Kluwer Arbitration Blog

# Following the Trend: State of São Paulo Regulates the Use of Arbitration by the Public Administration

Giovanni Ettore Nanni, Amanda Bueno Dantas (Nanni Advogados) · Tuesday, September 17th, 2019

**The development of the Brazilian Arbitration Act concerning the Public Administration**

Under the original wording of article 1 of Law no. 9.307/96 ("**Brazilian Arbitration Act**"), any capable person was entitled to resort to arbitration to settle disputes relating to patrimonial and disposable rights.

By referring to capable persons, article 1 of the Brazilian Arbitration Act allowed the use of arbitration by individuals and/or entities, both public and private. Article 1 did not expressly mention the public administration, but the capability of entities from the public administration (such as the government itself and its instrumentalities) to enter into contracts is recognized by article 175, sole paragraph, I; article 37, XXI of the Brazilian Constitution and other sets of rules that came into force prior to the Brazilian Arbitration Act, such as Law no. 8.987/95.

In fact, the use of arbitration by the public administration in Brazil has been endorsed by Brazilian courts even before the enactment of the Brazilian Arbitration Act. See, *e.g.*, the case between State of Minas Gerais v. Américo Werneck,[1)] and the notorious Lage Case,[2)] both judged by the Brazilian Supreme Court of Justice in 1918 and 1973, respectively.

Furthermore, several federal laws expressly provide for the possibility of including arbitration clauses in contracts executed by different spheres of the public administration: article 109, § 3 of Law no. 10.303/01 (which altered Law no. 6.404/76, regarding stock corporations), article 4, §§ 5 and 6 of Law no. 10.848/04 (regarding electricity trade), article 11, III of Law no. 11.079/04 (modified by Law no. 12.766/2012, regarding Public-Private Partnerships), article 23- A of Law no. 11.196/05 (which altered Law no. 8.987/95, regarding concessions, permissions and authorizations for providing public services),[3)] and article 15, III, and 31 of Law no. 13.448/2017 (concerning tender for biddings and prorogation of biddings in specific fields), are good examples of that.

The lack of an express provision in the Brazilian Arbitration Act concerning arbitration involving the public administration, however, raised certain doubts mostly by the public administration itself as to the arbitrability of such disputes, both from objective and subjective perspectives.

In 2015, Law no. 13.129/15 put an end to the debate by expressly including in article 1 of the Brazilian Arbitration Act that members of the direct or indirect public administration could engage

in arbitration. Ever since, Brazilian states have enacted rules concerning the drafting of arbitration agreements by the public administration, its representation during the procedure, the appointment and independence of arbitrators, and transparency standards.

**States' regulations concerning Arbitration and Public Administration: a special focus on the recently enacted São Paulo Decree**

The State of Minas Gerais had anticipated the matter in 2011 through State Law no. 19.477/11 ("**Minas Gerais Law**"). In 2018, the State of Rio de Janeiro enacted Decree no. 46.245/18 ("**Rio de Janeiro Decree**") – which was already reported in the blog here.

On July 31, 2019, the State of São Paulo enacted Decree no. 64.356/19 regarding the use of arbitration by the direct public administration ("**São Paulo Decree**"). The São Paulo Decree establishes certain criteria for the drafting of arbitration clauses: under its article 4, the seat of arbitration must be the city of São Paulo, Brazilian law must be applicable to the merits of the dispute, and the proceedings shall be conducted in the Portuguese language. The State General Attorney's Office is responsible for drafting arbitration clauses in contracts involving the direct public administration.

***Interim measures***

The São Paulo Decree further establishes that state courts of the seat of arbitration shall be competent to entertain urgent or interim measures prior to the constitution of the arbitral tribunal. Such rule differs from the one established by the sole paragraph of article 4 of the Rio de Janeiro Decree, which expressly authorizes the public administration to apply for urgent measures before the courts of the counterparty's location, which may confer in particular circumstances more efficient and expedient means to obtain and enforce the urgent measure that is sought.

***Number of arbitrators***

In addition, the São Paulo Decree requires that the disputes be conducted by a panel of three arbitrators and *preferably* administered by an arbitral institution. Sole arbitrator procedures are reserved to cases of lower complexity or involving claims for smaller amounts. It does not, however, establish any criteria as to objectively determine whether a dispute is of low complexity or involves smaller amounts.

