Arbitrating Commercial Disputes in Brazil: Necessary Clarifications

Kluwer Arbitration Blog
June 21, 2013

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Please refer to this post as: Bruno Guandalini, 'Arbitrating Commercial Disputes in Brazil: Necessary Clarifications', Kluwer Arbitration Blog, June 21 2013, http://arbitrationblog.kluwerarbitration.com/2013/06/21/arbitrating-commercial-disputes-in-brazil-necessary-clarifications/

Investing Across Borders, a World Bank Group's initiative, compares the regulation for foreign direct investment around the world. Among different indicators, it publishes considerations concerning arbitration of commercial disputes from different jurisdictions. However, the prospective investor must read with caution this Summary, at least regarding arbitration in Brazil.

Here is the Summary regarding arbitration in Brazil, as published:

> *"Brazil's Arbitration Law (1996) is largely based on the UNCITRAL Model Law, except that all arbitral awards made in Brazil are considered domestic. All types of commercial disputes are arbitrable. Brazil has a large number of arbitral institutions and arbitration is becoming increasingly popular. The use of arbitration to resolve shareholder disputes has also become common. There are no restrictions on the selection of arbitrators. However, arbitration in Brazil must be conducted in Portuguese, and parties in both domestic and international arbitrations can only be represented by lawyers licensed to practice in Brazil. Arbitrators are not legally required to preserve the confidentiality of the proceedings. The law provides for court assistance with orders for interim measures and evidence taking. Brazil is one of the slowest IAB countries in enforcing foreign arbitration awards. It takes on average 1 year to recognize and enforce a foreign award assuming there is no appeal, because proceedings are two-pronged, involving recognition before the Superior Court of Justice and*

> *enforcement at the Federal Court of São Paulo. A three-stage appeals process, including a constitutional appeal before the Supreme Federal Court, is also possible. Brazil has not ratified the ICSID Convention." (The Summary is available here)*

There are some inconsistencies in this Summary, which entitle us not only to provide clarifications, but also to address an invitation to the arbitration community to review the information provided regarding arbitration in other jurisdictions.

First of all, it is dangerous to assert that "there is no restriction on the selection of arbitrators" in Brazil. Even though the Brazilian Arbitration Act (*Law n. 9.307 of 23 September 1996*) does not require any professional qualification for the arbitrator, the law expressly mentions in article 14 that arbitrators are prevented to arbitrate in the same cases where there is impediment or suspicion of national judges according to article 134 of the Brazilian Code of Civil Procedure (*Law n. 5.869 of 11 January 1973*). In general, arbitrators cannot arbitrate a case (a) in which he or she is party; or (b) he has acted as an agent, expert, or testified as a witness; or (c) on of the party's counsel is married with the arbitrator, or is relative by blood or affinity, direct or collateral up to the second degree; or (d) when married to or is relative, by blood or affinity, of either party, direct or collateral up to the third degree; or (e) is director or member of the board of directors of a company party to the arbitration; or (f) is close friend or enemy of any party; or (g) one of the parties is a creditor or debtor of the arbitrator, the spouse, or relative, direct or collateral to the third degree; or (h) is presumptive heir, donee or employer of any of the parties; or (i) receives gifts before or after the beginning of the process; advises any of the parties regarding the subject of the dispute; or (j) has interest in the outcome of the dispute; or (k) declares suspect for personal reasons. Some of these impediments are also provided in the *International Bar Association Guidelines on Conflicts of Interest in International Arbitration*. It cannot be affirmed, therefore, that there is no restriction on the selection of arbitrators.

Secondly, Brazilian Arbitration Act does not require arbitrations to be conducted in Portuguese, official language in Brazil. Parties are free to adopt the language they consider appropriate. During the enforcement of arbitral awards rendered in Brazil, if in a foreign language, a certified translation is essential. The requirement regarding the language of the arbitration is provided in article 11 of the Brazilian

Public-Private Partnership Act (*Law n. Article 11.079 of 30 December 2004*), which requires arbitrations to be conducted in Portuguese. It is worth noting that this law just applies to cases related to PPPs in which the Brazilian Government is party. Therefore, arbitrations under the Brazilian Arbitration Act, excluding those PPP cases, are free to be conducted in any language.

