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PREFACE

Following the success of the fifth edition, we are pleased to present the sixth edition of *Global Legal Insights – International Arbitration.* The book contains 32 country chapters, and is designed to provide general counsel, government agencies, and private practice lawyers with a comprehensive insight into the realities of international arbitration by jurisdiction, highlighting market trends and legal developments as well as practical, policy and strategic issues.

In producing *Global Legal Insights – International Arbitration*, the publishers have collected the views and opinions of a group of leading practitioners from around the world in a unique volume. The authors were asked to offer personal views on the most important recent developments in their own jurisdictions, with a free rein to decide the focus of their own chapter. A key benefit of comparative analyses is the possibility that developments in one jurisdiction may inform understanding in another. I hope that this book will prove insightful and stimulating reading.

Joe Tirado
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Brazil

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The Brazilian Arbitration Act[1, 2]

The Brazilian *lex arbitri* can be considered a modern arbitration legislation when compared with other legislations abroad. Federal Law No. 9,307 of 23 September 1996 (the Brazilian Arbitration Act) has been constructed and modernised based on several advanced legislations, and its main sources are the UNCITRAL Model Law on International Commercial Arbitration and the Spanish Arbitration Law of 1988. Furthermore, the New York Convention of 1958, which was ratified by the Brazilian government on 23 July 2002, and the Convention of Panama of 1975 have also played a paramount role in the development of an arbitration-friendly legal framework in Brazil.

The Brazilian Arbitration Act is also satisfactory when it comes to the parties' freedom in choosing the features of the arbitration procedure, such as the language of the procedure, and whether or not to submit the arbitration to the rules of an institutional arbitration body or specialised entity.

The institutional arbitration, that is, the arbitration administered by – and under the rules of – an arbitration institution, is widely used in Brazil. No less than a dozen well-established arbitration institutions have been settled in Brazil, many of which are private, and some of which are dedicated to handling disputes within specific sectors and professions, such as real estate, energy or engineering. Bilateral chambers of commerce also keep key arbitration institutions in Brazil.

Some of the most reliable domestic dispute resolution institutions that manage a large number of proceedings in Brazil are:

a. the Arbitration and Mediation Centre for the Brazil–Canada Chamber of Commerce (CAM–CCBC), which is the oldest arbitration centre in Brazil, created in 1979;
b. the Conciliation, Mediation and Arbitration Chamber for the Centre/Federation of Industries of the State of São Paulo (CIESP/FIESP);
c. the Arbitration and Mediation Centre of the American Chamber of Commerce (AMCHAM);
d. the Business Mediation and Arbitration Chamber (CAMARB);
e. the Mediation and Arbitration Chamber of the Getúlio Vargas Foundation (FGV);
f. the Brazilian Centre for Mediation and Arbitration (CBMA);
g. the Market Arbitration Chamber of the Futures and Commodities Exchange and the São Paulo Stock Exchange – BM&F/BOVESPA (CAM-B3); and
h. the Mediation and Arbitration Chamber of the Commercial Association of the State of Paraná (ARBITAC).

These institutions follow almost all of the best international guidelines and standards, ensuring equal participation of the parties throughout the proceedings as well as the impartiality and independence of arbitrators.

In addition, there are no major difficulties in holding an arbitral proceeding in Brazil under the rules of the well-known international institutions, including: the International Court of Arbitration of the International Chamber of Commerce (ICC); the International Centre for Dispute Resolution of the American Arbitration Association (ICDR/AAA); the London Court of International Arbitration (LCIA); and the China International Economic and Trade Arbitration Commission (CIETAC), among others. In these cases, although the arbitration is handled by an international institution, the award will be considered national as long as it is rendered in Brazil, according to the *ius solius*, which is the criterion elected by Brazilian law to determine whether an award is domestic or foreign. The development of international arbitration in Brazil is also noted due to the recent opening in Brazil of an ICC International Court of Arbitration's office to administer Brazilian arbitrations.[3] "*The augmented presence of the Court Secretariat in São Paulo is a direct response to an ever-expanding Latin America arbitration market and a continuation of our efforts to bring ICC Arbitration services even closer to users in Latin America and beyond*", said the ICC Court President Alexis Mourre.[4]

