

BRAZIL

DELOS GUIDE TO ARBITRATION PLACES (GAP)

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is a consolidated dispute resolution mechanism in Brazil. The Brazilian Arbitration Law (“BAL”) is well developed and has been recently modified to adapt it to some important demands,¹ such as interim measures (Arts. 22-A and 22-B) and arbitrations with the public administration (Art. 1 §1), which were already accepted by the local case law.

Key places of arbitration in the jurisdiction	The key places in Brazil for arbitration are the cities of São Paulo (State of São Paulo), Rio de Janeiro (State of Rio de Janeiro), Porto Alegre (State of Rio Grande do Sul), Curitiba (State of Paraná) and Belo Horizonte (State of Minas Gerais).
Civil law / Common law environment?	Civil Law
Confidentiality of arbitrations?	Although there is no general legal provision dealing with the topic, confidentiality can be agreed by the parties. The BAL eliminates confidentiality in cases in which public administration parties are involved, imposing the publicity of the procedure (Art. 2 § 3).
Requirement to retain (local) counsel?	There is no restriction for foreign counsel to act as a party representative in domestic arbitral procedures. It differs from litigation in national courts, where an official registration of the counsel and the local law firm before the Brazilian Bar Association (“ <i>Ordem dos Advogados do Brasil</i> ”) is required.
Ability to present party employee witness testimony?	There is no restriction to present party employee witness testimony under the BAL.
Ability to hold meetings and/or hearings outside of the seat?	The BAL does not limit arbitral tribunals’ powers or parties’ choice to hold meetings and hearings outside of the seat. Parties can agree to different places in which the arbitral proceedings can occur (Art. 11, I, BAL) and these places can even be different from the seat. ²
Availability of interest as a remedy?	It is possible to recover interest as a remedy in Brazil (Brazilian Civil Code, Art. 407; Brazilian Supreme Court jurisprudence). ³
Ability to claim for reasonable costs incurred for the arbitration?	The Arbitral Tribunal can freely decide on the costs allocation in its decision (Art. 27, BAL).

¹ See the translated version of the Brazilian Arbitration Law at: <http://cbar.org.br/site/legislacao-nacional/lei-9-30796-em-ingles/>.

² Carlos Alberto CARMONA, *Arbitragem e Processo*. 3 ed. São Paulo: Atlas, 2009, p. 208.
Entry n° 254 of the Prevailing Case Law (“*Súmula da Jurisprudência Dominante*”). There is a huge list of precedents confirming such entry: Extraordinary Appeal n° 162890 ED, Justice Ilmar Galvão, 1st Section, date: 03/06/1997; Extraordinary Appeal n° 115123, Justice Sydney Sanches, 1st Section, date: 12/02/1988; Extraordinary Appeal n° 109462, Justice Rafael Mayer, 1st Section, date: 24/06/1986. This is also the understanding of the Brazilian High Court of Justice (“*Superior Tribunal de Justiça*”); See, also, Appeal n° 1133023/PE, Justice Og Fernandes, 6th Section, date: 17/09/2009; Appeal n° 979708/PE, Justice Og Fernandes, 6th Section, date: 02/09/2008; Special Appeal n° 464.234/PR, Justice João Otávio de Noronha, 2nd Section, date: 03/08/2006. Available at: <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=254.NUME.%20NAO%20S.FLSV.&base=baseSumulas>.

Restrictions regarding contingency fee arrangements and/or third-party funding?	Brazilian Law is silent on agreements regarding contingency fees or third-party funding. Moreover, there is no ethical or legal barrier to the funding arrangements. ⁴ The dominant opinion supports the possibility to make these arrangements. Accordingly, they are an option worth being considered. ⁵
Party to the New York Convention?	Brazil is a party to the New York Convention since 2002. ⁶
Other key points to note	<p>It is possible for an arbitrator to be criminally liable in Brazil. Arbitrators are treated as public officers when it comes to criminal liability (Art. 17 of the BAL). Arbitral awards rendered by an arbitrator who has been proven to be corrupt in a criminal procedure can be annulled on the grounds of the BAL (Art. 32, VI). When it comes to civil liability, arbitrators can also be condemned to pay damages as a consequence of the criminal offence.⁷</p> <p>Courts in Brazil are friendly to arbitration. Brazil is one of the leading countries in Latin America to facilitate the development of arbitration.⁸</p> <p>The duration of annulment proceedings may vary depending on whether a party appeals the decision on the validity of the award. A number of appeals can be submitted in an annulment proceeding, since it follows the regular procedure for civil actions. There are two ordinary degrees of jurisdiction in Brazil; thus, the decision in an annulment proceeding can be appealed. There are also extraordinary appeals, which can be made both to the High Court of Justice ("<i>Superior Tribunal de Justiça</i>") and to the Supreme Court ("<i>Supremo Tribunal Federal</i>"), when there are violations of federal legislation or to the Federal Constitution respectively.</p> <p>As a general rule, annulment proceedings do not suspend the enforcement of awards, except if the State judge understands that the annulment application is likely to succeed and that there is a risk that the enforcement causes irreparable or serious injury, according to the standards set forth by the Brazilian Code of Civil Procedure (Art. 294 <i>et seq.</i>). The annulment can also be required by the defendant in an enforcement proceeding by way of a mean of defense (BAL, Art. 33 §3).</p>
WJP Civil Justice score (2018)	0.53

⁴ Arnaldo WALD, Some positive and negative aspects of arbitration financing, *Revista de Arbitragem e Mediação*, vol. 49/2016, pp. 33-41.

⁵ Arnaldo WALD, Some positive and negative aspects of arbitration financing, *Revista de Arbitragem e Mediação*, vol. 49/2016, pp. 33-41.

