

GUIDE TO ARBITRATION PLACES (GAP)

BRAZIL

CHAPTER PREPARED BY

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OF TOZZINIFREIRE ADVOGADOS



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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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|--|---|
| 1. Law                                       | ● |
| a. Framework                                 | ● |
| b. Adherence to international treaties       | ● |
| c. Limited court intervention                | ● |
| d. Arbitrator immunity from civil liability  | ● |
| 2. Judiciary                                 | ● |
| 3. Legal expertise                           | ● |
| 4. Rights of representation                  | ● |
| 5. Accessibility and safety                  | ● |
| 6. Ethics                                    | ● |
| Evolution of above compared to previous year |   |
|  | ● |
| 7. Tech friendliness                         | ● |
| 8. Compatibility with the Delos Rules        | ● |

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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 any and all responsibility.

## IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is a consolidated dispute resolution mechanism in Brazil. The Brazilian Arbitration Law (“**BAL**”, available [here](#) as an English translation) is well developed and was modified in 2015 to adapt it to some important demands, 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. Courts in Brazil are friendly to arbitration. Brazil is one of the leading countries in Latin America to facilitate the development of arbitration.

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| Key places of arbitration in the jurisdiction?                                  | 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? (if mixed or other, specify)                | Civil Law environment.  |
| 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?  | The Brazilian Bar Association ( <i>Ordem dos Advogados do Brasil</i> ) imposes restrictions concerning the engagement of foreign law firms in issues related to national law. The Provision n. 91/2000 from the Federal Council of the Brazilian Bar Association prohibits foreign firms (even the ones with Brazilian lawyers hired) from “providing advice or consulting in Brazilian Law” (Article 1, First Paragraph, II). This provision, therefore, obliges at least a joint representation with national firms in cases involving Brazilian Law for actions such as signing documents, attending hearings, providing oral arguments. |
| 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 and/or remotely?   | The BAL does not limit arbitral tribunals’ powers or parties’ choice to hold meetings and hearings outside of the seat or remotely. 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. Parties can also agree to hold meetings and hearings remotely.  |
| 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).   |
| 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 of the BAL).   |
| Restrictions regarding contingency fee arrangements and/or third-party funding? | There are no restrictions. However, the BAL is silent on agreements regarding contingency fees or third-party funding. The practice is to disclose the existence of a third-party funder for conflict-check purposes.   |

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| Party to the New York Convention?   | Brazil is a party to the New York Convention since 2002 (see <a href="#">here</a> ).   |
| Party to the ICSID Convention?  | Brazil is not a party to the ICSID Convention.   |
| Compatibility with the Delos Rules?   | Delos Rules are compatible with Brazilian Law.   |
| Default time-limitation period for civil actions (including contractual)?                             | Time-limitation periods are set forth by the Brazilian Civil Code (Articles 205 and 206). For contractual actions, the default time-limitation period is 10 (ten) years.   |
| 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.</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 decisions in annulment proceedings can always be appealed. There are also extraordinary appeals, which can be made both to the High Court of Justice (“Superior Tribunal de Justiça”) and to the Supreme Court (“Supremo Tribunal Federal”), 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 believes 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). Annulment proceedings may suspend enforcement proceedings if a State judge understands that specific requirements are met, such as the provision of a guarantee.</p> |
| <a href="#">World Bank, Enforcing Contracts: Doing Business</a> score for 2020, if available?         | 64.1 (62.0 for Rio de Janeiro and 65.4 for São Paulo).   |
| <a href="#">World Justice Project, Rule of Law Index: Civil Justice</a> score for 2024, if available? | 0.51   |