The Brazilian Arbitration Act also allows the parties to establish the seat of arbitration, which is the place where the award will be rendered. It can be said that there is practically no difference between national and international arbitration under Brazilian legislation once the same law applies to national and international arbitrations. In fact, the only distinction is that awards rendered within Brazilian territory are immediately effective, while decisions handed down outside of Brazil must be recognised by the Superior Court of Justice in order to be enforceable in Brazil. The recognition proceeding is limited to verifying formal aspects of the foreign award in light of Brazilian sovereignty, public order and the principle of dignity of human beings. The merits of a foreign award are not revisited. Even so, recent studies show that the average time to have a foreign award recognised by the Superior Court of Justice is 18 months.

The international award in Brazil: the New York Convention of 1958 and its contributions to the Brazilian arbitration framework

Whilst the New York Convention was belatedly signed by Brazil, the success of its terms have been scarcely noticed.

In effect, the Brazilian Arbitration Act goes along the same lines of the New York Convention on establishing the cases where an international award **will not** be recognisable and enforceable in Brazil, rather than defining the cases where the award **will** be recognisable and enforceable. Undoubtedly, this option of Brazilian lawmakers expresses the same rational established in the New York Convention, which is the spirit in favour of the arbitration. Past rulings of the Superior Court of Justice, the court responsible for recognising and enforcing foreign awards, have undisputedly been *pro*-arbitration, which also helps to build an arbitration-friendly environment in Brazil.

The Superior Court of Justice, in the process of recognising and enforcing an award, will analyse whether or not the formal requirements to make an award enforceable in Brazil have been satisfied under the Brazilian Arbitration Act. As explained, the requirements of the Brazilian Arbitration Act are the same as those provided by the New York Convention. Therefore, a defendant cannot raise merit-based defences or any other defences related to

the scope of a foreign award. The analysis of the Superior Court of Justice is solely formal. However, it should be emphasised that the Superior Court of Justice will entertain the merits of the foreign award when it is not in accordance with the above-mentioned principles of national sovereignty, public policy and the dignity of human beings.

According to recent rulings of the Superior Court of Justice, this means that a foreign award will be recognised and enforced unless it is completely incompatible with the Brazilian legal system.[5] The mere violation of a dispositive or mandatory rule is not sufficient to deny recognition and enforcement to a foreign award. It is indispensable that the award be entirely irreconcilable with the founding laws of Brazil. That said, it is likely that an award rendered outside of Brazil will be recognisable and deemed enforceable within Brazilian territory without major setbacks. In fact, recognition is granted in the vast majority of cases as demonstrated by recent statistics and case law.

Formalities under the Brazilian Arbitration Act to consider an arbitration agreement existent, valid and efficient

The Brazilian Arbitration Act has kept the distinction between an arbitration clause (Article 4) and an arbitration commitment (Article 9); however, arbitration commitments are only required when the parties' contract contains no arbitration clause at all or when the arbitration clause is too open or vague, or else fails to provide the details on the applicable arbitral rules or on the appointment of arbitrators (pathological, empty or blank arbitration clauses) and the court interference is still something that the parties want to avoid. For these reasons, when the arbitration clause is what commentators call a "full arbitration clause", that is, when it provides enough information to initiate the arbitration proceeding, the arbitration commitment is not necessary.

When there is an empty arbitration clause and the parties are unable to agree on an arbitration commitment, Article 7 of the Brazilian Arbitration Act establishes an interesting rule that contributes to the enforceability of arbitration clauses.[6] The mechanism created by Article 7 incentivises a virtuous cooperation between the judiciary system and the arbitration system, since it provides that the national courts will be responsible to settle any issues that have either not been properly established in the arbitration clause or that the parties failed to agree upon afterwards. The judge will order the entering into of an arbitration commitment (Article 7, Paragraph 7), granting that the arbitration initially sought by the parties be respected and commenced. This harmony between public and private jurisdictions, created by the Brazilian Arbitration Act, has contributed to an enabling environment for the development of arbitration in Brazil.

