

## *Key Changes to the Brazilian Arbitration Law: A Foreign Practitioner's Perspective*

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**SUMMARY:** The Brazilian Arbitration Law of 1996 was amended in 2015 in both its thematic and technical aspects. The primary changes of interest to foreign arbitration practitioners are those which explicitly authorize use of arbitration by Brazilian public sector entities and in Brazilian corporate shareholder agreements. Additionally, determinations of subject matter arbitrability may now be made by the arbitral tribunal itself rather than the courts. Further, compulsory selection of arbitrators from institutions' so-called "closed lists" is now prohibited. On the other hand, efforts to allow arbitration for employment disputes at the Director level and above and for consumer disputes were vetoed by the Executive branch.

In 2013 a Brazilian Senate Special Commission completed its work on a draft revision to the country's 1996 Arbitration Law as well as creating a new Draft Law on Mediation. After the Commission sent the Draft Arbitration Law to the Chamber of Deputies for consideration, it was finally approved by both houses of Congress and the Office of the President of the Republic in June 2015 in the form of Law 13.129 dated 26 May 2015, which took the form of amendments to the original Brazilian Arbitration Law 9.307/96. These amendments took effect 60 days' after approval by the Office of the President<sup>2</sup>. This author accompanied the work of the Senate Commission and was invited to appear before it to offer suggestions on the Mediation Law.

The original Brazilian Arbitration Law 9.307/96 celebrated its 19th anniversary last September. The Law has generally worked quite well, fulfilling two main objectives – providing a more speedy and specialized forum for resolution of commercial disputes, and attracting more foreign business and investment for Brazil. It has also provided other very beneficial effects in making available a faster, more private arena for resolving Brazilian corporate shareholder

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<sup>2</sup> The new Mediation Law took effect 180 days after its approval by Congress and the President.

disputes and making Brazil a global trend-setter in this area of corporate law and dispute resolution.

To provide readers with an idea of the growing influence of arbitration in Brazil, in 2008 – only six years after the constitutionality of the 1996 law was upheld in 2002 – Brazil became the fourth-ranked country in the world in number of arbitrations filed with the ICC. This does also include a sizable number of Brazilian domestic arbitrations conducted by the ICC – mostly Brazilian corporate shareholder disputes. Research conducted by the Getúlio Vargas Foundation think tank in 2010 showed the amounts at stake in Brazilian arbitrations growing rapidly at a rate of 185 per cent, from 867 million Brazilian *reais* in 2008 to 2.4 billion *reais* just one year later. This research involved arbitrations conducted by companies, suppliers and consumers in five international chambers of commerce functioning in Brazil - three in São Paulo, one in Rio de Janeiro and one in the state of Minas Gerais, most probably in the state capital Belo Horizonte. These are the three main business cities in Brazil where most arbitrations of size are conducted.

While the 1996 Law has been working well, a number of suggestions were made to improve and fine-tune it. Some of these are thematic, others more technical. In March 2013, a Special Commission of the Brazilian Senate was established to reformulate the 1996 law. This Commission had some 21 members, primarily lawyers from the Brazilian arbitration bar, including one of the three main drafters of the original law, and was chaired by Justice Luis Felipe Salomão of the Brazilian Superior Court of Justice (STJ), the highest Brazilian court dealing with non-constitutional matters and the court of primary resort on arbitration issues. The Commission had six months to produce draft amendments to the 1996 law.

The following are the main changes embodied in the Amended Arbitration Law:

· **A. Brazilian governmental bodies are now explicitly authorized to engage in arbitration of disputes**, while respecting the laws dealing with transparency and openness in public affairs. Even so, one must bear in mind that not all matters in the public sector are arbitrable, as they remain limited to the sphere of so-called “disposable rights” (freely transferable rights) as stated in the original 1996 Law. However, the key issue of *who* determines disposability of rights/subject matter arbitrability has been changed quietly but radically by these 2015 Amendments, as described below.

Fortunately, the Senate wisely rejected a proposed amendment by the Lower Chamber of Deputies which would have made arbitration involving the public administration subject to further vague, undefined “regulation”.

This amounts to a huge change which will eventually bring more Brazilian public entities into the world of arbitration. It will take a while because the culture in Brazilian public administration is to use the courts which are inexpensive and where time is usually on their side. But those public entities which deal with foreign companies may be some of the first ones using arbitration for their disputes. Of course, those public entities involved in concessions or public-private partnerships with foreign companies are already authorized to use arbitration under the Brazilian Concessions and PPP Laws respectively, where all arbitrations must be held in Brazil in the Portuguese language. Other public entity related disputes may now be subject to arbitration and there is a steady stream of seminars and training programs in Brazil on this subject these days.