## 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.

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| Date of arbitration law?  | 23 September 1996, with its constitutionality declared by the Brazilian Supreme Court in 2001 ( <a href="#">Supreme Court, Recognition Procedure n.º 5.206, Justice Sepúlveda Pertence, date: 12/12/2001</a> ) and lastly reviewed in 2015 (Law 13,129/2015).  |
| UNCITRAL Model Law? If so, any key changes thereto? 2006 version?   | The BAL's working group got inspiration from UNCITRAL Model Law, the 1988 Spanish Arbitration Law, the 1958 New York Convention, as well as the 1975 Panama Convention, without literally adopting their terms. While the UNCITRAL Model Law is one of the bases 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 Brazilian key seats have arbitration-specialized first instance courts, <sup>1</sup> and São Paulo has a specialized business section at the appellate level to judge arbitration-related matters. <sup>2</sup>  |
| Availability of <i>ex parte</i> pre-arbitration interim measures?   | Parties to a future arbitration may seek interim measures from courts, such as a pre-arbitral procedure (Art. 22-A BAL). Such interim measures can be granted <i>ex parte</i> when the requirements set forth in the Code of Civil Procedure are fulfilled (Art. 300 §2, Code of Civil Procedure). The requirements are the likelihood of success of the main 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, therefore recognizing the competence of arbitral tribunals over national courts to decide on objections to their own jurisdiction ( <a href="#">High Court of Justice, Competence Conflict no. 157099/RJ, Justice Marco Buzzi, date: 10/10/2018</a> ).   |
| May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?      | Yes, according to Art. 23, Paragraph 1, arbitrators may render partial awards.   |
| Grounds for annulment of awards additional to those based on the criteria for the recognition and                             | 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  |

<sup>1</sup> 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 capital: <http://www.cnj.jus.br/noticias/cnj/80374-corregedoria-divulga-lista-de-varas-especializadas-em-arbitragem>.

<sup>2</sup> 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>.

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| enforcement of awards under the New York Convention?  | <p>a person who had not the right to serve as an arbitrator (section II); an award which does not fulfill 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 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> |
| Do annulment proceedings typically suspend enforcement proceedings?   | Annulment proceedings may suspend enforcement proceedings if a state judge understands that specific requirements are met, such as the provision of a guarantee, reasonable chance of success and risk of serious or irreparable harm.  |
| Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?   | 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 ( <a href="#">High Court of Justice, Special Section, Recognition Procedure nº 5782, date: 02/12/2015</a> ).  |
| If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction? | There is no judicial precedent so far dealing with such hypothesis, nor any legal provision regulating remote hearings and/or non-recognition or non-enforceability of awards derived from a non-respected party's objection.   |
| Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?   | The BAL does not establish any distinction or specific rules regarding enforcement of awards against public bodies.   |
| Is the validity of blockchain-based evidence recognised?  | There are no mandatory rules in Brazil that preclude or impose using blockchain-based evidence.   |
| Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?   | Yes. The BAL only requires the award to be signed by the arbitrators (Art. 26), and the arbitration agreement to be written (Art. 4, Paragraph 1; Art. 9, Paragraph 2). There are no mandatory laws or rules in Brazil that preclude an arbitration agreement and/or an award from being signed by and recorded on electronic means.  |
| Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?  | Yes.  |

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| Other key points to note? | <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 date on which 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> |
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## JURISDICTION DETAILED ANALYSIS

### 1. The legal framework of the jurisdiction

#### 1.1 The Form of Brazilian Arbitration rules

Although without literally adopting their terms, 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. 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 which is six months from the commencement of the arbitration, unless otherwise agreed by the parties (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 by 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.<sup>3</sup> The BAL became effective in 1996, so it is now more than 20 years old.

#### 1.2 Last major revision of the Brazilian arbitration rules

The BAL 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);<sup>4</sup> 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's decision to enforce an arbitral order is necessary (Art. 22-C); among other modifications.

### 2. The arbitration agreement

#### 2.1 Determination of the law governing 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,<sup>5</sup> 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

<sup>3</sup> WALD, Arnaldo. Arbitragem: Passado, Presente e Futuro. *Revista de Arbitragem e Mediação*, vol. 50/2016, p. 59-78.