As a way of concluding this item, the contractual nature of the arbitration agreement permits that any individual with full legal capacity, or any legal entity represented by individuals with due powers, may satisfy the subjective requirements for validity of any arbitration agreement. Article 4, Paragraph 1 of the Brazilian Arbitration Act states that "*an arbitration clause must be in writing, and it may be inserted into the contract or into a separate document to which it refers*". Furthermore, there is one extra mandatory formality, which is required in adhesion contracts. Arbitration clauses in adhesion contracts are only enforceable if the adhering party initiates the arbitration or expressly gives his/her specific written consent to the arbitration; in either case, the arbitration clause must also be written in a separate document or in bold type within the contract.

Arbitrability

The Brazilian Arbitration Act is technical and straightforward in defining the agents that may refer their disputes to arbitration (Article 1): "***those who are capable of entering into contracts may make use of arbitration*** *to resolve conflicts regarding freely transferable property rights*." However, this clarity is not duplicated when it comes to determining the matters that can be referred to arbitration. Case law and the arbitration doctrine have been carefully studying and discussing these concepts to offer a solid argument of who can(not) address their requests and disputes to an arbitrator/arbitral tribunal, and what can(not) be submitted to an arbitrator/arbitral tribunal. The first concept, which relates to *who* has standing to participate in an arbitral proceeding, is known as subjective arbitrability. The second concept, which is associated to *what* can(not) be decided in an arbitral proceeding, is known as objective arbitrability.

Every individual who is both capable and authorised by law to enter into contracts may resort to arbitration for resolution of a dispute (subjective arbitrability). However, only disputes in relation to transferable property rights can be solved via arbitration (objective arbitrability).

Subjective arbitrability may be effortlessly verified since the Brazilian Civil Code provides a clear and direct definition of what legal capacity is. On the other hand, doctrine and case law have long discussed how judges and arbitrators could define which rights or matters could be surrendered to arbitration. There is no unambiguous definition of freely transferrable (or 'disposable') rights in Article 1 of the Brazilian Arbitration Act. In fact, it is only possible to fathom that disposable rights are related to the financial character of the dispute.

By contrast, non-disposable rights are those without immediate connection to economic realms, such as the right to life, liberty, physical integrity, name, honour and intimacy. Disposable rights, in their turn, are commonly classified as any right that may be assigned, conveyed, waived or settled. Hence, arbitration cannot be used as a method of dispute resolution in some areas of law in Brazil, for example, family-related disputes, some environmental law disputes, criminal law disputes, etc. Nevertheless, it is still unclear whether or not disputes connected to bankruptcy and competition law could be resolved through arbitration.

As mentioned above, the Brazilian Arbitration Act states in Article 1 that any individual with legal capacity to contract and any legal entities represented by individuals with due powers to do so may refer to arbitration (subjective arbitrability). In this sense, by the time the alterations in the Brazilian Arbitration Act were made in 2015, legal commentators and judges had extensively discussed whether or not the state and state-controlled companies could address their disputes to arbitration. Regardless of those discussions, the Brazilian Arbitration Act is now clear in determining that it is completely possible for the state and for state-controlled companies to use arbitration as a method to solve their disputes surrounding property rights. Article 1, Paragraph 1 of the Brazilian Arbitration Act, as amended in 2015, states that "*direct and indirect public administration may use arbitration to resolve conflicts regarding transferable public property rights*".

The competence-competence principle and the doctrine of separability

The doctrine of separability and the competence-competence principle are expressly adopted by the Brazilian Arbitration Act in Article 8. Therefore, in Brazil, arbitrators will be capable of determining their own jurisdiction before and after commencement of the arbitration proceedings, even if the contract in which the arbitration clause is inserted may be considered invalid or non-existent. According to the doctrine of separability,

the arbitration clause is autonomous in relation to the contract where it is placed, so the invalidity of a contract will have no bearing on the effectiveness of its arbitration clause. This combination between separability and competence-competence has also been successfully applied by national courts in Brazil, which has created, as stated above, an arbitration-friendly state of affairs in Brazil.