**B. A subtle but very important detail is that the Amendment deleted Article 25 of the original Arbitration Law, which had provided that the courts must determine whether rights at issue in an arbitration are so-called “disposable rights” which can be the subject of arbitration.** This means that the arbitral tribunal itself can make this key gateway determination. Elimination of former Art. 25 now places Brazil in harmony with most advanced countries in the world in having the arbitrators themselves decide the question – known as *kompetenz-kompetenz* in arbitration vocabulary - the arbitrators determine their own jurisdiction.

Prior to this Amendment, Article 25 of the Arbitration Law explicitly provided for the courts to rule whether subject-matter arbitrability existed or not in the form of so-called “disposable rights”. Interestingly, two of Brazil’s very largest arbitrations were essentially decided on this very point. Both involved disputes between the Brazilian oil & gas regulatory body, the *Agência Nacional de Petróleo, Gás e Biocombustíveis* (“ANP”) versus the mixed-capital government-controlled Brazilian national oil company Petrobrás. The first arbitration involved whether the enormous *Tupi* oil block (block BM-S-11) could be separated in two. Petrobrás and its two partners in the operation, Petrogal from Portugal and BG from the UK,

wanted to separate the block into two in order to save on government concession rights fees. It was the second largest arbitration in the world in monetary value at the time, after the *Yukos* case. In that case, *ANP x Petrobrás*, decided in April 2014, the 1<sup>st</sup> *Vara* (section) of the Federal court in Rio de Janeiro (*TJ – RJ*) did not allow an ICC arbitration to go forward, denying subject-matter arbitrability because the court held that this type of dispute involved public, non-disposable rights<sup>3</sup>.

However, in another ICC arbitration between the same parties, the Federal Superior Court of Justice (STJ) – the highest Brazilian court for non-constitutional matters and the court which has responsibility for all arbitration-related questions, ruled that arbitration could proceed because the issue contested there had to do with tax collection on another oil drilling block (the *Parque de Baleias* block in the Campos Basin, block BC-60) which was held to be a “disposable right.”<sup>4</sup> Under the 2015 amended Brazilian Arbitration Law, the courts would not have had the authorization to rule on disposable rights—instead it would have been left to the arbitral tribunals themselves, possibly producing markedly different results.

One practical effect of this change in the Law is that it will be very difficult if not impossible to engage in pre-arbitral litigation or interrupt an arbitration in mid-stream with a claim in the courts that the subject matter is not arbitrable, as occurred in the first *ANP v. Petrobrás* ICC arbitration cited above. A party making this kind of claim or response will now have to wait until the arbitral tribunal issues its award in order to try and set it aside, nullify it, or have its enforcement refused in the courts.

• **C. Arbitration is expressly provided for in corporate disputes.** Shareholders may approve arbitration clauses in the corporate by-laws by a majority vote, giving minority

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<sup>3</sup> See the text of this decision in Portuguese at <http://www.jusbrasil.com.br/diarios/70954551/trf-2-jud-trf-28-05-2014-pg-332> and the article “Justiça Federal nega pedido da ANP para multar Petrobras”, *Valor Econômico online*, 16.06.2014. Este trecho é parte de conteúdo que pode ser compartilhado utilizando o link <http://www.valor.com.br/politica/3585218/justica-federal-nega-pedido-da-anp-para-multar-petrobras> ou as ferramentas oferecidas na página.

<sup>4</sup> CONFLITO DE COMPETÊNCIA Nº 139.519 - RJ (2015/0076635-2)

shareholders the right to liquidate and be reimbursed for the value of their shares, with a few exceptions.

Brazil is a worldwide leader in arbitration of corporate shareholder disputes. As observed earlier, the number of Brazilian domestic corporate shareholder disputes arbitrated by the ICC has been significant enough to push Brazil into ICC's top four participating countries. The so-called *Novo Mercado* of the principal Brazilian stock exchange actually requires arbitration clauses for shareholders agreements of publicly traded companies listed on that exchange – in contrast with the prevalent rule on major U.S. stock exchanges which prohibits such arbitration clauses in favor of use of the specialized Delaware courts. But even Delaware is becoming attuned to corporate arbitration these days, having enacted the Delaware Rapid Arbitration Act taking effect in May 2015<sup>5</sup>. Delaware's prior attempt at enacting an arbitration law was struck down as unconstitutional because the Chancery Court judges themselves were to serve as arbitrators, but this subsequent Rapid Arbitration Act has cured this defect.