<sup>4</sup> 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 versus 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, e.g.: 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"), among others. 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, among others. Lastly, ANTT enacted a recent Resolution (no. 5.845/2019) regulating mediation and arbitration procedures that have ANTT as a party.

<sup>5</sup> 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, needing recognition by the High Court of Justice to become enforceable in Brazil (Art. 34 of the BAL, Sole Paragraph).

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,<sup>6</sup> among others<sup>7</sup>).

On the other hand, there is no legal provision in Brazil determining 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 seat<sup>8</sup> following Art. 38, II, of the BAL,<sup>9</sup> while others invoke the governing law of the underlying contract as the criterion to be considered.<sup>10</sup> 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,<sup>11</sup> 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.<sup>12</sup>

## 2.2 In the absence of an express designation of a “seat” in the arbitration agreement, how do the courts deal with references therein to a “venue” or “place” of arbitration?

The BAL does not contain any reference to the “seat” of an arbitral procedure, giving importance only to the place where the arbitral award is rendered in order to determine its nationality. If an arbitral award is issued in Brazil, it is domestic and can be promptly executed; if issued in a foreign country, it is deemed foreign and must be recognized (“homologado”) by the High Court of Justice first.

According to the BAL, it is not mandatory for an arbitration agreement to contain a reference to place, or places, where the arbitration shall be held (Art. 4, Paragraph 1; Art. 11, I). If there is such a gap in the arbitral agreement, the BAL refers the parties to State courts in order to complete and execute the arbitration agreement (Art. 7 of the BAL).

<sup>6</sup> 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*”, [http://www.planalto.gov.br/ccivil\\_03/decreto-lei/Del4657.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/Del4657.htm)).

<sup>7</sup> MARTINS-COSTA, Judith; NITSCHKE, Guilherme Carneiro Monteiro. Contratos duradouros lacunosos e poderes do árbitro: questões teóricas e práticas. *Revista Jurídica Luso-Brasileira*. Lisboa: Faculdade de Direito da Universidade de Lisboa, 2015, no. 1, p. 1284-1290. ZANETTI, Cristiano de Sousa. Filling the gaps: a Civil Law Tradition. In: VAN DEN BERG, Albert (ed.). *Legitimacy: Myths, Realities, Challenges (ICCA Congress Series no. 18)*. The Hague: Kluwer Law International, 2015, pp. 1014-1016.

<sup>8</sup> BRAGHETTA, Adriana. A importância da sede da arbitragem. In: LEMES, Selma Ferreira; CARMONA, Carlos Alberto; MARTINS, Pedro Batista (coords.). *Arbitragem. Estudos em homenagem ao Prof. Guido Fernando da Silva Soares. In Memoriam*. São Paulo: Atlas, 2007, p. 25.

<sup>9</sup> “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”.

<sup>10</sup> GREBLER, Eduardo. 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, Arnaldo; LEMES, Selma Ferreira (coords.). *Arbitragem Comercial Internacional. A Convenção de Nova Iorque e o direito brasileiro*. São Paulo: Saraiva, 2011, p. 198.

<sup>11</sup> “§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”.

<sup>12</sup> [State Court of São Paulo, 6th Section of Private Law, Appeal nº 3049794920118260000, date: 19.04.2012](#); 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.



### 2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. Art. 8 preserves the arbitration agreement from any nullity affecting the contract in which it is inserted. However, the same cause for annulment of a contract 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).<sup>13</sup> This provision enables the parties to circumvent the competence-competence principle and go straight to the Judiciary.

### 2.4 What are the formal requirements (if any) for an enforceable arbitration agreement?

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., it does not provide sufficient indications for the initiation of the arbitral proceedings, the clause will not be considered void, since the BAL refers the parties to state courts to complete/execute the arbitration agreement (Art. 7 of the BAL).<sup>14</sup> 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 initiative to file arbitration proceedings or if it expressly agrees with its initiation in writing (Art. 4 §2 of the BAL).<sup>15</sup>

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. Such requirements 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.