In effect, the doctrine of separability and the competence-competence principle do not prevent Brazilian courts from analysing the validity of arbitration clauses. However, seldom have national courts scrutinised arbitration clauses. In fact, the rare interventions made by national judges are only effectuated once an arbitration is concluded, and occur in actions whose objective is to cancel the arbitration award. In fact, only if the claimant provides undoubtable proof of the invalidity of an arbitration clause will the national judge declare its invalidity.

Interim and urgent matters

One may say that it is almost consensual amid arbitration commentators, professors, lawyers and judges that, once the arbitrator or the arbitral tribunal is invested, the competence and jurisdiction to decide any interim and urgent matters must be exclusively exercised by the arbitral body. However, the question that remains is: what can a party do if some urgent issue arises before the constitution of the arbitration body? The answer is quite simple, since the Brazilian Arbitration Act clearly establishes that "*prior to commencing the arbitration, the parties may seek provisional measures of protection and urgent relief from a judicial court*".[7] Under the Brazilian Arbitration Act, resorting to the courts will not affect the arbitral jurisdiction, and "*once arbitration has been commenced, the arbitrators will have competence for maintaining, modifying or revoking the provisional or urgent measures granted by the Judicial Authority*".[8]

It is worth clarifying that the Judiciary may intervene only to ensure that arbitration guidelines are strictly followed, but not to replace arbitral jurisdiction in any case with regard to the merits of the controversy. It is now a fact that precautionary measures and other emergency actions granted by the national courts are common and increasing in number. Once again, the Brazilian Arbitration Act creates healthy cooperation between the public and private jurisdictions.

Confidentiality

The confidentiality of arbitration proceedings under the Brazilian Arbitration Act is possible, but not mandatory. Therefore, unless agreed by the parties that it must be confidential, the arbitration shall be public. However, the regulations of the vast majority of arbitration institutions provide that arbitration proceedings are confidential. Consequently, bearing in mind that institutional arbitrations are more common than *ad hoc* arbitrations, most Brazilian arbitration proceedings are confidential. That said, the recommendation is to clearly stipulate the duty of confidentiality in the arbitration clause or commitment in order to prevent the dispute from future disclosure.

Still, one may question whether the national courts are bound to the duty of confidentiality provided by the parties in an arbitration agreement when a dispute arises, for instance, over the validity of an arbitral award before a court. By the time of enactment of the new Brazilian Code of Civil Procedure in 2015, two distinct arguments among jurists and legal practitioners had been advocated. According to one school of thought, cases involving arbitration should be confidential to attend the duty of confidentiality imposed

by the applicable arbitration rules or by the arbitration agreement. Others contended that a contract between private entities should by no means prevail over the courts' publicity duty. Article 189 of the new Code of Civil Procedure clarified this issue by providing that "*although procedural acts are public, lawsuits are prosecuted under a gag order when* [...] *they deal with arbitration, including the enforcement of arbitral decisions by means of a letter of request sent by the arbitral tribunal to the judiciary, provided the confidentiality stipulated in the arbitration proceedings is proven before the court*".

Therefore, as long as the duty of confidentiality is provided within the arbitration agreement or within the regulations of the arbitration institution that is administering the arbitration proceeding, the national court will abide by the same duty of confidentiality.

Applicable law

Brazilian legislation can nowadays be considered flexible and permissible in acknowledging the parties' free will to choose the governing law of the contract. In fact, once the parties have agreed on a foreign law to govern their contract, arbitrators must apply it to resolution of the merits of a dispute even if the seat of the respective arbitration is in Brazil. The only requirement made by Brazilian legislation is that the chosen law does not violate public policy, Brazilian sovereignty or the principle of dignity of human beings. In this sense, it is completely possible for a contractual dispute governed by New York law to be solved by an arbitration proceeding in Brazil, for instance.