**D. Parties may now opt to dispense with those arbitral institutional rules that restrict their choice of arbitrators to those on the institutions' lists.** This was one of the most controversial changes to the Arbitration Law, with opposition coming from some of the main Brazilian arbitral institutions which asserted a possible loss of arbitrator quality and an unconstitutional interference with the freedom of private arbitral entities to operate. Those supporting the change believe it is necessary to respect party autonomy in their choice of arbitrators, which is in line with international arbitration practice and rules of major international arbitral institutions.

Some Brazilian institutions restricted choice of all arbitrators to their lists, while others only restricted choice of the Panel Chair ("*Presidente do Tribunal*") to their lists. Either way, from the viewpoint of a foreign practitioner who may have foreign clients involved in Brazilian institutional arbitrations with Brazilian counter-parties, the effect will be to widen the pool of

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<sup>5</sup> For details on the DRAA and how it works, see "Delaware Enacts New Rapid Arbitration Act", posted by Kobi Kastiel, Harvard Law School Forum on Corporate Governance and Financial Regulation, April 14, 2015 at <https://corpgov.law.harvard.edu/2015/04/14/delaware-enacts-new-rapid-arbitration-act/>

arbitrators each side can select from, including more foreign arbitrators. The fact is that as of the date this chapter is being written, very few Brazilian arbitral institutions have foreign arbitrators on their rosters. Of those which do, not very many speak Portuguese fluently. This author is not aware of any Brazilian institutions which actively administer arbitrations outside Brazil, meaning that knowledge of Portuguese remains a vital qualification for any foreign arbitrator. Of course, removing the requirement that a chosen arbitrator be on an institution's list does not make the list meaningless – many parties will still consult the lists as a first reference or guide, regardless of the change in the Law which no longer makes this step mandatory.

**E. Arbitrators are authorized to issue partial awards.** This can be especially helpful in bifurcated arbitrations where claims on liability and damages are heard and sometimes decided separately. These are becoming more common for reasons of efficiency. Unlike mere procedural orders or rulings on dispositive motions in the arbitrations, such partial awards are much more difficult to amend and are enforceable *sui generis*.

**F. The parties and arbitrators by common agreement can extend the period prescribed by law in which the arbitral award must be issued.** In the absence of agreement by the parties, the limit is six months under the 1996 Arbitration Law.

**G. It is now explicitly provided that all foreign arbitral awards must be ratified by the STJ – and only the STJ – in order to have effect in Brazil.** This is viewed most positively as a step which consolidates all proceedings to “homologate” (ratify) foreign arbitral awards in Brazil's STJ, a high level court which is generally favorably inclined to arbitration and which has an adequate number of justices (“*ministros*”) to hear arbitration-related matters in a timely manner.

Even so, there are two particular items which, at least in theory, could draw some concern from foreign practitioners. One is an internal STJ Rule approved in 2015 whereby in addition to

the typical public policy and other grounds enumerated in the New York Convention for declining enforcement of foreign arbitral awards, a new somewhat vague and open-ended ground is added: if the foreign award “offends human dignity”, its enforcement in Brazil may be refused<sup>6</sup>. Nobody is quite sure what kind of award would violate “human dignity” as interpreted by the STJ, but it may be similar to a famous 1964 U.S. Supreme Court decision on obscenity where Justice Potter Stewart famously declared words to the effect that “I can’t define it but I know it when I see it”.

Another area giving some pause is a recent STJ decision in December 2015 in which it refused to homologate an arbitral award annulled by the courts of Argentina, the arbitration’s country seat of origin. In that case the STJ based its decision on the reasoning that an arbitral award nullified in its country seat of origin is never really accorded the status of an award at all, so cannot be recognized or enforced at such<sup>7</sup>. This decision is not in accord with jurisprudence in leading arbitral jurisdictions such as France<sup>8</sup>, the Netherlands and England<sup>9</sup> where the courts are open to reconsidering recognition of foreign arbitral awards annulled at their original seat, depending on the circumstances. In the French decision, the *Cour de Cassation* recognized an award partially annulled by the courts of England, the arbitral seat, holding that the arbitral award at issue was truly international in nature and therefore subject to no particular country’s laws with any superior status. In the Dutch and English cases involving Russian parties, both the Dutch and English courts found that the decision by the Russian courts at the arbitral seat annulling the award was the result of a biased dispensing of justice. For this reason, the Dutch and English courts decided to recognize the award.

