

Kluwer Arbitration Blog

The Recent Amendments to the Brazilian Arbitration Act – One Step Back, Two Steps Forward?

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On May 26, 2015, the law containing the amendments to the Brazilian Arbitration Act (BAA) was finally enacted (Law n. 13,129/2015), almost 20 years after the publication of the BAA. It will soon enter into force, on 27 July 2015.

Though Law n. 13.129/15 amended certain provisions of the BAA and introduced some innovations, it maintained the structure of the BAA, as well the substantial achievements contained therein. It went further to reflect consolidated practices in Brazil, as well as to strengthen the practice of arbitration in the country. Some of the amendments are likely to stir discussions in practice and before the courts (as anticipated in one of [last week's post](#)). The aim of this post is to briefly introduce the main modifications to the BAA, and to explain what, in our opinion, could represent a 'step back' and what could constitute the 'steps forward'.

Background

The discussions on the need and the appropriateness of a reform began back in 2012, when Brazilian Senator Renan Calheiros proposed the creation of a Commission of Jurists in the Senate to discuss the reform. At that time, the reasons put forward to justify it were that arbitration had become a preferential dispute resolution method in the country, and that there was a need for an adaptation to new demands of international trade (as explained and assessed in previous posts of this Blog: see [\[1\]](#), [\[2\]](#) and [\[3\]](#)). The referred Commission of Jurists was established in April 2013, presided by Superior Court of Justice Judge Luis Felipe Salomão.

The path to the reform: a careful approach

The Brazilian arbitration community questioned the immediate need to reassess the BAA, in view of its successful application so far. As the reform was inevitable at some point, it motivated lengthy and qualified discussions involving the arbitral community, politicians and other interested parties. In December 2013, the proposal of the Commission of Jurists was revealed and approved with amendments by the Constitution, Justice and Citizenship Commission (*Comissão de Constituição, Justiça e Cidadania*) of the Senate (Senate [Bill n. 406 of 2013](#)). The Brazilian arbitral community praised the proposed Bill, as it maintained the advancements achieved with the BAA, and pushed for innovative solutions.

In February 2014, the Bill was sent to the analysis of the Chamber of Deputies ([Chamber of](#)

Deputies Bill n. 7108/2014). Its Constitution, Justice and Citizenship Commission approved a final text in March 2015, and then sent it back to the Senate. The version that was approved by the Chamber of Deputies contained two amendments, one of them a rather controversial one: it restricted the recourse to arbitration involving the Public Administration to the cases in which it was provided for in the bidding terms or in the contracts, thus being dependent on previous regulation. Back to the Senate, such amendment was rejected, as it was considered a major setback. The approved Bill was then sent to Presidential approval.

The President in-office, before sanctioning the Law, sadly vetoed three provisions related to: **(i) adhesion contracts**: an arbitration clause would only be effective if it was written in bold or in a separate document; **(ii) a consumption relationship established through an adhesion contract**: an arbitration clause would be effective if the adherent party took the initiative of filing for arbitration or expressly agreed with its filing; and **(iii) labor contracts**, which provided for the possibility of establishing an arbitration clause only in a narrow situation: when the employee is or may become or act as statutory director or administrator, being the clause effective only if such employee took the initiative of filing for arbitration or expressly agreed with its filing.

Various representatives of the arbitral community criticized such vetoes. They argued that the vetoed provisions were in fact more protective to consumers and workers than the previous text, which permitted the recourse to arbitration in case of adhesion contracts (being labor contracts included therein, as some have argued) under specific circumstances; in addition, that the vetoes were the result of misinterpretation and other political concerns that prevailed. We understand the importance and the sensitiveness of the rights and interests connected to this discussion, but agree that the vetoed provisions had been carefully written to enhance the already protective legal regime in labor and consumer disputes. However, in practice, this discussion is not a clear-cut one, especially if one reflects upon the risk of an inappropriate and generalized use of arbitration to solve those kinds of disputes (but still within the strict limits of the law) in the Brazilian context, which could be detrimental to the institute of arbitration and its users. In other words, this topic will certainly continue to be debated in Brazil despite the abovementioned vetoes.

Overall, we understand that, at a first glance, the vetoes could be considered a step back in comparison to the 1996 text of the BAA.

Which are the amendments that could be deemed as ‘steps forward’, then?

The main modifications to the BAA

Law 13,129/2015 has put forward substantial improvements to the BAA. We focus on the following ones:

1. The inclusion of an express provision authorizing the direct and indirect Public Administration to have recourse to arbitration to resolve disputes related to disposable patrimonial rights. In fact, the Concessions’ Law and the Public-Private Partnerships’ Law already provided for this possibility, and the Superior Court of Justice had recognized it in its decisions. Notwithstanding, it still raised questions regarding arbitrability issues that justified amending this provision;

2. The creation of the arbitral letter (*carta arbitral*) – an instrument of cooperation between the Arbitral Tribunals and the Courts, to guarantee the enforcement by the Courts of the acts determined by the arbitrator. The confidentiality set forth in the arbitral proceedings must be preserved when complying with the arbitral letter. As to the formal requirements of the arbitral

letter, they are provided for in the New Code of Civil Procedure;

3. The inclusion of a specific provision dealing with the provisional remedies and interlocutory reliefs, which ratified the power of the arbitrators to grant such measures after the beginning of the arbitration, as well as to maintain, modify, or revoke such interlocutory reliefs granted by the courts before the filing of an arbitral proceeding;

4. The possibility for the parties to appoint as arbitrator someone who is not part of the list of arbitrators of a certain arbitral institution or chamber, subject to the analysis of the competent organ of that institution – which protects the freedom of the parties to constitute an arbitral tribunal of their choice;

5. The inclusion of an express provision authorizing the arbitrators to issue partial arbitral awards – which was already a uniform arbitration practice. In addition, the parties and the arbitrators, by mutual agreement, may extend the deadline for the issuance of the arbitral award;

6. Regarding the statute of limitations: the inclusion of a provision according to which the institution of an arbitral proceeding interrupts the limitation period, with retroactive effect to the date of the arbitration request, even if the arbitration were extinguished due to absence of jurisdiction;

7. It amended the Brazilian Law of Corporations providing for a minimum quorum to include the arbitration clause in the articles of incorporation so that it binds all shareholders, ensuring the dissenting shareholders' right to withdrawal, and defining the lapse of time for the effectiveness of the arbitration clause. Such inclusion aimed at strengthening the use of arbitration in corporate disputes.

Conclusions

At this point, the discussions concerning the need of reforming the BAA have been overcome for now by the enactment of Law n. 13.129/2015.

In sum, the amendments to the BAA either: **(i)** set down in writing, through specific provisions, some practices that were already consolidated in the Brazilian legal system (such as the issuance of partial awards and the arbitrability of disputes involving the direct and indirect Public Administration regarding disposable patrimonial rights); **(ii)** clarified certain provisions that had been the subject of controversy (such as the one concerning the inclusion of an arbitration clause in the articles of incorporation); or **(iii)** presented an innovation (for instance, the arbitral letter).

There are those who sustain that “reform” would not be the best word to refer to the amendments set forth by Law n. 13.129/2015 to arbitration in Brazil, as they largely reflect practices and positions already consolidated in the arbitral practice. Nonetheless, we understand that the outcome was positive thanks to the efforts and the careful approach taken by the arbitral community during this whole process. Even though the abovementioned vetoes could represent a ‘step back’, the transposition of consolidated practices and positions in Brazil (a civil law country) to the legal text will certainly strengthen even more the use of arbitration in Brazil at its best, representing not only two, but numerous steps forward a promising future.

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