Kluwer Arbitration Blog

Amendments to the Brazilian Arbitration Law – an outsider's view

Manuel de Abreu Castelo Branco (Linklaters) · Monday, February 3rd, 2014

By Manuel Castelo Branco and Raquel Galvão Silva

The proposal prepared by the Committee for the modification of the Brazilian Arbitration Law was finally revealed and approved with some adjustments on 11 December 2013 by the Constitution, Justice and Citizenship Commission of the Federal Senate (the "Proposal").

The Proposal comes 17 years after the publication of the current Brazilian Arbitration Law – Law no. 9.307 of September 1996 – and the proposed amendments have the stated objective of strengthening and fine-tuning the arbitration framework in Brazil, thus reassuring international investors at a time when Brazil is engaged in major construction projects and international events such as the 2014 World Cup and the 2016 Olympics.

The Proposal introduces some significant changes and deals with important aspects such as the participation of public entities in arbitration, injunctions and interim measures, selection of arbitrators and arbitrability of corporate and employment matters.

One of the most relevant topics of the Proposal is the inclusion of a general rule clarifying that public entities can arbitrate disputes related to disposable rights, although arbitration related to public law contracts is a reality in Brazil nowadays, as envisaged in some specific legislation (e.g., the Public Private Partnerships Law). According to the Proposal, arbitrations involving public entities cannot be decided ex aequo et bono and are subject to public disclosure rules in order to respect the principle of legality and the principle of publicity and transparency – two key elements of Brazilian Administrative Law by which public entities are bound.

The Proposal also aims at implementing a new regime for interim measures. It is worth saying that the current version of the Brazilian Arbitration Law provides that arbitrators may request interim or protective measures from state courts if and when they become necessary. This provision has been subject to different opinions. According to some authors, it means that the state courts have exclusive jurisdiction to grant interim measures. According to other opinions, it means that arbitral tribunals have jurisdiction to grant interim measures, but lack the authority to enforce them, in which case the assistance of state courts will be required.

According to the Proposal, parties are entitled to seek interim measures from state courts prior to the constitution of the arbitral tribunal. The effects of an interim measure thus granted will cease if the requesting party does not initiate the arbitration proceedings within 30 days from the state court's decision.

The Proposal further determines that having been properly constituted, the arbitral tribunal will have jurisdiction (i) to maintain, modify or revoke an interim measure granted by the state court and (ii) to grant interim measures. Thus, it seems that under the proposed regime the arbitral

tribunal shall, after being constituted, have exclusive jurisdiction on taking any decision pertaining to interim measures. It is not clear, however, if this exclusive jurisdiction of the arbitral tribunal also covers the granting of interim measure which require the use of coercive powers, as it is generally understood that this type of measures may only be granted by the state courts. It will certainly be interesting to see how this question will be dealt with by Brazilian case law and doctrine.

By favouring arbitration proceedings as the appropriate forum to seek interim measures, the Proposal seems to entail an innovative regime, departing from the UNCITRAL Model Law and from many national arbitration laws which give preference to a dual system where state courts and arbitral tribunals have concurrent jurisdictions.

On another topic, and despite maintaining a degree of control by the arbitration institutions, the Proposal also sets out to grant a higher degree of freedom to the parties concerning the selection of arbitrators.

According to the Proposal, parties that elect an arbitration institution will now be able to agree not to apply arbitral institutions' rules which provide that arbitrators must be selected from a pre-defined list of arbitrators from that institution. Nevertheless, the new regime makes it clear that arbitration institutions will still be able to supervise and control the parties' selection of arbitrators not included in the institution's list.

Another highlight relates to the possibility of including arbitration clauses in employment contracts. In fact, the Proposal allows for arbitration clauses to be included in employment contracts provided that the employee is a director (administrador) or a statutory manager (diretor estatutário).

In any case, the employee will only be subject to the arbitration proceedings if he/she is the one requesting the arbitration or, where the employer is the one initiating the arbitration, if he/she gives his/her express consent after the dispute has arisen.

The Proposal also includes an amendment to the Brazilian Corporation Law (Law no. 6.404 of 15 December 1976 (Lei das Sociedades por Ações)), where it is made clear that the approval by the shareholders of the addition of an arbitration clause to the by-laws of a company is binding for all shareholders, in which case dissenting shareholders are generally granted an exit right.

As a final remark, the proposal will be sent to the Chamber of Deputies unless a plenary vote is requested.

This entry was posted on Monday, February 3rd, 2014 at 4:56 am and is filed under Arbitration Act, Brazil
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.