⁶ Available at: http://www.planalto.gov.br/ccivil_03/decreto/2002/d4311.htm.

⁷ BAL Art. 14: "*Individuals somehow linked to the parties or to the submitted dispute, by any of the relationships that characterize the impediment or suspicion of judges, are prevented from serving as arbitrators and become subject, as the case may be and to the applicable extent, to the same duties and responsibilities incurred by court judges, as set up in the Code of Civil Procedure*".

⁸ Eleonora COELHO PITOMBO, Arbitragem e o Poder Judiciário: aspectos relevantes, in Luiz Fernando do Vale de ALMEIDA GUILHERME, *Aspectos Práticos da Arbitragem*, São Paulo, Editora Quartier Latin, 2006, p. 122.

ARBITRATION PRACTITIONER SUMMARY

Arbitration is a consolidated dispute resolution method in Brazil. Courts and scholars are informed on the subject, leading to uniform and safe decisions. High Courts and District Courts located in the key seats are friendly to arbitration.

Date of arbitration law?	23 September 1996, with its constitutionality declared by the Brazilian Supreme Court (" <i>Supremo Tribunal Federal</i> ") in 2001 ⁹ and lastly reviewed in 2015 (Law 13,129/2015).
UNCITRAL Model Law? If so, any key changes thereto?	The BAL's working group got inspiration from UNCITRAL Model Law, the 1988 Spanish Arbitration Law, the 1958 New York Convention and the 1975 Panama Convention, without literally adopting their terms. While the UNCITRAL Model Law is one of the basis for the BAL, Brazil did not officially adhere to it and is not part of the official list of Model Law countries.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	All the Brazilian key seats have arbitration-specialized first instance courts, ¹⁰ and São Paulo has a specialized business section at the appellate level to judge arbitration-related matters. ¹¹
Availability of <i>ex parte</i> pre-arbitration interim measures?	Parties to a future arbitration seek interim measures from courts, such as a pre-arbitral procedure (Art. 22-A BAL), which can be granted <i>ex parte</i> when the legislative requirements are fulfilled (Art. 300 §2, Code of Civil Procedure). The requirements are the likelihood of success of the claim on the merits and the risk of irreparable or serious injury, if the measure sought is not granted (Art. 300, Code of Civil Procedure).
Courts' attitude towards the competence-competence principle?	The BAL (Art. 20) and Brazilian Courts recognize the competence-competence principle, giving preference to arbitral tribunals over national courts to decide on objections to the jurisdiction of the arbitral tribunal. ¹²
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Art. 32 of the BAL provides for additional and more general grounds for the annulment of awards. These are the following: the nullity of the arbitral agreement (section I); an award rendered by a person that had not right to serve as an arbitrator (section II); an award without the formal requirements set forth by Art. 26 of the BAL (summary of the case, legal grounds, decision, date and place) (section III); an award that exceeds the limits of the

⁹ Supreme Court, Recognition Procedure n.º 5.206, Justice Sepúlveda Pertence, date: 12/12/2001. Available at: <http://stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28SE%24%2ESCLA%2E+E+5206%2ENUME%2E%29+OU+%28SE%2EACMS%2E+ADJ2+5206%2EACMS%2E%29&base=baseAcordaos&url=http://tinyurl.com/c7wyaxt>.

¹⁰ In 2015, the National Council of Justice ("*Conselho Nacional de Justiça*", "CNJ", the public entity that supervises the judiciary in Brazil) made available a list of specialized Brazilian Courts in almost every state capitals: <http://www.cnj.jus.br/noticias/cnj/80374-corregedoria-divulga-lista-de-varas-especializadas-em-arbitragem>.

¹¹ Creation of the Reserved Section for Business Law ("*Câmara Reservada de Direito Empresarial*") for arbitration-related matters: <https://api.tjsp.jus.br/Handlers/Handler/FileFetch.ashx?codigo=31267>.

¹² See, for instance, High Court of Justice, Competence Conflict n.º 139519/RJ, Justice Regina Helena Costa, date: 11/10/2017. Available at: <http://www.stj.jus.br/SCON/jurisprudencia/toc.jsp?livre=%22compet%EAncia-compet%EAncia%22&b=ACOR&thesaurus=JURIDICO&p=true>.

	<p>arbitration agreement (section IV); the substantiated proof of unfaithfulness, extortion or corruption of the arbitrator (section VI); an award rendered after the time limit has expired (section VII); and an award that violates the principles set forth by Art. 21 §2 of the BAL (adversarial, equality, impartiality and free conviction principles) (section VIII).</p> <p>As far as the enforcement of foreign awards is concerned, Art. 38 of the BAL contains similar provisions to those of the New York Convention.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>According to Art. 38, VI, of the BAL, an award which has been annulled at the seat of arbitration cannot be recognized or enforced in Brazil. The High Court rendered a leading case on this matter in 2015, denying enforcement to an award that had been rendered and annulled in Argentina.¹³</p>
<p>Other key points to note?</p>	<p>According to Art. 33 of the BAL, the 90-day time limit for the party to seek annulment of the final or partial award is triggered with the notification of the award. This time limit will start to run also for the annulment of partial awards. When there is a request for clarifications of the award, the time limit runs from the decision on the clarifications is notified to the parties.</p> <p>Partial and interim awards are enforceable according to Art. 23, §1 of the BAL.</p>

¹³ High Court of Justice, Special Section, Recognition Procedure n° 5782, date: 02/12/2015. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201101290847&dt_publicacao=16/12/2015.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

The BAL's working group got inspiration from the UNCITRAL Model Law, the 1988 Spanish Arbitration Law, the 1958 New York Convention and the 1975 Panama Convention, without literally adopting their terms. It contains several provisions which are not set forth in those instruments, such as: validity of arbitral agreements inserted in adhesion contracts only if highlighted and specifically signed by the adhering party (Art. 4 §2); court intervention to solve pathological arbitration agreements (Art. 7); the standard of impartiality for arbitrators, applying the criteria set by the Brazilian Code of Civil Procedure (Art. 14); a time limit for rendering the award, unless otherwise agreed by the parties, which is six months from the commencement of the arbitration (Art. 23); or a shorter time-limit of 5 days for the request for correction of the award to be presented (Art. 30).

