

Arbitration and Public Contracts in Brazil: The New Government Procurement Act

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Introduction

On April 1st, the new Government Procurement Act (“GPA”) came into force (Law n. 14,133/2021). The new Act brings many positive changes to the processes of tendering and bidding conducted by state entities. Its legal provisions intend to bring greater legal certainty for those who want to invest in large projects in Brazil led by the Federal, State or Local Governments. A remarkable novelty within the Act is a chapter exclusively dedicated to dispute resolution (ss. 151 to 154), which reinforces Brazil’s arbitration-friendly framework.

As many readers may know, Brazil has not yet signed the ICSID Convention, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or BITs with investor-state dispute settlement mechanisms. Unlike the vast majority of countries, Brazil believes that it does not need to sign any investment treaties to attract foreign investment. Therefore, the new GPA is designed to establish most of the rights of investors interested in playing a part in a market that generated roughly USD 72 billion from 2017 to 2020.

The new Act expressly encourages parties to public contracts to solve their disputes by non-judicial methods, notably conciliation, mediation, dispute boards, and arbitration. The legislator wanted to make explicit that parties may deploy these different mechanisms for resolution of conflicts arising from public tenders and contracts based on Law n. 14,133/2021. It is important to note that such methods can be used not only in new public contracts, but also in pre-existing public contracts. An express provision makes it clear; therefore, that mediation can be initiated, for example, to resolve any outstanding issue. Likewise, arbitration can be adopted to solve a dispute related to a state contract signed before the enactment of the new GPA.

Particular features of arbitration in public contracts

With regard to matters that can be taken to arbitration (*i.e.*, objective arbitrability), the sole para. of s. 151 limits them to negotiable and pecuniary matters, which means, for example, non-performance of obligations, economic imbalance of contracts, assessment of damages due to breach of contracts etc. Basically, the only limitation rests on matters in connection with the narrow concept of *acta iure imperii*.

Unlike arbitrations between private parties, arbitrations involving public contracts must be decided by applying statute law, as set forth in the first part of s. 152 of the GPA. In other words, parties to public contracts are prohibited from adopting *ex aequo et bono* arbitration. Likewise, arbitral tribunals cannot render their decisions based on usages of trade or general principles of law or *lex mercatoria*. The same provision can be found in para. 2 of s. 2 of the Brazilian Arbitration Act (“BAA”).

In addition, arbitrations involving public contracts are not confidential, but public, pursuant to the second part of s. 152 of the GPA. Indeed, publicity is a principle provided for in s. 37 of the Brazilian Constitution, which seeks to safeguard better control of the Public Administration, *i.e.*, public accountability. Again, the same requirement is set forth in para. 2 of s. 2 of the BAA. It is important to say, however, that in some circumstances the law imposes confidentiality, as for example when the arbitration involves contracts containing national security issues.

As for the arbitrators, the GPA does not demand any specific personal requirement,

not even nationality, years of experience, or qualification in Brazilian law. In other words, it is a market open to foreign arbitrators, not only Brazilian ones. In this regard, s. 154 only mentions that the process of choosing arbitrators or arbitral tribunals should be based on technical, fair and transparent criteria. In practical terms, this process will follow the provisions contained in institutional rules of arbitration, where, in general, one arbitrator is nominated by the claimant, the other one is nominated by the defendant, and the presiding arbitrator is chosen by the co-arbitrators already appointed.

The GPA does not address the choice of the arbitral institution in charge of administering the arbitral proceedings. As a rule, in arbitrations involving public entities in Brazil, parties are free to choose the arbitral institution, as long as the institution is registered with the federal, state or local attorney's general office. Currently, not only well regarded local arbitral institutions (CAM-CCBC, Ciesp/Fiesp, Camarb, CBMA, Amcham etc.) are registered, but also the International Chamber of Commerce - ICC.

Unlike other Brazilian statutes governing the public sector, the GPA is silent regarding the seat of the arbitration, the applicable law to the merits, and the language of the arbitral proceedings. It is our understanding that nothing prevents a state entity from entering into an arbitration agreement where the seat is outside of Brazil, the applicable law is not Brazilian, and the language is not Portuguese. In practical terms, however, it is very likely that state entities in Brazil will try to favour domestic features in negotiating/drafting the public contracts.

Needless to say: such domestic preferences run against foreign investors' interests for neutrality, who will manage this risk by simply increasing the financial return for the projects. Maybe it is time for Brazilian state entities to start weighing up the advantages of offering investors more options in terms of law, seat and language, as happens in some investment treaty arbitrations.

Conclusion

The GPA represents another welcome initiative taken by Brazil, which is strengthening its arbitration-friendly legal framework, and promoting arbitration as a means of solving disputes arising from public contracts. Other specific statutes already contained provisions in the same sense, but it is the first time in the

country that the main Procurement Act expressly adopts arbitration.

The provision of arbitration and other alternative dispute resolution methods in the GPA has the potential to bring many benefits to state entities and to those looking to invest in Brazil, whether Brazilian or foreign investors, with the main benefits being efficiency and speed in the resolution of contractual conflicts with state entities. Efficiency is favoured by the flexibility of arbitration in comparison to court proceedings. Also, arbitral tribunals are specialists in the subject matter of the case, which increases the chances of having a highly technical decision. In addition, speed speaks for itself when Brazilian courts sometimes take 10 years to render a final decision (by the end of 2019, the last official national report informs that there are currently more than 77 million ongoing cases before Brazilian courts).

In the end, arbitration will reduce transaction costs in public contracts, which represents a more cost-effective solution for state entities (and, of course, for the taxpayer) and potential investors.