Thirdly, it is inaccurate to say that parties in both domestic and international arbitrations can only be represented by lawyers licensed to practice in Brazil. To begin with, as correctly stated in the Summary, there is no difference between domestic and international arbitrations according to the Brazilian Arbitration Act. They are considered the same as long as the award is rendered in Brazil, even if an institution that has seat in France administers the arbitration. (*Superior Court of Justice, REsp 1231554/RJ*) Thus, when the award is not rendered in the Brazilian territory, it was decided that the law of the seat of the arbitration governs procedural matters as representation. (*Superior Court of Justice, SEC 3709*) Also, the Brazilian Arbitration Act does not require parties to be assisted by lawyers licensed to practice in Brazil in arbitration proceedings, as it does generally require for litigation before national courts. Arbitration in Brazil is based on the party autonomy principle. From the interpretation of the provision that governs this matter (Brazilian Arbitration Act, article 21, paragraph 3), it can be inferred that parties in arbitrations conducted in Brazil may be represented by any person in whom they have confidence, concept that includes the foreign lawyer. (See, CARMONA, C. A., *Arbitragem e Processo: um comentário à Lei n. 9.307*, Ed. Atlas: São Paulo, 2009, p. 300)

It is also dangerous to affirm that arbitrators are not legally required to preserve the confidentiality of the arbitration proceedings. The law expressly states that arbitrators shall act with impartiality, independence, competence, diligence and discretion. (Brazilian Arbitration Act, Article 13, paragraph 6) The arbitrator's duty of confidentially may be inferred from his duty of discretion. Even though this position is not unanimous, most part of arbitration chambers impose this duty in their rules. Notwithstanding, party autonomy prevails in arbitration in Brazil and arbitrators' duty of confidentiality tends to remain in force when parties do not provide otherwise.

Furthermore, the assertion that "the law provides for court assistance with orders for interim measures" may not explain the positive law regarding interim measures in Brazil. The statute does not mention whether arbitrators may order interim

measures – it only states that the arbitrator may request them to the court (Brazilian Arbitration Act, Article 22, paragraph 4). The text is not clear whether the decision to order interim measures shall be made by the court (when the arbitrator requests and the court decides if it is appropriate) or by the arbitrator (who just asks the court to enforce when the party does not comply with his order). Fortunately, the Superior Court of Justice (*REsp 1297974/RJ*) has confirmed recently that the arbitral tribunal has jurisdiction to decide on the interim measures, remaining to the courts the power to enforce them if the party does not voluntarily comply. The same judgment ruled that while the tribunal is not yet constituted the court has jurisdiction to decide on interim measures, even if there is a valid arbitration agreement. In this case, following the constitution of the tribunal, the files should be turned over to the arbitrator, who has the authority to either maintain or revoke the court's decision. Hence, arbitrators may order interim measures in Brazil and request court assistance if parties do not comply with the tribunal's order.

Lastly, regarding enforcement of foreign arbitral awards, the Summary affirms that Brazil is one of the slowest IAB countries on the matter of enforcing foreign arbitration awards. It also affirms that it takes "on average 1 year to recognize and enforce a foreign award assuming there is no appeal, because proceedings are two-pronged, involving recognition before the Superior Court of Justice and enforcement at the Federal Court of São Paulo." More clarifications are necessary. To begin with, in force since 5 September 2002, Brazil has ratified the New York Convention of 1958, which is not mentioned in the Summary. The Law adopts and the Judiciary respects the principles and grounds for denial of foreign awards imposed by the Convention (Brazilian Arbitration Act, Article 38). The second point concerns the procedure of recognition of foreign awards. Since 2005, the Superior Court of Justice has the competence to recognize foreign arbitral awards (*45th Constitutional Amendment of 30 December 2004*). However, it is still controversial whether appeal of the decision of recognition is possible to the Federal Supreme Tribunal. This appeal is not mentioned in the Summary and can result in a longer period of recognition. The third point concerns the enforcement procedure. Federal Courts are competent to enforce foreign awards recognized in Brazil (*Brazilian Federal Constitution of 1988*, Article 109, X). A territorial division will determine which one is competent. Consequently, it is incorrect to affirm that the enforcement will be made by the Federal Court of São Paulo. Also, the duration of the enforcement can be different in each of them.

That being said, the Summary of the Investing Across Boarders Program of the World Bank Group is, unfortunately, not quite precise regarding arbitration in Brazil. It would be advised to have the Summaries on Arbitrating Commercial Disputes revised by local lawyers who would report to the World Bank any inaccuracies.

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