

**International Commercial Arbitration in Brazil – A Primer**  
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**Background**

Pre-1980 Brazil could rightly be said to have been hostile towards arbitration, clinging to the “Calvo doctrine” which did not permit foreigners any different treatment than Latin American nationals. In the late 1980’s, however, Brazil began to emerge from its shell and take its first steps towards a more modern approach in respect of international arbitration.

The first movement towards modernization was Brazil’s ratification of the Panama Convention in 1995, closely followed by: (1) the adoption, in 1996, of its own national arbitration law, Law No. 9.307, 23 September 1996 (the “Arbitration Act”) and (2) the adoption of the Mercosur Protocol in 1998, all of which set the stage for modern arbitration practice in Brazil. While the new Arbitration Act was enacted in 1996, it took another five years to come into full force due to a constitutional challenge lodged in the Brazilian Supreme Court, which ultimately decided, in December 2001, that the Arbitration Act was constitutional. After 2001, the Brazilian courts have routinely enforced arbitration clauses in commercial contracts, thus bringing Brazil in line with internationally accepted standards. With the ratification of the New York Convention in July 2002, Brazil joined the family of nations who offer a viable legislative and enforcement framework for international arbitration proceedings.

Further adding to the acceptance and visibility of the arbitration practice in Brazil are the actions of the Brazilian Arbitration Committee (“CBar”) which has taken steps in recent years to promote international arbitration in Brazil by forming relationships with international institutions like the ICC, LCIA and ICDR and by holding major conferences in Brazilian cities, such as the ICCA bi-annual convention which was held in Rio de Janeiro in 2010. What follows is a brief summary of the key points of the Arbitration Act and various court decisions that provide support for international commercial arbitration in Brazil.

**The Brazilian Arbitration Act**

The Brazilian Arbitration Act is generally based on the UNCITRAL Model Law (1985); however, there are some significant differences. First, while the Model Law applies only to international commercial arbitration, the Arbitration Act applies to both domestic and international arbitration. Second, the Arbitration Act provides for two different forms of arbitration agreements: the arbitration clause (the “clausula compromissoria”) and the submission agreement (the “compromisso arbitral,” which is an arbitration agreement negotiated between the parties after execution of the contract to settle a dispute). Third, the Arbitration Act requires the arbitral tribunal to state the grounds for its award, unless the parties agree otherwise.

**Key Features of the Arbitration Act**

Salient features of the Arbitration Act include:

- A wide scope of arbitrability under Article 1;

- The parties may select one or more arbitrators, always an odd number;
- Parties may choose the venue and language of the proceedings;
- Parties may agree on substantive and procedural rules that they wish to adopt and the arbitration can be based on law or equity; the only limiting factor is that the law chosen must not violate public policy or accepted customs of behavior. Thus the parties may choose to adopt the rules of any institutional arbitration body to govern their arbitration; in addition to the well-known international arbitration bodies, Brazil has a dozen or so well-established domestic arbitration institutions that have promulgated their own procedures. Those institutions include CCBC, FIESP/CIESP, AmCham, CMA-IE, FGV, BCMA, ARBITAC and CAMARB;
- The arbitrator(s) have the power to decide any dispute about the validity of the arbitration clause (Art. 8);
- A non-cooperating party can be compelled by a Brazilian court order to arbitrate if there is a valid arbitration clause in a contract (Art. 7);
- The use of arbitration is an effective way to ensure that the parties' choice of applicable (foreign) law is enforced since Brazilian courts tend not to respect choice of foreign law;
- A domestic arbitral award can be immediately enforced without the need for prior confirmation by a Brazilian court; and
- A foreign arbitral award can be entered after it is confirmed by the Superior Court of Justice, which will analyze the foreign award to make sure it is not contrary to public policy and good morals. There is no need for a local court in the state where the award was issued to confirm the award before it can be enforced in Brazil.

### **Brazilian Courts Support Arbitration**

There exists today a substantial and growing body of Brazilian court decisions in support of and relating to arbitration proceedings, including at the Supreme Court, Superior Court of Justice and State Court levels. It is possible to derive the following general principles:

- Brazilian courts generally have a positive attitude towards arbitration and usually enforce arbitration clauses;
- Brazilian courts recognize and respect the principle of autonomy of the parties;
- Brazilian courts do not go out of their way to “protect” Brazilian parties. Foreign companies can expect to get a “fair shake” in arbitration proceedings in Brazil;
- Brazilian courts recognize and respect the powers of arbitrators once the arbitral tribunal is constituted; and

- Brazilian courts are reluctant to interfere with the decisions of arbitral tribunals.

### **Arbitration with State Entities**

Brazil, and in particular Rio de Janeiro, has been chosen to host several major global sporting events, including the 2011 Military World Games, the 2013 FIFA Confederations Cup, the 2014 FIFA World Cup and the 2016 Summer Olympic and Paralympic Games. Given the magnitude of state spending on infrastructure and other projects in support of these major events, attention will be brought to bear on whether international commercial arbitration can be used to resolve disputes where the state or a state-controlled entity is a party to a contract.

Generally speaking, it is now accepted in Brazil that the state or a state-controlled entity (the so-called “mixed-capital companies”) may be a party to an arbitration agreement. Since 2005, there have been a number of cases decided in which Brazilian courts have recognized that state-owned or controlled entities possess the capacity to submit to arbitration. Legislative reforms in 2004 regarding public-private partnerships and in 2005 regarding concession contracts expressly authorized the use of arbitration in contracts with the state or with state-controlled entities.

### **Areas of Concern with Arbitration in Brazil**

A few hurdles still need to be overcome before Brazil is to become on a par with some of the more established seats of arbitration like London, Paris, Geneva and New York City. Those include the following:

- There are a few outlier decisions in the State courts where arbitration clauses were not enforced on the grounds that a valid arbitration still required a “compromisso” (a separate agreement to arbitrate outside the arbitration clause); those cases are, however, very much against the majority of decisions and are considered to be aberrations. They will likely be reversed by the State Courts of Appeal;
- An award rendered in favor of a party in Brazil will be subject to Brazilian tax consequences, which may include a 25% withholding if the award was for services rendered;
- There is a relatively small pool of experienced arbitrators, who tend to be very busy, thus causing delay to some arbitrations; and
- Brazil has not ratified the ICSID Convention and the current government does not appear to be interested in joining ICSID.

### **Conclusion**

International commercial arbitration in Brazil is flourishing. The legal framework has changed considerably for the better since 1996 and Brazil is now considered a player in international commercial arbitration. With its new arbitration-friendly atmosphere and its developing case law, generally in line with the accepted standards of international commercial arbitration, the future for arbitration in Brazil is very promising.