***Institutional or 'ad-hoc' arbitration?***

The adoption of '*ad hoc*' procedures is not forbidden – as it is the case in article 2 of the Rio de Janeiro Decree – but must be justified. '*Ad hoc*' procedures, furthermore, must be necessarily conducted in accordance with the UNCITRAL Rules of Arbitration in force at the time of the filing of the request for arbitration.[4)]

Articles 13 to 15 of the São Paulo Decree aim at the creation of a database registered within the State Public Attorney's Office of arbitral institutions that can administer procedures involving members of the direct public administration. The institutions must meet a few requirements, including being regularly constituted for longer than five years – against the three-year provision of Minas Gerais Law – and having their own hearing center available for the parties, without additional charges. The arbitral institutions must also be able to receive payments in accordance with the regime adopted by state-owned entities and have notorious experience in administering arbitral proceedings involving the public administration.

The creation of the database depends on the publication of a resolution by the State Public Attorney's Office, whereby the General Public Attorney of the State of São Paulo may establish further criteria and rules for evaluating and excluding arbitral institutions from the database. To be eligible, the arbitral institutions do not need to have headquarters in the State of São Paulo, a requirement imposed by article 14, I, and § 3 of the Rio de Janeiro Decree.

### *Express regulation or inarbitrable dispute?*

Although the São Paulo Decree, unlike the regulation of the Rio de Janeiro Decree, does not expressly prohibit arbitration in connection with the narrow concept of *acta iure imperii*, this lack of an express provision should not be an issue. The non-arbitrability of *acta iure imperii* derives from the previously mentioned article 1 of the Brazilian Arbitration Act.

### *Costs and publicity*

Article 4, § 1(5) of the São Paulo Decree establishes that the requesting party must advance all costs of the arbitral proceedings.

It also provides that the arbitration case records must be publicly available as a rule,[5)] which is in line with the provision of article 2, § 3, of the Brazilian Arbitration Act, that provides for publicity of the case files when the public administration is a party in the proceedings.

Under article 12, § 2 of the São Paulo Decree,the State Public Attorney's Office will be responsible for making all documents of the cases, such as written submissions, procedural orders, terms of reference and expert reports, available online.

By demanding full publication of the proceedings on the internet, the São Paulo Decree takes transparency to a further level than the Rio de Janeiro Decree, which, despite providing for publicity of the arbitrations, establishes in article 13, § 2, that access to case files will be granted after a request submitted directly with the State General Attorney's Office. Similarly, the standard arbitration clause of the 15th round of public biddings of the National Agency of Petroleum (*Agência Nacional de Petróleo* – ANP) leaves the matter of publicity to the arbitral institution administering the proceedings, although it recommends that access to the case files be provided online.

Differences aside, the Decrees enacted by the State of São Paulo and Rio de Janeiro are both in

compliance with the principle of publicity set forth by articles 5, XXXIII, LX and 37 of the Brazilian Constitution, under which every person has the right to receive from public agencies information about their own private interest or of collective or general interest. Hence, proceedings involving the public administration must be public unless to protect privacy or the social interest, under the Brazilian Constitution.

It must be noted that the Brazilian Arbitration Act does not expressly provide for confidentiality, leaving the parties usually free to agree on a confidentiality clause or to adopt a set of institutional rules that provide for secrecy. If that is the case, such provision shall be observed by the judicial authorities granting enforcement (see article 22-C, sole paragraph, of the Brazilian Arbitration Act and article 189, IV, of the Brazilian Code of Civil Procedure).

Therefore, publicity is not incompatible with arbitration in Brazil *per se,* although the parties most commonly agree on confidentiality either by contract or by choosing institutional rules that provide so.

**Conclusion**

In conclusion, the text of the São Paulo Decree certainly gained from the experiences of previous Decrees enacted by other States and from the experience of the State of São Paulo General Attorney's Office itself in arbitral proceedings. The final product regulates arbitration involving the direct public administration in a very brief, but effective, set of 19 articles.

---

References

?1 Reported by Ruy Barbosa in: BARBOSA, Ruy. Americo Werneck v. Minas Geraes: sustentação dos embargos do estado appellante, Rio de Janeiro, Jornal do Commercio, 1918. The book is available online on the Supreme Court of Justice website.

?2 Registered under no. AI 52.181/GB.

?3 Art. 23- A of Law no. 11.196/05.

?4 Art. 6 of the São Paulo Decree.

?5 Confidentiality applies only in the cases of judicial secrecy, such as those provided by article 189, I to IV, of the Brazilian Code of Civil Procedure.

This entry was posted on Tuesday, September 17th, 2019 at 4:05 am and is filed under Arbitrability, Brazil, Brazilian Arbitration Act, Latin America, Public Entities
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.