The field for arbitration in Brazil was prepared through the works of professionals and scholars in what was called "Arbiter Operation", which was conceived by Professor Carlos Alberto Carmona, Professor Selma Lemes and Professor Pedro Batista Martins.¹⁴ The BAL became effective in 1996, so it is now more than 20 years old. It was last revised on 26 May 2015. In this reform, alterations were made on the arbitrability of public administration issues, strengthening its possibility and imposing the non-confidentiality of its proceedings (Art. 1 §§1 and 2; Art. 2 §3);¹⁵ on the possibility to render partial awards (Art. 23 §1); on the interim measures provisions, allowing requests before and after the arbitral tribunal is constituted (Art. 22-A and 22-B); on the relations between arbitration and judiciary when a judge to enforce an arbitral order is necessary (Art. 22-C); among other modifications.

2. The arbitration agreement

According to Art. 2 §1 of the BAL, parties are free to agree on the law applicable to the merits of the dispute and to the arbitration agreement.

In international arbitral proceedings,¹⁶ if the parties have chosen a specific legislation to govern the underlying contract, the arbitral tribunal will not determine the substantive law. However, if the Parties have not done so, the arbitral tribunal has the power to fill the contractual gap taking into account any implicit choice of law that may arise from a group of circumstances to be assessed (e.g. parties nationality, place in which the contract was executed, nature of the transaction, sporadic references in the contract to legislation or soft law, the general conflict of law rule set forth by the Introductory Law to the Brazilian Legal System if applicable,¹⁷ among others).

¹⁴ Arnaldo WALD, *Arbitragem: Passado, Presente e Futuro*, *Revista de Arbitragem e Mediação*, vol. 50/2016, p. 59-78.

¹⁵ The ability of the public administration to be a party to an arbitral procedure was acknowledged by a series of judicial precedents at least since the case *State of Minas Gerais vs Américo Werneck*, of 1915. Also, before the BAL's 2015 review, a significant number of sparse laws was published allowing State entities to choose arbitration as the dispute resolution method, for instance: Law No. 8.987/95 (law regarding concessions and permissions of public services); Law No. 9.472/97 (National Telecommunications Agency – "ANATEL"), Law No. 9.478/97 (National Petroleum Agency – "ANP"), Law No. 10.233/2001 (National Roadway Transportation Agency – "ANTT"); Law No. 12.154/2009 (National Superintendence for Private Security – "PREVIC"). It is also worth mentioning that the State of Rio de Janeiro enacted a Decree (no. 46,245/2018) allowing local State entities to participate in arbitral proceedings, but only if some requirements are complied with, e.g.: institutional arbitration only, the city of Rio de Janeiro as the seat, Brazilian law as the applicable one, Portuguese as the chosen language.

¹⁶ Although the BAL does not establish any differentiation between domestic and international arbitration, Brazilian doctrine deems *international* the arbitral procedure that contains any foreign connecting elements, such as foreign parties, foreign law or a seat in a foreign country. A domestic procedure would be the one having only *national* connecting elements. The sole difference between domestic and international arbitration established by the BAL relates to the nationality of the award: any awards issued outside the Brazilian territory are considered foreign awards, needing recognition by the High Court of Justice to become enforceable in Brazil (BAL Art. 34, Sole Paragraph).

¹⁷ The law which governs the contract will be the one of the place where the obligation was signed (Article 9, "*Lei de Introdução às Normas do Direito Brasileiro*", available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/Dei4657.htm).

On the other hand, there is no legal provision in Brazil that determines which law should govern the interpretation of arbitral agreements when parties have not expressly agreed to one. There is also no consensus among Brazilian authorities on what criteria shall be followed by arbitrators when filling this gap. Some of them point to the law of the seat¹⁸ following Art. 38, II, of the BAL,¹⁹ while others invoke the governing law of the underlying contract as the criterion to be considered.²⁰ One of the most paradigmatic disputes involving a Brazilian party relating to governing law was the *Jirau case*, in which parties to an insurance contract disagreed on the law that should apply to the arbitral agreement. While one party argued before a Brazilian State Court the nullity of the arbitral agreement based on Art. 4 §2 of the BAL,²¹ the other filed an anti-suit injunction before an English court arguing that the law of the seat should apply, which was English law because the place of arbitration was London. The Brazilian court deemed applicable the law of the underlying contract, while the English judiciary declared the law of the seat as applicable to interpret the arbitral agreement.²²

The underlying issue relates to the autonomy of the arbitration agreement from the contract in which it is set forth, as stated by Art. 8 of the BAL. As a matter of procedure, Art. 8 grants the arbitrator the power to decide *ex officio* or upon parties' request the issues relating to the existence, validity and effectiveness of the arbitration agreement (Art. 8, Sole Paragraph). As a matter of substantive law, this provision preserves the arbitration agreement from any nullity affecting the contract in which it is inserted. However, a contract's nullity may also affect the arbitral agreement in an independent way (e.g. when both the underlying contract and the arbitral agreement were concluded under coercion). According to the principle of competence-competence, the tribunal will also decide this issue (Art. 8, Sole Paragraph, and 20 of the BAL). Exceptions to such principle are the compulsory arbitral clauses inserted in consumer contracts, which are null and void according to Art. 51, VII, of the Brazilian Code of Consumer Defence and Protection (Law No. 8.078 of September 11, 1990).²³ This provision enables the parties to circumvent the competence-competence principle and go straight to the Judiciary.