### 2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

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

<sup>13</sup> "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](http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf).

<sup>14</sup> APRIGLIANO, Ricardo de Carvalho. *Cláusula compromissória: aspectos contratuais*. *Revista do Advogado*. São Paulo: AASP, 2012, n. 116, p. 183. CARMONA, Carlos Alberto. *Arbitragem e Processo*. 3. ed. São Paulo: Atlas, 2009, p. 112. ZANETTI, Cristiano de Sousa. Filling the gaps: a Civil Law Tradition. In: VAN DEN BERG, Albert (ed.). *Legitimacy: Myths, Realities, Challenges (ICCA Congress Series no. 18)*. The Hague: Kluwer Law International, 2015, p. 1014-1015. And more recently, NITSCHKE, Guilherme Carneiro Monteiro. *Lacunas Contratuais e Interpretação: história, conceito e método*. São Paulo: Quartier Latin, 2019, p. 425-427.

<sup>15</sup> The High Court of Justice deems this rule applicable even to consumer contracts, being valid an arbitral agreement only if the consumer specifically agrees with the initiation of the arbitral procedure in its very beginning (e.g.: High Court of Justice, Fourth Section, AgInt in Special Appeal no. 1192648/GO, j. 27/11/2018; High Court of Justice, Third Section, Special Appeal no. 1628819/MG, j. 27/02/2018).

agreements.<sup>16</sup> Also, in a recent case ruled by the Brazilian High Court of Justice, it was decided that an insurer can be bound, by force of subrogation, to an arbitral agreement entered into by the insured parties, when the insurance contract is accessory to the main contract.<sup>17</sup> There are, however, cases deciding the contrary.<sup>18</sup>

## **2.6 Are there restrictions to arbitrability? In the affirmative:**

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.

### **2.6.1 Do these restrictions relate to specific domains (such as anti-trust, employment law etc.)?**

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.

Nevertheless, when relating to specific subject-matters such as bankruptcy, it is argued that the patrimonial effects of those procedures can be submitted to arbitration. Moreover, there have been discussions about the arbitrability of tax disputes.<sup>19</sup>

### **2.6.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)?**

As a matter of specific persons, Art. 1 excludes disputes relating to consumers in which arbitration is imposed by the opposing party, employees and adhering parties in adhesion contracts not in compliance with Art. 4 §2 requirements. Recently, the labour law has been amended to allow arbitration in specific cases.

## **3. Intervention of domestic courts**

### **3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?**

Yes.

#### **3.1.1 If the place of the arbitration is inside of the jurisdiction?**

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).

#### **3.1.2 If the place of the arbitration is outside of the jurisdiction?**

Same as previous answer. Nor the BAL neither the Code of Civil Procedure distinguish domestic from international arbitrations.

### **3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?**

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

<sup>16</sup> [High Court of Justice, Special Section, Recognition Procedure nº 1, j. 19/10/2011.](#)

<sup>17</sup> [High Court of Justice, Special Section, Recognition Procedure nº 14930, date: 15/05/2019.](#)

<sup>18</sup> [State Court of São Paulo, 10th Section of Private Law, Appeal nº 03698571720108260000, date: 22/03/2011.](#)

<sup>19</sup> [Grupo de Estudos em Arbitragem Tributária do CBar. Arbitragem tributária é um caminho a ser explorado.](#)

implied from Art. 20 of the BAL that an arbitrator could grant an injunction to suspend the court proceedings until the decision is rendered. Courts usually respect the arbitrator's injunctions and admit suspension of the litigation proceedings.

### **3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to anti-suit injunctions/anti-arbitration injunctions or orders, but not only)**

Also, for arbitrations seated outside of the jurisdiction, 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.

