Is Brazil an Arbitration-Friendly Jurisdiction?

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Recently, the 2018 White & Case International Arbitration Survey confirmed London, Paris, Singapore, Hong Kong, Geneva, New York and Stockholm as the most in-demand places for arbitration in the world.

Brazil is well represented by São Paulo – the economic hub of the country – which occupied eighth place in the overall ranking. This result gives rise to the following question among those not familiar with the country: is Brazil an arbitration-friendly jurisdiction?

In previous Kluwer posts, it has been discussed Brazilian arbitration developments in franchising, extension of arbitration agreements, and facilitation and cooperation investment agreements (here and here),This post aims to answer that question, providing a concise but comprehensive overview of the Brazilian legal framework for arbitration.

Legal Framework

In Brazil, arbitration is governed by Law 9.307, which came into force in 1996. The Brazilian Arbitration Act (hereafter BAA) is partially based on the UNCITRAL Model

Law and the 1988 Spanish Arbitration Act.

The BAA adopts the monism regime, which means that its provisions apply equally to international arbitration and domestic arbitration. However, the Act is considered modern, particularly because it leaves plenty of space for party autonomy.

Brazil has not signed the Washington Convention (ICSID Convention) and, therefore, all arbitrations follow commercial standards, even when the State is one of the parties.

Nevertheless, a few mandatory provisions apply to arbitrations involving "State entities". This term encompasses the Union, states, municipalities, government agencies, government foundations, wholly-owned state companies and state-controlled companies, although not all entities are subject to the same mandatory provisions (explained below).

Arbitrability

The scope of arbitrability in Brazil is wide. Article 1 of the BAA declares that "those who are capable of entering into contracts may use arbitration to resolve conflicts related to negotiable and pecuniary matters". Article 1(1) establishes that "State entities may use arbitration to resolve conflicts related to negotiable and pecuniary matters". In short, any civil or commercial matter in Brazil can be resolved through arbitration, even when the case involves "State entities".

Most arbitral proceedings in Brazil arise from construction contracts, corporate conflicts (company *v*. shareholders, controlling shareholder *v*. minority shareholder, parties to shareholders' agreements etc.), energy and insurance contracts and contractual disputes in general.

Choice of Law

According to Article 2 of the BAA, in arbitrations seated in Brazil, parties are unrestrained in the choice of law applicable to the merits, to the arbitral process (*lex arbitri*) and to the arbitration agreement. This rule applies not only to

arbitrations involving foreign parties but also to purely domestic arbitrations. There are a few exceptions: in some cases, if the arbitration involves “State entities”, the application of Brazilian Law is mandatory.

Arbitrators

Parties have complete autonomy in selecting the arbitrators who shall rule upon the claims submitted in arbitration. There are no limits regarding nationality, age, gender, religion or language proficiency. As set forth in Article 13 of the BAA, “any individual with legal capacity, who is trusted by the parties, may serve as arbitrator”. This rule also encompasses arbitrations involving “State entities”, where parties in general can even nominate foreign arbitrators.

Arbitral Institutions

Parties are entirely free to choose the arbitral institution, whether international arbitral institutions like the ICC (which has an office in São Paulo) and the LCIA, or one of the renowned Brazilian arbitral institutions: CAM-CCBC (whose rules of arbitration were adopted for the 2017 Vienna Vis Moot), CAMARB, Ciesp/Fiesp, CBMA, Amcham and others.

Language

Finally, parties have total autonomy in choosing the language of the arbitration. Again, there are a few exceptions: in some cases, where the arbitration involves “State entities”, Portuguese is compulsory. However, this does not prevent parties from adopting a bilingual arbitration (Portuguese and English, for example).

Kompetenz-Kompetenz

Brazilian Arbitration Law recognises both positive and negative effects of Kompetenz-Kompetenz.

According to Article 8(1) of the BAA, “the arbitrator has jurisdiction to decide *ex officio* or at the parties’ request, any issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as the contract containing the arbitration agreement”. Article 20 of the same Act complements this provision. In turn, the second part of Article 485(VII) of the Brazilian Code of Civil Procedure states that “a judge shall not rule on the merits when (…) the arbitral tribunal confirms its jurisdiction” (*i.e.*, the judge has to dismiss the case).

Legal scholars interpret this latter provision as guaranteeing the chronological priority rule in favour of the arbitral tribunal deciding on its own jurisdiction. Among other cases, the Superior Court of Justice declared in *SPPATRIM v. BNE* that “as a consequence of the Kompetenz-Kompetenz principle, set forth in Articles 8 and 20 of Law n. 9.307/96, the Brazilian legislation on arbitration establishes a chronological priority rule in arbitral proceedings, allowing access to the courts only after the delivery of the arbitral award”.