There are some specific validity requirements for an arbitration agreement to be enforceable.

If the arbitration agreement is an arbitral clause in a contract ("*cláusula compromissória*"), the only requirement is that it must be stipulated in writing (Art. 4). If an arbitration clause is pathological, *i.e.*, there are no means for the initiation of the arbitral proceedings, the clause will not be considered void, since the BAL provides for a solution to this problem, referring the parties to state courts to complete/execute the arbitration agreement (Art. 7 of the BAL). An exception to this rule is the arbitral clause inserted in an adhesion contract, which will only be deemed valid if the adhering party takes the

¹⁸ Adriana BRAGHETTA, A importância da sede da arbitragem, in Selma Ferreira LEMES, Carlos Alberto CARMONA, Pedro Batista MARTINS (coords.), *Arbitragem. Estudos em homenagem ao Prof. Guido Fernando da Silva Soares*. In *Memórias*, São Paulo, Atlas, 2007, p. 25.

¹⁹ "Art. 38. Recognition or enforcement of the foreign arbitral award may be refused if the party against which it is invoked, furnishes proof that: [...] II. the arbitration agreement was not valid under the law to which the parties have subject it, or failing any indication thereon, under the law of the country where the award was made".

²⁰ Eduardo GREBLER, Artigo V (inciso 1 "A" e "B"). A recusa de reconhecimento à sentença arbitral estrangeira com base no artigo V, (1) alíneas "A" e "B" da Convenção de Nova Iorque, in WALD, Arnoldo; LEMES, Selma Ferreira (coords.). *Arbitragem Comercial Internacional. A Convenção de Nova Iorque e o direito brasileiro*, São Paulo, Saraiva, 2011, p. 198.

²¹ "§2. In adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to file an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or in boldface type, with a signature or special approval for that clause".

²² State Court of São Paulo, 6th Section of Private Law, Appeal nº 3049794920118260000, date: 19.04.2012. Available at: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=5841705&cdForo=0>; and London, High Court of Justice, Queen Bench's Division Commercial Court, Case No: 2011 FOLIO NP. 1519. [2012] EWHC 42 (Comm). The case had no final decision rendered because the parties have reached an agreement before that.

²³ "Art. 51. Any clauses that impose any of the following situations, among others, will be nullified: [...] VII - determine the compulsory use of arbitration". English unofficial version available at: http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf.

initiative to file the arbitration proceeding or if it expressly agrees with its initiation in writing (Art. 4 §2 of the BAL).

When it comes to a post-dispute agreement to arbitrate ("*compromisso arbitral*"), there are a few requirements which need to be complied with for the agreement to be valid. These are set forth in Art. 10 of the BAL: (i) the name, profession, civil status and address of the parties; (ii) the name, profession and address of the arbitrators, or the identification of the arbitration institution to whom the parties delegated their power of nomination; (iii) the matter of dispute that will be subject to arbitration; and (iv) the place of arbitration. If any of these requirements is not fulfilled, the arbitral tribunal may try to reach a supplemental agreement with the parties in order to fill the contractual gap (Art. 19 §1 of the BAL). Only as a last resort, the arbitration agreement will be deemed null and void. There is no need for a "*compromisso arbitral*" when there is already a binding "*cláusula compromissória*" inserted into the underlying contract.

There is no legal provision regulating the possibility that a third-party to a contract be bound by an arbitration agreement executed without its acceptance. However, according to the Brazilian jurisprudence, there are a few cases in which an extension of the arbitration agreement to non-signatories is admitted. For instance, in a case of a set of contracts, it was decided that the arbitration agreement in one of the contracts could be extended in order to bind the parties to all contracts, unless there was a specific restriction in one of the agreements.²⁴ There are, however, cases deciding the contrary.²⁵

In Brazil, there are some restrictions as to which disputes can be settled by arbitration. These restrictions provide for limitations not only as to certain subject-matters but also as to specific persons. Art. 1 of the BAL reads: "*Those who are capable of entering into contracts may make use of arbitration to resolve conflicts regarding freely transferable property rights*". The expression "transferable property right" is considered to exclude: as a matter of specific domains, disputes relating to personal rights, family law, inheritance law, tax law, criminal law and bankruptcy procedures; as a matter of specific persons, disputes relating to consumers, employees and adhesion contracts not in compliance with Art. 4 §2 requirements. When relating to specific subject-matters such as bankruptcy, it is argued that the patrimonial effects of those procedures can be submitted to arbitration. Recently, the labour law has been amended to allow arbitration in specific cases. Moreover, there have been discussions about the arbitrability of tax disputes.²⁶

3. Intervention of domestic courts

State courts give protection to the principle of competence-competence and to the negative effect of the arbitration agreement by staying litigation and referring parties to arbitration. The existence of an arbitration agreement is cause for extinction of the legal process before state courts, either if the seat of arbitration is outside or inside the jurisdiction of courts (Art. 485, VII, Code of Civil Procedure). However, an arbitration agreement will be deemed to be waived if parties do not object to court proceedings before they present their argument on the merits (Art. 337, § 6, Code of Civil Procedure).

There is no express provision in Brazilian Law on the stay of court proceedings as a result of an injunction granted by an arbitrator, except when a competence matter is under its analysis. In such situations, it is implied from Art. 20 of the BAL that an arbitrator could grant an injunction to suspend the court proceeding until the decision is rendered.