• **H. Before an arbitration is instituted, the law authorizes parties to go to the courts in order to obtain protective or emergency measures.** However, once the arbitration is instituted,

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<sup>6</sup> See Art. 216-F of the *Emenda Regimental* (Amended Internal Rules) of the STJ, no. 18 of 2014.

<sup>7</sup> See the STJ decision in case SEC 5782, December 2, 2015.

<sup>8</sup> See the decision of the *Cour de Cassation* in *Putrabali v. Rena*, *1ière civ.*, 29 June 2007

<sup>9</sup> See decision of the English High Court in *Yukos Capital SARL v. OJ SC Rosneft Oil Co.*, [2014] EWHC 2188 (Comm)

it will be up to the arbitrators to maintain, modify or revoke these measures. And after the arbitration is instituted, the parties must go directly to the arbitral tribunal in order to request such measures.

· **I. The arbitral tribunal may issue a so-called “Arbitral Letter” requesting that the courts in the territory where the arbitration is seated help to ensure the requests of the tribunal are being carried out.** This measure will help improve coordination and cooperation between arbitral panels and the judiciary.

**J. The statute of limitations (prescription period) in a litigation will be interrupted by the pleading of existence of an arbitration of that same dispute.**

For the future:

· **K. The Ministry of Education is encouraged to incentivize institutions of higher education to add the discipline of arbitration to their approved list of courses dealing with dispute resolution.** At a conference in Brasília in June 2015, this author learned that Brazil has some 1,300 law schools – more than the rest of the world combined ! However as of that date only 17 offered ADR disciplines so there is plenty of room to expand here.

· **L. The National Council of the Judiciary and National Council of the Ministry of Justice are likewise encouraged to add material dealing with arbitration as a recognized method of dispute resolution** to their candidate examinations for careers in the judiciary and Ministry of Justice.

But **not** for the foreseeable future:

**M. Corresponding changes were also inserted into the 2015 revised Brazilian Code of Civil Procedure (CPC).** But the Senate did not accept a version from the Chamber of Deputies which would have provided for an expedited, separate hearing process in which the defendant in a court proceeding could plead and show existence of an agreement to arbitrate instead. That would have avoided the necessity of pleading a full defense in court.

**N. Arbitration of employment disputes for company Director level and above.** The idea here was to allow arbitration of employment disputes, but only for well-educated sophisticated upper level personnel who are officers of the company and generally not labor union members. As such, they would not find themselves oppressed by being forced to sign adhesion contracts containing arbitration clauses. Even so, Brazil's specialized labor courts were against this provision.

**O. Arbitration of consumer disputes if the consumer explicitly agrees in writing.** In addition to the legal issues, an enormous challenge here would be creating a business model for high-volume, low value consumer cases to arbitrate. Unlike the U.S., Brazil has no civil jury, class action or punitive damages tort systems to avoid by using arbitration instead, thereby lacking some of the prime incentives for individual consumer arbitration in the U.S. at least.

The Vice President's office vetoed portions of the Amended Law that would have permitted arbitration of adhesion contract, consumer and employment disputes under the above-cited conditions. All employment disputes thus remain subject to the specialized Brazilian labor courts.

## CONCLUSION

These amendments to a very workable and successful Arbitration Law are very positive in nature, especially those of interest to foreign arbitration practitioners. The public sector plays a very large and controlling role in Brazil's economy and is also involved as a party in a large number of the 108 million or so cases working their way through the Brazilian courts. Because the Brazilian tax system is so extensive and complicated, generating many disputes with local and foreign businesses, there may be a future for arbitration in that area as well. A number of seminars are being launched in Brazil on this very subject. Brazilian corporate shareholder disputes continue and certainly affect foreign investors as shareholders. Explicitly authorizing arbitration of these with a legal exit for shareholders who do not agree to arbitrate is a wise move. And giving arbitral tribunals the power to determine their own subject matter jurisdiction by having them rule on whether certain rights at issue are "disposable" or not can markedly affect arbitrations of very large size, as we have seen in the *ANP v. Petrobrás* cases.