## **4. The conduct of proceedings**

### **4.1 Can parties retain foreign counsel or be self-represented?**

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.<sup>20</sup> However, the Brazilian Bar Association (*Ordem dos Advogados do Brasil*) imposes restrictions concerning the engagement of foreign law firms in issues related to national law. The Provision n. 91/2000 from the Federal Council of the Brazilian Bar Association prohibits foreign firms (even the ones with Brazilian lawyers hired) from "providing advice or consulting in Brazilian Law" (Article 1, First Paragraph, II). The provision, thus, obliges at least a joint action with national firms in cases that involve Brazilian Law – signing documents, attending hearings, providing oral arguments.

### **4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances be of a gravity such as to this outcome?**

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,<sup>21</sup> 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,<sup>22</sup> some of which can be encountered in soft law, like the IBA Guidelines on Conflict of

<sup>20</sup> CARMONA, Carlos Alberto. *Arbitragem e Processo*. 3. ed. São Paulo: Atlas, 2009, p. 301.

<sup>21</sup> [State Court of Goiás, 3rd Section of Civil Law, Request for Clarifications nº 65345-40.2014.8.09.0051, date: 23/08/2016.](#)

<sup>22</sup> " 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

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.<sup>23</sup> 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.

#### **4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?**

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.<sup>24</sup> 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.<sup>25</sup>

#### **4.4 Do courts have the power to issue interim measures in connection with arbitrations?**

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.

##### **4.4.1 If so, are they willing to consider *ex parte* requests?**

Yes. Interim 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).

#### **4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?**

Yes.

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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 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".

<sup>23</sup> CARMONA, Carlos Alberto. *Arbitragem e Processo*. 3. ed. São Paulo: Atlas, 2009, p. 253.

<sup>24</sup> GUERRERO, Luis Fernando. *Convenção de Arbitragem e Processo Arbitral*. São Paulo: Atlas, 2009, p. 117.

<sup>25</sup> AIMORÉ CARRETEIRO, Mateus, et al. *International Arbitration in Brazil: An Introductory Practitioner's Guide*. The Hague: Kluwer Law International, 2016, §3.02.

#### 4.5.1 Does it provide for the confidentiality of arbitration proceedings?

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.<sup>26</sup> 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).

There is an ongoing debate regarding the possible mitigation of confidentiality in cases involving companies in which shareholders' rights could be affected by decisions rendered in arbitral procedures, originated by a public notice issued by the Brazilian Securities and Exchange Commission ("*Comissão de Valores Mobiliários*", "CVM") on February 11, 2021 (N. 01/2021), announcing its intention to amend CVM Instruction N. 480, of December 7, 2019. No final decision from CVM was issued so far.

#### 4.5.2 Does it regulate the length of arbitration proceedings?

If no timing has been established by the parties and/or the arbitral tribunal, the arbitral award shall be rendered within six months from the date of the commencement of the arbitration or from the date of the substitution of an arbitrator (Art. 23, BAL).

#### 4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?

The BAL does not contain any specific provision on the hearings, so the parties and the arbitral tribunal are free to regulate this issue (Art. 21, BAL).

#### 4.5.4 Does it allow for arbitrators to issue interim measures?

Yes. Prior to commencing the arbitration, the parties may seek provisional measures of protection and urgent relief from a judicial court (Art. 22-A). Once arbitration has been commenced, the arbitrators will have competence for maintaining, modifying or revoking the provisional or urgent measures granted by the Judicial Authority (Art. 22-B). If arbitration proceedings have already been commenced, the request for the injunctive and urgent relief will be directly addressed to the arbitrators (Art. 22-B, Sole paragraph).