²⁴ High Court of Justice, Special Section, Recognition Procedure n° 1, j. 19/10/2011. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=200701569795&dt_publicacao=01/02/2012

²⁵ State Court of São Paulo, 10th Section of Private Law, Appeal n° 03698571720108260000, date: 22/03/2011. Available at: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=5039128&cdForo=0>

²⁶ Grupo de Estudos em Arbitragem Tributária do CBAr. Arbitragem tributária é um caminho a ser explorado. Available at: <https://www.conjur.com.br/2017-jul-11/opiniao-arbitragem-tributaria-caminho-explorado>

Case law registers rare anti-arbitration injunctions being used to stay arbitral proceedings with also rare acceptance by the judiciary, since Brazilian doctrine and case law are almost unanimous on its inadmissibility.²⁷ For this reason, it is rare for a State court to issue an anti-arbitration injunction.

4. The conduct of the proceedings

There is no restriction under the BAL when it comes to party representation. Lawyer representation is not even necessary (Art. 21 §3, BAL) and there is no need for a lawyer to be registered before the local bar to act as a party representative in an arbitral procedure.²⁸ On the contrary, registration of lawyers and Brazilian law firms is mandatory when it comes to court representation (Art. 1, I, Law No. 8.906/94).

The BAL differs from the UNCITRAL Model Law on the impartiality and independence criteria of arbitrators. Instead of providing for the “justifiable doubts” standard, the BAL demands fulfilment of the same requirements set forth for the removal of national judges (Art. 14, BAL). The standard for disclosure is, however, identical to the one provided by the UNCITRAL Model Law. In this respect, a district court has held that non-disclosure *per se* is not a sufficient ground for removal,²⁹ since the object of disclosure must provide for grounds for partiality of the challenged arbitrator.

Articles 144 and 145 of the Brazilian Code of Civil Procedure provide for concrete standards of impartiality and independence,³⁰ some of which can be encountered in soft law, like the IBA Guidelines on Conflict of

²⁷ Rafael Francisco ALVES, *A Inadmissibilidade das Medidas Antiarbitragem*, São Paulo, Atlas, 2009, p. 252; Eduardo TALAMINI, Competência-competência e as medidas antiarbitrais pretendidas pela administração pública, *Revista de Arbitragem e Mediação*, São Paulo, RT, 2016, v. 50, p. 127 et seq. The High Court of Justice (“*Superior Tribunal de Justiça*”) most recent decisions are the following: Special Appeal n° 1.569.422, Justice Marco Bellizze, date: 26.04.2016, available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1490302&num_registro=201501776949&data=20160520&formato=PDF; Recognition Procedure n° 854, Justice Sidnei Benetti, date: 16/10/2013, available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=670286&num_registro=200501238031&data=20131107&formato=PDF, Special Appeal n° 1.327.619, Justice Isabel Galotti, date: 20/08/2013, available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1255895&num_registro=201201146709&data=20130828&formato=PDF.

²⁸ Carlos Alberto CARMONA, *Arbitragem e Processo*, 3. ed. São Paulo, Atlas, 2009, p. 301.

²⁹ State Court of Goiás, 3rd Section of Civil Law, Request for Clarifications n° 65345-40.2014.8.09.0051, date: 23/08/2016. Available at: http://ino.tjgo.jus.br/tamino/SGE/NXML_SGE/nXML/ACOR_653454020148090051_23082016_917CC4A041.PDF

³⁰ “Art. 144. A judge is disqualified, and therefore prevented from hearing a case: I – in which he or she intervened as an agent of the party, acted as an expert witness, worked as a member of the Public Prosecutor’s Office or testified as a witness; II – that he or she heard at another instance of jurisdiction, having rendered a decision; III – when the judge’s spouse or civil partner, or any other relative, by blood or affinity, in direct line of descent or collateral, to the third degree, inclusive, is acting in the case as a public defender, lawyer or member of the Public Prosecutor’s Office; IV – when the judge, his or her spouse or civil partner, or any other relative, by blood or affinity, in direct line of descent or collateral, to the third degree, inclusive, is a party to the proceedings; V – when the judge is a member, officer or manager of a legal entity that is a party to the proceedings; VI – when the judge is the presumptive heir, donee or employer of any of the parties; VII – in which an educational institution with which the judge has an employment relationship or one arising from a services agreement is a party; VIII – in which one of the parties is a client of the law firm belonging to the judge’s spouse, civil partner or relative, by blood or affinity, in direct line of descent or collateral, to the third degree, inclusive, even if represented by a lawyer from another law firm; IX – when the judge files an action against the party or the latter’s lawyer. § 1 In the case presented in item III, the disqualification only occurs when the public defender, lawyer or member of the Public Prosecutor’s office was already part of the proceedings before the start of the judge’s judicial activity. § 2 The creation of a supervening fact that aims to characterise the disqualification of the judge is forbidden. § 3 The disqualification provided in item III also occurs in the case of agency granted to a member of a law firm that has on its staff a lawyer who individually fits the conditions set forth, even if said lawyer does not directly intervene in the proceedings. Art. 145. There is disqualification of a judge: I – who is a close friend or enemy of any of the parties or their lawyers; II – who receives gifts from people who have an interest in the action, either before or after the start of the proceedings, who advises any of the parties regarding the subject matter of the action or who provides the means to cover the expenses of the lawsuit; III – when any of the parties is a creditor or debtor of the judge, the judge’s spouse or civil partner, or their respective relatives, in direct line of descent to the third degree, inclusive; IV – who has an interest in the adjudication of the action in favour of any of the parties. § 1 A judge may recuse him or herself for reasons of conscience, without having to state said reasons. § 2 The allegation of disqualification shall be inadmissible when: I – when it was provoked

Interest (such as the need for removal of an arbitrator when the arbitrator is or was a party representative). There are, however, other provisions set in Articles 144 and 145 of the Brazilian Code of Civil Procedure which could be waived by the parties, as stated by respected doctrine.³¹ Such a waiver would not lead to the annulment of the award or the removal of the arbitrator. This leads to the conclusion that Brazilian standards of impartiality and independence are potentially more flexible than the IBA Guidelines on Conflict of Interest, given that some of the circumstances that, under the IBA Guidelines, fall under the Non-Waivable Red List are waivable under Brazilian law. On top of that, parties are free to combine the standards set by the Code of Civil Procedure with any other established by arbitral institutions or soft law instruments, such as the IBA Guidelines.

