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Brazil

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Trends and Developments

Brazil

Southern Brazil: Arbitration With State Parties in the Spotlight

Arbitration and other non-judicial dispute resolution mechanisms are a reality in commercial contracts in Brazil. It is unusual to find a large-scale contract that does not rely on some form of mediation or arbitration. The business community embraced arbitration vigorously after the enactment of the Brazilian Arbitration Act (BAA) in 1996. In 2018 Brazil is one of the keenest users of arbitration in both its international and domestic contexts, having developed from virtually no use at all before the 1990s.

This growth has prompted a series of positive developments. Arbitral institutions have evolved to become internationally recognised, such as CAM-CCBC or CCMA/CIESP-FIESP. Others have left their regional origin and opened offices in various locations in the country, like CAMARB, which in 2018 added a Recife office to its previous list of offices in Belo Horizonte, São Paulo and Rio de Janeiro. Many have taken advantage of connections with business associations or the entrepreneurial community to administer dispute resolution processes at local or regional level. CBMA, in Rio de Janeiro, is the most successful example, as it started from an association between manufacturing and commercial business organisations. This thriving market has attracted the International Chamber of Commerce (ICC), which in 2017 opened their Latin American office in São Paulo.

Southern Brazil has been especially active in the development of regional mediation and arbitration. CAMFIEP and ARBITAC in Curitiba and FIERGS and FEDERASUL in Porto Alegre are regional references in their respective states of Paraná and Rio Grande do Sul. Following a widespread national pattern, they are all connected with business organisations and located in their states' capital cities. The southern state of Santa Catarina is a notable exception since it is the only Brazilian state with active arbitral institutions located outside its capital city. A good example is CAMESC, based in Itajaí, a relatively small city but a hub for intense economic activity, especially manufacturing and agricultural industries, as well as maritime transportation. In 2018, the commercial business organisation of Florianópolis, the state capital, launched CMAA, an arbitral institution that promises to be a new regional powerhouse.

The community of arbitrators, mediators and specialised law firms has also grown remarkably. Think-tanks such as CBAr, the Brazilian arbitration committee, have become sophisticated and active players, including in the legislative and regulatory processes involving dispute resolution. The Chartered Institute of Arbitrators (CIArb) has a growing membership in Brazil and is bound to soon have a local branch. Domestic arbitral institutions include in their rosters some of the most well-known international arbitrators and mediators, alongside Brazilian specialists. Diversity is a special concern, and CAMFIEP has more than 30% of its roster comprised of women. In the period after 2010, several boutique arbitration firms have emerged whose partners specialise in only serving as arbitrators. This illustrates a trend in work specialisation that reflects a perception of a potential growth in the market for arbitrators and the community's awareness of potential conflicts. Both in terms of regulation or guidelines and of actual practice, the ethics of Brazilian arbitrators and specialised law firms are in line with international best practices.

The third pillar for a successful dispute resolution system is also in place in Brazil. The court system is arbitration-friendly, and the higher courts (STF for constitutional matters and STJ for non-constitutional matters) are consistently supportive of arbitration. The arbitration regulation offers mechanisms to avoid anti-arbitration injunctions and to compel a recalcitrant party to arbitrate, and the courts almost invariably apply them with efficacy and swiftness. Statistics show a minimal rate of success in challenges to arbitral awards, which illustrates the deference courts generally grant to an arbitral tribunal's findings and final decision.

This positive picture explains why Brazil has now moved to adopting with the same enthusiasm arbitration involving state parties. This is the single most important trend in Brazilian arbitration practice at this moment. Arbitration in government disputes is the subject matter of industry discussions, academic works and conferences, regulatory consultations and bills in Congress. Most of all, it is part of the government practice, since agencies, especially in sophisticated sectors such as energy and airports, have come to embrace dispute resolution mechanisms as an adequate means to resolve contractual disputes in an effective, specialised and expeditious manner.

Brazil is unique in Latin America because of the size of its economy and domestic market. It is also unique in not adopting investment treaty arbitration or arbitration based in national investment protection laws. It has recently signed a number of investment treaties, one of them already ratified, but they only provide for state-to-state arbitration and do not grant standing directly to the interested investor. Instead, Brazil offers international and domestic investors alike an investment protection system that comprises of its national administrative law, the independence of its federal and state courts, and contractual dispute resolution, including international and domestic arbitration (for more, see Marçal Justen Filho et al, Brazil Infrastructure Law, Eleven International Publishing, 2016). Dispute resolution with state parties requires a submission agreement set forth in a contractual provision or one concluded specifically for a certain dispute (post-dispute submission agreement).

This general practice of voluntary submission to arbitration has exceptions. An agreement to arbitrate is required in specific areas as a pre-requisite for entering into a contract. This has been the case for the past 15 years in certain power purchase agreements (PPA). Another example appeared in 2017, when Law 13.448 allowed concessionaires of railways, highways and airports to terminate their federal concessions provided they included an arbitration agreement to resolve any disputes regarding the respective final financial termination settlements. Law 13.448 has also been interpreted to allow concessionaires, in existing contracts, to compel the federal government to submit to arbitration – regardless of any previous arbitration agreement – matters regarding the economic and financial equilibrium of the contract, financial settlements due to termination or assignment of the concession, and the breach of contractual obligations by either party (for more on the latter point, see Cesar Pereira, Luísa Quintão, "Has Brazil made a unilateral binding offer to arbitrate in the 2016 Investment Partnership Program (PPI)", Kluwer Arbitration Blog, 24 March 2017).