Interim Measures

As Article 22-B(1) of the BAA states, “if arbitration proceedings have already commenced, the request for the interim measure will be directly addressed to the arbitrators”. In short, pursuant to that provision, arbitrators have the power to grant interim measures. Before the appointment of the arbitrators, parties can seek an interim measure before Brazilian courts. Whether granted or denied by the courts, the arbitrators have the power to confirm, modify or reverse any such judicial decision following their appointment (Article 22-A(1)). If the party against whom the interim measure was granted does not voluntarily comply with the arbitral decision, the interim measure can be enforced before the courts.

Awards

The BAA provides in Article 31 that “the arbitral award shall have the same effect on the parties and their successors as a judgement rendered by the courts and, if it includes an obligation for payment, it shall constitute an enforceable instrument thereof”. This means that the arbitral award has the same effect as decisions issued by Brazilian courts, which shall encompass the *res judicata* effect.

Appellate Proceedings

The BAA does not give the losing party the right to appeal against arbitral awards (neither awards on jurisdiction nor awards on the merits). There are no appellate proceedings in arbitrations seated in Brazil. As described below, parties can apply for annulment of the arbitral award.

Enforcement of Arbitral Awards

Arbitral awards issued in Brazil can be directly enforced before Brazilian courts (Article 32 of the BAA and Article 515(VII) of the Brazilian Code of Civil Procedure). There is no need for *exequatur* or any kind of judicial authorisation to give effect to arbitral decisions. Arbitral awards are enforced as judicial decisions, following the same legal proceedings, which means that the winning party can seize the losing party's bank accounts and other assets.

There is only one exception: when the losing party is the Union, a state, a municipality, a government agency or a government foundation, a "certificate of judgment debt" (the so-called *precatório*) shall be issued in favour of the winning party. Hence, it is legally impossible to seize their bank accounts or other assets. Payment in these cases occur only after inclusion of the debt in the State entity's budget, in average two years after the decision becomes enforceable. However, investors in Brazil can be reassured that in most cases the State uses state-controlled companies to carry out its largest projects. These companies are subject to normal foreclosure proceedings, what means that their assets can be seized and the *precatório* regime does not apply to them.

Annulment of Arbitral Awards

Arbitral awards can be set aside before Brazilian courts should the losing party apply for such within 90 days of receiving the award (Article 33(1) of the BAA), either partial or final. Article 32 of the BAA states that there are seven limited grounds upon which annulment can be sought. In a few words, the grounds are related to formal requirements, validity of the arbitration agreement, due process,

impartiality of the arbitrator, excess of power, arbitrability and public policy. In Brazil, courts are not allowed to control arbitral awards on the merits.

Recognition of Foreign Arbitral Awards

Brazil ratified the 1958 New York Convention in 2002, and the country thus adopts international standards for the recognition of foreign arbitral awards (*i.e.*, awards made in another State). The court with jurisdiction to recognise foreign awards is the Superior Court of Justice. This court is the second highest court in Brazil (only below the Supreme Federal Court), which means there are no avenues for endless appellate proceedings. In addition, case law has largely been in favour of the recognition of arbitral awards.

Courts

In assessing whether a jurisdiction is arbitration-friendly, one must naturally judge the quality of decisions rendered by courts of the seat in connection with arbitral proceedings. In Brazil, the Supreme Court demonstrated its pro-arbitration approach by declaring the constitutionality of the BAA in 2001. In its turn, the Superior Court of Justice is also undoubtedly pro-arbitration. To cite one example, the Court said in *SERPAL v. Continental do Brasil* that "arbitration, as an alternative dispute resolution method, fulfils precisely the fundamental right of access to justice, provided by Article 5(XXXV) of the Brazilian Constitution". It is the current understanding that Brazilian courts support arbitration when faced with any challenge concerning that procedure.

Anti-arbitration Injunctions

Brazilian courts have in few cases granted anti-arbitration injunctions that prevented parties from commencing arbitral proceedings. There are two decisions that became notorious among international arbitration practitioners: (i) a 2003 decision by a first-instance judge in Paraná in the case *Copel v. UEG*; and (ii) a 2012 ruling by the São Paulo Court of Appeals in the case *Sulamérica v. ENESA* (also known as the "Jirau case"). It is well established in Brazil that these decisions

represent exceptions.

Conclusion

In conclusion, based on all the above mentioned reasons, we can affirm with confidence that Brazil is currently an arbitration-friendly jurisdiction.