Other than partiality issues, the constitution of an arbitral tribunal may lead to various disputes, such as whether the arbitration is *ad hoc* or not. If the arbitration agreement does not provide for means to constitute the arbitral tribunal, the clause is considered blank and incapable of being performed, but not void.³² Under the BAL, these gaps can be filled by state courts if parties do not reach an agreement (Art. 7). In any case, even after a party files a lawsuit aiming at constituting the arbitral tribunal, the courts only interfere if the parties cannot reach an agreement on the terms of the arbitration. The court's authority is broad in order to preserve the initial intention to arbitrate the dispute, having the power to determine how the tribunal shall be constituted as well as to make any necessary appointments itself, always taking into consideration what the parties had already agreed on.³³

Also under the umbrella of the court intervention, the BAL grants the possibility of judicial pre-arbitral measures (Art. 22-A, BAL) if the requirements of likelihood of success and risk of irreparable or serious injury previously mentioned. These measures can be granted *ex parte* (Article 300 §2, Code of Civil Procedure). After an arbitral tribunal is constituted, interim measures can only be filed before the arbitrators themselves, making it inadmissible to resort to state court injunctions (Art. 22-A, BAL). Arbitrators have the power to issue interim measures (Art. 22-B, BAL), which may be enforced by the state courts if necessary by means of an "arbitral letter" ("*carta arbitral*", Art. 22-C, BAL).

Although there is no general legal provision dealing with the topic, confidentiality can be agreed on by the parties. The BAL eliminates confidentiality in cases in which the public administration is involved, imposing the publicity of the procedure (Art. 2 §3). Some authors tend to temper this duty of publicity by restraining its application only to disputes in which an interested third-party asks for access to the case files, subject to the secrecy as a general rule in order to preserve parties' strategic information made available during the procedure.³⁴ Until now, there is no consensus among Brazilian authors on the range of this duty. Confidentiality is extended to court measures that are required by the arbitrator (Art. 22-C, Sole Paragraph, BAL).

The BAL contains several other procedural regulations. Most of them, however, are not mandatory and can be derogated by parties' agreement.

by the one who alleges it; II – the party who makes the allegation has performed an act that implies the express acceptance of the accused".

³¹ Carlos Alberto CARMONA, *Arbitragem e Processo*, 3. ed. São Paulo, Atlas, 2009, p. 253.

³² Luis Fernando GUERRERO, *Convenção de Arbitragem e Processo Arbitral*, São Paulo: Atlas, 2009, p. 117.

³³ Mateus AIMORÉ CARRETEIRO et al., *International Arbitration in Brazil: An Introductory Practitioner's Guide*, The Hague, Kluwer Law International, 2016, §3.02.

³⁴ Lauro GAMA, Sinal Verde para a Arbitragem nas Parcerias Público-Privadas (A Construção de um Novo Paradigma para os Contratos entre o Estado e o Investidor Privado), *Revista Brasileira de Arbitragem*, São Paulo, Comitê Brasileiro de Arbitragem CBAr & IOB, 2005, v. 2, issue 8, p. 35; José Emilio NUNES PINTO, A arbitralidade de controvérsias nos contratos com o Estado e empresas estatais, *Revista Brasileira de Arbitragem*, São Paulo, Comitê Brasileiro de Arbitragem CBAr & IOB, 2005, v. 1, issue 1, 2004, pp. 9-26; José Emilio NUNES PINTO, Confidencialidade na Arbitragem, *Revista de Arbitragem e Mediação*, São Paulo, RT, 2005, v. 6, pp. 25-36; Thiago Luís SOMBRA, Mitos, crenças e a mudança de paradigma da arbitragem com a administração pública, *Revista Brasileira de Arbitragem*, Comitê Brasileiro de Arbitragem CBAr & IOB; Kluwer Law International, 2017, v. 14, issue 54, p. 66.

When it comes to evidence, the BAL provides for a broad authority of the arbitrator to admit, exclude and order evidence production (Art. 22, BAL). There are no specific restrictions to the presentation of evidence. The exclusion of any evidence requested by the parties is possible and will not be a reason to annul the award if it is properly reasoned.³⁵ The BAL establishes that the Code of Civil Procedure applies to evidence issues in respect of which the former is silent. Evidence production rules in Brazil leaves limited possibilities to request document production, because a party cannot be compelled to produce evidence against its own interests.³⁶

The BAL does not contain any specific provision on the hearings, so the parties are free to regulate this issue (Art. 21, BAL). As opposed to Brazilian Court proceedings, in which direct witness examination and cross-examination are precluded, these kinds of witness examination procedures have become a practice in arbitral proceedings in Brazil.³⁷

Cost allocation is also not specifically regulated by the BAL, which provides for the Arbitral Tribunal's power to allocate the costs in the award in the manner that it considers reasonable (Art. 27 BAL). On the other hand, it may be decided in arbitration that the losing party pays the costs, adopting the "costs follow the event" rule. As it is provided by the Brazilian Code of Civil Procedure for court proceedings, the rule of defeat lawyers' fees (which is similar to the costs follow the event rule) may also apply in arbitration.³⁸