#### 4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

When it comes to evidence, the BAL provides for a broad authority of arbitral tribunals 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.<sup>27</sup> 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

<sup>26</sup> GAMA, Lauro. 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; Comitê Brasileiro de Arbitragem CBar & IOB, 2005, v. 2, issue 8, p. 35; NUNES PINTO, José Emilio. A arbitralidade de controvérsias nos contratos com o Estado e empresas estatais. *Revista Brasileira de Arbitragem*. São Paulo: Comitê Brasileiro de Arbitragem CBar & IOB; Comitê Brasileiro de Arbitragem CBar & IOB, 2005, v. 1, issue 1, 2004, pp. 9-26; NUNES PINTO, José Emilio. Confidencialidade na Arbitragem. *Revista de Arbitragem e Mediação*. São Paulo: RT, 2005, v. 6, pp. 25-36; SOMBRA, Thiago Luís. 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.

<sup>27</sup> [High Court of Justice, 3rd Section, Special Appeal nº 1.500.667, Justice João Otávio de Noronha, date: 09/08/2016.](#)

to request document production, because a party cannot be compelled to produce evidence against its own interests.<sup>28</sup>

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.

#### **4.5.6 Does it make it mandatory to hold a hearing?**

No. The BAL does not contain any specific provision on the hearings, so the parties are free to regulate this issue (Art. 21, BAL), including to dismiss this event.

#### **4.5.7 Does it prescribe principles governing the awarding of interest?**

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).<sup>29</sup> 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".<sup>30</sup>

#### **4.5.8 Does it prescribe principles governing the allocation of arbitration costs?**

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 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.<sup>31</sup>

### **4.6 Liability**

#### **4.6.1 Do arbitrators benefit from immunity from civil liability?**

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).

#### **4.6.2 Criminal liability of arbitrators**

Arbitrators are equalized to public officers when it comes to criminal liability (Art. 17, BAL).

#### **4.6.3 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?**

Arbitral awards rendered by an arbitral tribunal constituted by an arbitrator who has been proven to be

<sup>28</sup> SEREC, Fernando. *Evidence Production in Arbitration in Brazil: What to Expect*. Kluwer Arbitration Blog, 2008.

<sup>29</sup> "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".

<sup>30</sup> Entry nº 254 of the Prevailing Case Law ("*Súmula da Jurisprudência Dominante*"). There is a long list of precedents confirming such entry: Extraordinary Appeal nº 162890 ED, Justice Ilmar Galvão, 1st Section, date: 03/06/1997; Extraordinary Appeal nº 115123, Justice Sydney Sanches, 1st Section, date: 12/02/1988; Extraordinary Appeal nº 109462, Justice Rafael Mayer, 1st Section, date: 24/06/1986. This is also the position of the Brazilian High Court of Justice ("*Superior Tribunal de Justiça*"), e.g.: Appeal nº 1133023/PE, Justice Og Fernandes, 6ts Section, date: 17/09/2009; Appeal nº 979708/PE, Justice Og Fernandes, 6th Section, date: 02/09/2008; Special Appeal nº 464.234/PR, Justice João Otávio de Noronha, 2nd Section, date: 03/08/2006. Regarding the debates on the inception date for the interests to be counted under the Brazilian Civil Law, see TEPEDINO, Gustavo; VIÉGAS, Francisco de Assis. O termo inicial da contagem de juros de mora na liquidação da sentença arbitral. In: BAPTISTA, Luiz Olavo; VISCONTE, Débora; ALVES, Mariana Cattel Gomes (orgs.). *Estudos de Direito: uma homenagem ao Prof. Dr. José Carlos de Magalhães*. São Paulo: Atelier Jurídico, 2018, p. 925 et seq.

<sup>31</sup> 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 nº 1005627-81.2015.8.26.0053, date: 17/02/2016.

corrupt in a criminal procedure can be annulled on the grounds of the BAL (Art. 32, VI).

## **5. The award**

### **5.1 Can parties waive the requirement for an award to provide reasons?**

The 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.<sup>32</sup>

### **5.2 Can parties waive the right to seek the annulment of the award?**

No, the parties cannot waive the right to seek the annulment of the award, since Arts. 32 and 33 are considered mandatory rules.<sup>33</sup>

### **5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?**

The other mandatory requirements, beside the reasons, are the summary of the facts, the ruling and the date and place the award was rendered.