Moreover, the parties can also grant the arbitrators different kinds of power, such as the power to act as an *amiable compositeur*, to decide *ex aequo et bono* and to rule according to general principles of law, customs or international commercial law. Article 2 of the Brazilian Arbitration Act provides that "*at the parties' discretion, arbitration may be at law or in equity*, [and that] *the parties may freely choose the rules of law that will be used in the arbitration, as long as their choice does not violate good morals and public policy*, [and that] *the parties may also agree that the arbitration shall be conducted under general principles of law, customs, usages and the rules of international trade*".

There is, in fact, only one exception to this rule. When the public administration is one of the parties to an arbitration proceeding, the arbitration must be invariably decided according to the law. As stated in Article 2, Paragraph 3, "*arbitration that involves public administration will always be at law and will be subject to the principle of publicity*".

The parties are also free to choose the procedural rules to be followed during the proceedings. However, the Brazilian Arbitration Act states that, regardless of the parties' choice of the procedural rules, the proceedings must always comply with due process of law, the principles of equal treatment between the parties and the arbitrator's impartiality and free decision-making process.

Arbitral tribunal

Once again, party autonomy is endorsed by the Brazilian Arbitration Act. The parties can choose the number of arbitrators (provided it is uneven – Article 13, Paragraph 1 says that "*the parties will appoint one or more arbitrators, always an uneven number, and they may also appoint their respective alternates*") and their qualifications, as well as the method of their appointment. In fact, the parties can choose anyone as arbitrator. The requirements to be an arbitrator are essentially full legal capacity, impartiality and independence. Furthermore, of course, the arbitrator must also deserve the trust of the parties. There is no requirement related to legal or technical training of the arbitrator, nor is there any restriction on a foreigner acting as an arbitrator in Brazil.

The Brazilian Arbitration Act also requires that arbitrators act with impartiality, independence, competence, diligence, and in a judicious manner. Article 13, Paragraph 6 of the Brazilian Arbitration Act says that "*in performing his duty, the arbitrator shall proceed with impartiality, independence, competence, diligence, and discretion*". To ensure their impartiality and independence, the Brazilian Arbitration Act permits the challenge of an arbitrator on the grounds of the same criteria adopted for national judges. Such situations are provided in Articles 144 and 145 of the Brazilian Code of Civil Procedure. These Articles, in fact, simply describe a few situations in which the judge or the arbitrator shall not decide the dispute or participate in the proceedings. However, as noted by the modern doctrine, there are no criteria sufficiently objective to determine what impartiality and independence are.

That national judges and arbitrators are different is consensual among jurists and legal practitioners; thus, the question that arises is: why are they treated as equal when they are, in fact, different? Probably, the Brazilian Arbitration Act has chosen the above-mentioned criteria simply because there are no other objective criteria available. In fact, better patterns have been thought to tackle the impartiality and independence of an arbitrator. The IBA Guidelines on Conflicts of Interest are a good example of recent contributions, but they only list possible situations that could raise concerns about the impartiality or independence of an arbitrator. There are no purely objective criteria yet, and perhaps no objective criteria can ever be devised, as impartiality is closely related to an arbitrator's state of mind.

To avoid the nomination of biased or dependent arbitrators, the Brazilian Arbitration Act provides that, before accepting any appointment, prospective arbitrators must disclose anything that *can* or *may* give rise to justifiable doubts about their impartiality or independence. In addition, most arbitration institutions require a full disclosure, and often ask the arbitrator to sign a statement of impartiality and independence.