Although there is no express provision in the BAL allowing or restraining the claim, interests are deemed to be a public policy matter under Brazilian substantive law (Civil Code, Art. 407).³⁹ The Supreme Court ("*Supremo Tribunal Federal*") already ruled the following: "*Interest for late payment is included in liquidation, even if there is no claim thereof or order for payment thereof in the judgment*".⁴⁰

Another important aspect to refer is the possible liability of the arbitrators. They are equalized to public officers when it comes to criminal liability (Art. 17, BAL). As an analogy with national judges, arbitrators can be liable for damages only if they incur in fraud or intentionally omit or delay any measures that must be taken by them (Art. 143, Code of Civil Procedure).⁴¹

³⁵ High Court of Justice, 3rd Section, Special Appeal n° 1.500.667, Justice João Otávio de Noronha, date: 09/08/2016. Available at: https://ww2.stj.jus.br/processo/revista/documento/mediado?componente=ITA&sequencial=1528345&num_registro=201302297455&data=20160819&formato=PDF.

³⁶ Fernando SEREC, *Evidence Production in Arbitration in Brazil: What to Expect*. Kluwer Arbitration Blog, 2008. Available at: <http://arbitrationblog.kluwerarbitration.com/2010/12/08/evidence-production-in-arbitration-in-brazil-what-to-expect/>.

³⁷ Fernando SEREC, *Evidence Production in Arbitration in Brazil: What to Expect*. Kluwer Arbitration Blog, 2008. Available at: <http://arbitrationblog.kluwerarbitration.com/2010/12/08/evidence-production-in-arbitration-in-brazil-what-to-expect/>.

³⁸ Defeat lawyer's fees are established when the arbitral tribunal orders the losing party to pay fees for the lawyer of the winning party. State Court of São Paulo, 13th Section of Public Law, Appeal n° 1005627-81.2015.8.26.0053, date: 17/02/2016. Available at: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=9184386&cdForo=0>.

³⁹ "Art. 407. *Even if no losses are claimed, the debtor is required to pay interest for late payment which will be computed on money owed or performance of other nature, once its pecuniary value is established by judgment, arbitration, or agreement between the parties*".

⁴⁰ Entry n° 254 of the Prevailing Case Law ("*Súmula da Jurisprudência Dominante*"). There is a huge list of precedents confirming such entry: Extraordinary Appeal n° 162890 ED, Justice Ilmar Galvão, 1st Section, date: 03/06/1997; Extraordinary Appeal n° 115123, Justice Sydney Sanches, 1st Section, date: 12/02/1988; Extraordinary Appeal n° 109462, Justice Rafael Mayer, 1st Section, date: 24/06/1986. This is also the understanding of the Brazilian High Court of Justice ("*Superior Tribunal de Justiça*"). For instance: Appeal n° 1133023/PE, Justice Og Fernandes, 6th Section, date: 17/09/2009; Appeal n° 979708/PE, Justice Og Fernandes, 6th Section, date: 02/09/2008; Special Appeal n° 464.234/PR, Justice João Otávio de Noronha, 2nd Section, date: 03/08/2006. Available at: <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=254.NUME.%20NAO%20S.FLSV.&base=baseSulmulas>.

⁴¹ State Court of São Paulo, 3rd Section of Private Law, Appeal n° 1018710-47.2014.8.26.0071, date: 29/11/2016. Available at: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=10021606&cdForo=0>.

5. The award

When it comes to the award, the BAL regulates certain aspects which cannot be modified by the parties. For instance, parties cannot waive the requirement for an award to provide reasons. According to Art. 26, reasons are a mandatory requirement of the award, the lack thereof being a valid ground for its annulment.⁴² Other mandatory requirements are the summary of the facts, the ruling and the date and place the award was rendered.

The arbitral award is final and cannot be submitted to any appeal (Art. 18, BAL). The only way to disregard an award is through an annulment proceeding, under the strict grounds set forth on Art. 32 of the BAL.

For the annulment of an award there is a specific time-limit, which is 90 days after the award is notified to the parties. This time limit also applies to partial awards. When there is a request for clarifications, the time limit is initiated with the notification to the parties of the decision rendered. If the parties do not respect this time frame, the consequence is the impossibility of the court to rule on the merits of the annulment proceedings.

The duration of annulment proceedings may vary depending on whether a party appeals the decisions on the validity of the award. A number of appeals can be submitted in an annulment proceeding, since it follows the regular procedure for civil actions. There are two ordinary degrees of jurisdiction in Brazil. Thus, the decision in an annulment proceeding can be appealed. There are also extraordinary appeals, which can be made both to the High Court of Justice and to the Supreme Court, when there are violations to federal legislation or to the Federal Constitution respectively.

In a case of 2015, for example, the final judgment by the Supreme Court was made four years after the annulment proceeding was initiated.⁴³ This is the average duration of annulment proceedings in Brazil, although it may vary from case to case. These proceedings can or cannot suspend the effects on the enforcement of the award, depending on the decision of the court and the defences submitted by the parties. A party defending itself in the enforcement proceedings can ask for the suspension of the enforcement proceedings (Art. 525 §6, Code of Civil Procedure) and, if the requirements are complied with (*i.e.* the provision of a guarantee, reasonable chance of success and risk of serious or irreparable harm), the judge will suspend it.

The defending party can also rely on the nullity of the award and provide a security and then ask for the suspension of the enforcement proceedings (Art. 525 §6 Brazilian Code of Civil Procedure). If deemed necessary according to the criteria to grant interim measures provided in the Brazilian Code of Civil Procedure, the judge will suspend it.