### **5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?**

No. 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.

### **5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?**

As soon as an award is rendered, the winning party may start enforcement proceedings before the competent local court. Although local awards may be promptly executed, foreign awards must be firstly recognized ("*homologados*") by the High Court of Justice.

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.<sup>34</sup> 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.

### **5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?**

The annulment 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. 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.

### **5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?**

Yes, it precludes. Foreign awards must be recognized ("*homologados*") by the High Court of Justice first. Recognition and enforcement of a foreign arbitral award may only be denied when the defendant demonstrates that the arbitral award has been annulled (Art. 38, VI, BAL).

<sup>32</sup> [State Court of São Paulo, 3rd Section of Private Law, Appeal nº 1125099-32.2015.8.26.0100, date: 03/10/2017.](#)

<sup>33</sup> CAHALI, Francisco José. *Curso de arbitragem*. São Paulo : Thompson Reuters, 2018, p. 387.

<sup>34</sup> E.g. [High Court of Justice, Special Appeal nº 1543564/SP, Justice Marco Aurelio Bellizze, date: 25/09/2018.](#)



In 2015, the High Court rendered a leading case on this matter denying enforcement to an award that had been rendered and annulled in Argentina ([High Court of Justice, Special Section, Recognition Procedure nº 5782, date: 02/12/2015](#)).

## 5.8 Are foreign awards readily enforceable in practice?

A foreign award 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).<sup>35</sup> The duration of these proceedings may also vary from case to case, but the average time is between one to two years. However, the High Court of Justice may not analyze the merits of the dispute, as it can only determine whether the formal requirements set forth on Art. 38 of the BAL have been fulfilled.<sup>36</sup>

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).

## 6. Funding arrangements

### 6.1 Contingency or alternative fee 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.),<sup>37</sup> the funding arrangements have been seen as good options for impecunious parties to be able to participate in arbitral proceedings.<sup>38</sup>

### 6.2 Third-party funding arrangements

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.<sup>39</sup> The funding can also be contracted or provided by any capable person, as there are no specific restrictions and it is not considered to be an activity exclusively allowed for financial institutions.<sup>40</sup>

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

<sup>35</sup> MELO, Leonardo de Campos. Recognition and Enforcement of Foreign Arbitral Awards in Brazil: A Practitioner's Guide. The Hague: Kluwer Law International, 2015, p. 23.

<sup>36</sup> [High Court of Justice, Special Section, Recognition Procedure nº 866, date: 17.05.2006](#).

<sup>37</sup> FILHO, Napoleão Casado. 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.*

<sup>38</sup> WALD, Arnaldo. Some positive and negative aspects of arbitration financing. *Revista de Arbitragem e Mediação*, vol. 49/2016, p. 33 – 41.

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

<sup>40</sup> FILHO, Napoleão Casado. 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.



## 7. Arbitration and technology

### 7.1 Is the validity of blockchain-based evidence recognised?

Yes, but not explicitly. Although blockchain-based evidence is not regulated by the Brazilian Law, there are no mandatory rules precluding the use of blockchain-based evidence. Plus, the BAL grants broad authority for arbitrators to admit, exclude and order evidence production (Art. 22, BAL). There are no specific restrictions to the presentation of blockchain-based evidence.

### 7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

The BAL only requires the award to be signed by the arbitrators (Art. 26). Concerning the arbitration agreement, if it is an arbitration clause, the BAL establishes that it has to be written (Art. 4, Paragraph 1); if it is an extrajudicial post-dispute agreement to arbitrate, the BAL requires it to be written and signed by two witnesses (Art. 9, Paragraph 2). There are no mandatory rules precluding an arbitration agreement and/or an award from being signed by and recorded on electronic means.

### 7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purpose of recognition and enforcement?

Yes. Same as previous answer.