Conclusions

a. The Brazilian Arbitration Act provides an arbitration-friendly legal framework and has contributed to the development of good arbitration practice in Brazil.
b. The New York Convention of 1958 is widely applied by the Superior Court of Justice, and has facilitated the recognition and enforcement of foreign awards in Brazil.
c. The arbitration clause and the arbitration commitment must be in writing and signed by individuals with full civil capacity, or by legal entities represented by people with due powers to do so.
d. "*Those who are capable of entering into contracts* [subjective arbitrability] *may make use of arbitration to resolve conflicts regarding freely transferable property rights* [objective arbitrability]" (Brazilian Arbitration Act, Article 1).
e. The competence-competence principle and the doctrine of separability are granted by the Brazilian Arbitration Act and applied by the national courts. The national courts will analyse the existence, validity and effectiveness of the arbitration clause only in a few extreme situations.
f. The parties may present urgent matters to the national courts before commencement of the arbitration proceeding. This will not affect the arbitral jurisdiction.
g. The Brazilian Arbitration Act does not state that confidentiality is mandatory in arbitration proceedings. The parties must agree upon the duty of confidentiality to coat the arbitration proceeding with confidentiality.

h. The parties can choose the applicable law to their dispute providing that the chosen law does not violate public policy, Brazilian sovereignty or the principle of dignity of human beings.
i. Under the Brazilian Arbitration Act, the arbitrator and the national judge must follow the same patterns of impartiality and independence. The only requirement to act as an arbitrator in Brazil is full civil capacity. Foreign arbitrators are permitted.

* * *

Endnotes

1. All of the Code of Civil Procedure translations are available in Alvim, Teresa Arruda and Didier Jr., Fredie (coordinators), *Brazilian Code of Civil Procedure*, translated by Barros, Alexandra. Salvador: *Ed. Juspodivm*, 2017.
2. All of the Brazilian Arbitration Act translations are available in http://cbar.org.br/site/legislacao-nacional/lei-9-30796-em-ingles/.
3. The office was inaugurated on 4 May 2017.
4. https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-operations-brazil/.
5. Superior Court of Justice, Sentença Estrangeira Contestada No. 14.930 / EX, 15 May 2019, p. 44.
6. **Article 7.** If there is an arbitration clause and there is an objection for the commencement of arbitration, the interested party may request that the other party be served with process to appear in court so that the submission agreement is drawn up. The court judge will designate a special hearing for this purpose.
   Paragraph 1. The plaintiff will accurately define the subject matter of arbitration, and will substantiate its request with the document containing the arbitration clause.
   Paragraph 2. If the parties show up at the hearing, the judge shall first try to bring the parties into a settlement. If this is not successful, the judge will lead the parties to a consensual submission agreement.
   Paragraph 3. If the parties fail to agree on the terms of the submission agreement, after hearing the party against whom the request is filed, the judge shall determine the contents of the submission agreement, either at the hearing or within 10 days therefrom, in accordance with the wording of the arbitration clause, taking into account the provisions of Articles 10 and 21, Paragraph 2 of this law.
   Paragraph 4. If the arbitration clause has no provision as to the appointment of arbitrators, the judge, after hearing the parties, shall decide, and is allowed to appoint a sole arbitrator to resolve the dispute.
   Paragraph 5. If the plaintiff fails to appear at the hearing designated for drafting the submission agreement without showing good cause, the case will be dismissed without judgment on the merits.
   Paragraph 6. If the defendant fails to attend the hearing, the judge, after hearing the plaintiff, shall be competent to draw up the contents of the submission agreement and to appoint a sole arbitrator.
   Paragraph 7. The court ruling that grants the plaintiff's request will be considered the submission agreement.
7. Brazilian Arbitration Act, Article 22-A.
8. Brazilian Arbitration Act, Article 22-B.

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Gilberto Giusti earned his Bachelor of Laws in 1985 from the University of São Paulo and his Master of Laws in 2012 from the University of California, Berkeley. Partner at Pinheiro Neto Advogados since 1993 having joined the firm as an intern in 1982, Gilberto advises on court litigation and alternative dispute resolution proceedings such as mediation and arbitration. He has acted in hundreds of domestic and international civil, commercial, corporate, securities and construction disputes, and in other regulated sectors (energy, telecommunication, oil and gas). He is a former Board member of the American Arbitration Association, a former member of the London Court of International Arbitration, and is a current advisor of the Centre for Arbitration of the Brazil–Canada Chamber of Commerce. In January 2019, Gilberto returned to Pinheiro Neto as the head of one of the firm's litigation and arbitration groups after a year on sabbatical leave.

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