As occurred with arbitration in general in Brazil, arbitration with state parties has also undergone significant changes in the past 20 years. Around the same time the BAA was enacted, the first pieces of legislation providing for arbitration in specific sectors of government activity (such as power or oil and gas) started to appear. This led to a rapid succession of new laws that culminated with an amendment to the BAA in 2015 to expressly allow for arbitration of any contractual or non-contractual disputes with state parties (government departments or state-owned or state-controlled companies) that involved economic disposable rights. Although arbitration with state parties was already a thriving reality by then, the enactment of this amendment consolidated the idea that arbitration in such matters had statutory grounds (for more on the arbitrability of government disputes, see Eduardo Talamini, Diego Franzoni, "Arbitragem nas empresas estatais" inMarçal Justen Filho (org), Estatuto Jurídico das Empresas Estatais, Revista dos Tribunais, 2016, p565-596).

The phrase "economic disposable rights" has been widely understood to encompass all relevant instances of usual contractual disputes involving contractors or concessionaires. Therefore, even in current practice, this requirement is less of an obstacle than it might suggest at first sight. All economic disputes with government parties are generally accepted as arbitrable. In recent years, a series of cases in the oil sector gave rise to a discussion at the federal courts of Rio de Janeiro as to whether resolutions issued by a regulatory agency (in the instant case, the oil and gas regulator) qualified as arbitrable. The final resolution of the matter is still pending, but the latest decision by the STJ, of October 2017 (CC 139.519), was favourable to the continuance of the ICC arbitration for the time being.

The prospects now are for more detailed and sophisticated regulation of the participation of state parties in arbitration. A clear and sound basis for arbitration with the government evolved from the existing legislation. However, it is foreseeable that government agencies will resort more and more to arbitration. This has led to initiatives by the federal government, by federal regulatory agencies and by local (state and city) governments to discipline and organise their participation in arbitration. In February 2018, the state government of Rio de Janeiro issued an executive order (decree) to define under which conditions the government and state-owned or controlled companies may agree to arbitrate. Other state and local governments are expected to follow suit and take Rio de Janeiro's decree as a template for their own regulations. Also in February 2018, the city of São Paulo enacted a law providing for dispute boards in certain city government contracts, which inspired similar bills currently in the Brazilian Congress to possibly become federal law soon.

Back in 2015, the state government of Paraná had already entered into co-operation agreements with CAMFIEP and ARBITAC, arbitral institutions in southern Brazil, to provide dispute resolution support in state government contracts. At least one such contract – a PPP, public-private partnership – was concluded, and CAMFIEP was later called upon to administer the respective dispute resolution when the parties decided to terminate the PPP. As had happened in the development of case law involving arbitration with state parties in Brazil, such as the landmark STJ case Compagás, the southern states of Brazil led the way in the administrative practice involving arbitration as well.

At federal level, in 2018 the transport regulator (ANTT) submitted to public consultation a draft regulation for dispute resolution in the respective sector. The airport regulator (ANAC) also launched a public consultation in 2018 to seek comments on its standard concession agreements, including their dispute resolution provisions. The oil and gas regulator (ANP), after a public consultation which took place in 2017, adopted an arbitration clause in its 2018 concession contracts providing for a two-step mechanism for selecting the arbitration institution to administer any possible dispute through arbitration in Brazil: in the event of a dispute, the parties are expected to agree on an institution; if there is no agreement, ANP will choose one among three pre-selected institutions, namely ICC, LCIA or PCA.

Arbitration and mediation with state parties is arguably the main focus of development for dispute resolution in Brazil in 2018. Its evolution draws from the strong growth of commercial arbitration in Brazil since the BAA in 1996. It also reflects a shift in government perception of arbitration not only as an instrument to attract investment, but also as a useful tool in effective dispute resolution in the government's own interest. There is a marked alignment in the interests of both state and investors or contractors that should lead in the near future to the use of dispute boards, mediation and arbitration as preferred methods of dispute resolution in large-scale government contracts.

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Justen, Pereira, Oliveira & Talamini arbitration department is headed by senior partners Cesar Pereira and Eduardo Talamini, with the cooperation of founding partner Marçal Justen Filho and senior partner Fernão Justen de Oliveira, and features a team of eight associates. The partners often serve as co-arbitrators, presiding arbitrators or legal expert witnesses in international or domestic arbitration procedures under various institutional rules. The department has an active practice representing either private or government clients in mediation or arbitration and related litigation. The firm's long-established practice in public law and corporate disputes has made it a primary choice both for mediation and arbitration involving State parties and in private or government-related corporate dispute resolution. The firm's renowned background in public and administrative law extends to its arbitration practice, and the firm handles several large-scale arbitral disputes involving a wide range of government contracts with various subject matters. The firm's specialized partners serve as arbitrators or legal expert witnesses in cases involving Brazilian public law, government contracts, corporate law, commercial contracts, civil construction and a wide range of other topics. The firm features also as partners or associates several specialists in civil procedure and dispute resolution, and the combination of arbitration and litigation specialisms gives the firm's clients a broad and effective dispute resolution support. For international matters, the firm often partners with US, European or other Latin American law firms. It takes advantage of a wide network of correspondents to offer a large range of services for private and government companies or entities.

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