### 7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

In both hypotheses the award would be recognized as enforceable by state courts. Concerning electronically signed awards, although there are no mandatory laws or rules in Brazil precluding the recognition and enforcement of an arbitral award signed manually and then scanned and assembled into one electronic file, it would be considered a copy, not an original document. Courts do not usually require the original document to enforce it.

Regarding digitally signed awards, Brazilian Law deems them as original and enforceable (nowadays, most court proceedings are digital, governed by Federal Law N. 11.419/2006, with awards, interlocutory decisions and claims digitally signed by judges and lawyers). Digital signatures were originally governed by the “Medida Provisória” n. 2,200-2 (“MP 2,200-2”), establishing means to guarantee the authenticity of digital documents. In 2018, the High Court of Justice (“Superior Tribunal de Justiça”) acknowledged the validity of digital agreements.<sup>41</sup> Recently, the Federal Law N. 14,063/2020 was enacted, converted from the “Medida Provisória” N. 983/2020, regulating the digital signatures involving public entities.

However, the recognition of a foreign arbitral award, according with the BAL, must contain “the original of the arbitral award or a duly certified copy, authenticated by the Brazilian consulate and accompanied by an official translation” (Article 37, I). Nevertheless, the Federal Decree n. 8,660/2016 establishes something different. This Decree internalized the Convention of Abolishing the Requirement of Legalisation for Foreign Public Documents (Hague, 5 October 1961) and it has been cited in STJ’s decisions. In at least two Articles, the Federal Decree mitigates formalities concerning the authentications of documents (Arts. 2 and 3). In light of this, several decisions of the STJ have dismissed this formality, applying the abovementioned Federal Decree n. 8,660/2016.

<sup>41</sup> REsp 1495920/DF, Judge-Rapporteur PAULO DE TARSO SANSEVERINO, Third Panel, ruled on 15/05/2018, published on 07/06/2018.

## 8. Is there likely to be any significant reform of the arbitration law in the near future?

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<sup>42</sup> to allow arbitration in some specific cases. In Brazil, Labour law cases are dealt with by a special jurisdiction, consisting of labour judges, Regional Labour Courts (“Tribunal Regional do Trabalho”) and the High Court of Labour Justice (“Tribunal Superior do Trabalho”). However, considering the few cases decided after the reform, it seems that arbitration is not yet friendly-welcomed in the Labour sphere.<sup>43</sup>

## 9. Compatibility of the Delos Rules with local arbitration law

Delos Rules are compatible with the BAL.

## 10. Further reading

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<sup>42</sup> Reforma Trabalhista de 2017, [Lei nº 13.467/2017](#).

<sup>43</sup> See [High Court of Labour Justice, AI Recurso de Revista nº 128300-94.2007.5.02.0020](#), Justice Cláudio Brandão, date: 19.09.2018; [Regional Labour Court of 2nd Region, Agravo de Petição nº 1000087-52.2018.5.02.0704](#), Justice Gustavo Kiyoshi Fujinohara, date: 18.10.2018. See also, VERÇOSA, Fabiane. *Arbitragem para a resolução de dissídios individuais trabalhistas em tempos de*, *Revista Brasileira de Arbitragem*, The Hague: Kluwer Law International, 2019, Volume XVI, Issue 61, pp. 7 – 35.

## ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

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| Leading national, regional and international arbitral institutions based out of the jurisdiction, <i>i.e</i> with offices and a case team? | ICC, CAM/CCBC, CIESP/FIESP, CAMARB, CAF, CAMERS, ARBITAC |
| Main arbitration hearing facilities for in-person hearings?  | ICC-CNI International Hearing Centre<br>CAM/CCBC         |
| Main reprographics facilities in reasonable proximity to the above main arbitration hearing facilities?                                    | φ  |
| Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?             | φ  |
| Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?                   | Fidelity Translations, Traduzca                          |
| Other leading arbitral bodies with offices in the jurisdiction?  | φ  |