arbitration. The statistics from the ICC demonstrate that Brazil is actively involved in international arbitrations and is now considered favorably as a place of arbitration. Brazil can now be regarded as an arbitration-friendly country.

The case law that is developing in Brazil is in line with the globally accepted standards of international arbitration. All things considered, the future of arbitration in Brazil is very promising.

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