As soon as an award is rendered, the winning party may start enforcement proceedings before the competent local court. A foreign award,⁴⁴ however, must be recognized by the High Court of Justice, which has exclusive jurisdiction to grant *exequatur* to the award after a preliminary analysis (Art. 35, BAL).⁴⁵ The duration of these proceedings may also vary from case to case, but the average time is between one to two years. Thus, local awards may be promptly executed, whereas foreign awards must be recognized ("*homologados*") by the High Court of Justice first. The High Court of Justice may not, however, analyze the

⁴² State Court of São Paulo, 3rd Section of Private Law, Appeal nº 1125099-32.2015.8.26.0100, date: 03/10/2017. Available at: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=10852071&cdForo=0>.

⁴³ High Court of Justice, Special Appeal nº 1519041, Justice Marco Aurélio Belizze, date: 11.09.2015. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201500144429&dt_publicacao=11/09/2015.

⁴⁴ Under Brazilian law, any awards issued outside the Brazilian territory are considered foreign awards (BAL Art. 34, Sole Paragraph).

⁴⁵ Leonardo de Campos MELO, *Recognition and Enforcement of Foreign Arbitral Awards in Brazil: A Practitioner's Guide*, The Hague, Kluwer Law International, 2015, p. 23.

merits of the dispute, as it can only determine whether the formal requirements set forth on Art. 38 of the BAL have been fulfilled.⁴⁶

Brazil is a party to three of the most important multilateral treaties on the enforcement of arbitral awards: the New York Convention (endorsed by Brazil in 2002); the Inter-American Convention on International Commercial Arbitration adopted in Panama in 1975 (endorsed by Brazil in 1996); and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral awards adopted in Montevideo, Uruguay, in 1979 (endorsed by Brazil in 1995). Thus, the criteria for recognition and enforcement of foreign awards follow the principles set forth in these treaties, as well as the Code of Civil Procedure and the Court Rules of the High Court of Justice (Articles 216-A to 216-N).

A foreign award shall not be recognized if it has been annulled at the seat of arbitration (Art. 38, VI, BAL), not being enforceable in Brazil.⁴⁷ That has been decided recently by the High Court of Justice, which denied enforcement of an award rendered and annulled in Argentina.⁴⁸ The other way around, however, is also possible. A foreign award may not be recognised in Brazil even if it was not annulled at its seat.⁴⁹ This decision was taken in the well-known *Abengoa case*, in which the offense to public order was considered to deny recognition to an US-seated arbitral award.

There have been discussions about the enforceability of awards that go against judicial precedents. Since the new Code of Civil Procedure was enacted (2015), precedents have a binding force under Brazilian Law. Therefore, it may be defended that the arbitrator has the duty to follow these precedents as well. This duty derives from respect to parties' autonomy when choosing the applicable law and, therefore, may result in a possible ground for the annulment of an award. Until now, there is no consensus within the doctrine or in the case law on whether arbitrators are bound by precedents in the same way as judges are.

6. Funding arrangements

The BAL is silent on agreements regarding contingency fees or third-party funding, and there is no restriction regarding these topics. Although there has been criticism that this possibility of funding may be used for bad purposes (e.g. frivolous arbitrations, lending money at unlawful rate of interest, etc.),⁵⁰ the funding arrangements have been seen as good options for impecunious parties to be able to participate in arbitral proceedings.⁵¹

Even though third-party funding is a brand-new possibility in Brazilian arbitration, investment funds and specialized companies already provide options of funding in their portfolios.⁵² The funding can also be

⁴⁶ High Court of Justice, Special Section, Recognition Procedure nº 866, date: 17.05.2006. Available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=628271&num_registro=200500349265&data=20061016&formato=PDF.

⁴⁷ Antonio Carlos Nachif CORREIA FILHO, The theories of international arbitration and related practical issues: the Brazilian approach (particularly the recent leading case on recognition of annulled awards) vis-à-vis the “delocalization trend”, *Revista Brasileira de Arbitragem*, The Hague, Kluwer Law International, 2016, Vol. XIII Issue 52, p. 26-54.

⁴⁸ High Court of Justice, Special Section, Recognition Procedure nº 5782, date: 02.12.2015. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201101290847&dt_publicacao=16/12/2015.

⁴⁹ High Court of Justice, Special Section, Recognition Procedure nº 9412 / US, date: 19.04.2017. Available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1456133&num_registro=201302788725&data=20170530&formato=PDF.

⁵⁰ Napoleão Casado FILHO, Arbitragem comercial internacional e acesso à justiça: o novo paradigma do Third Party Funding, 2015, Tese (Doutorado em Direito), Pontifícia Universidade Católica de São Paulo, São Paulo, 2015, p. 132 *et seq.*

⁵¹ Arnoldo WALD, Some positive and negative aspects of arbitration financing, *Revista de Arbitragem e Mediação*, vol. 49/2016, p. 33 – 41.

⁵² Thais Cristina GADOTTI, Advantages and disadvantages of third party funding in arbitration, *Revista dos Tribunais*, vol. 981/2017, Brazil, Editora Revista dos Tribunais, 2017, p. 39-54.

contracted or provided by any capable person, as there are no specific restrictions and it is not included as an action allowed only for financial institutions.⁵³

The practice is to disclose the existence of a third-party funder, so that arbitrators can proceed with broad conflict checks.

7. Possible future reform

It is not likely for Brazil to have another reform of its Arbitration Law as it was last revised in 2015. However, there have been debates about whether arbitration should be allowed in tax disputes and insurance disputes. In addition, there has been a recent reform in the labour legislation to allow arbitration in some specific cases; there is still no precedent on the matter.

⁵³ Napoleão Casado FILHO, Arbitragem comercial internacional e acesso à justiça: o novo paradigma do Third Party Funding, 2015, Tese (Doutorado em Direito), Pontifícia Universidade Católica de São Paulo, São Paulo, 2015.