

Kluwer Arbitration Blog

Recent Legal Provision Enabling Public Notaries to Act as Arbitrators in Brazil

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In October 2023, the Law 14,711/2023 was sanctioned, aimed to establish new rules on foreclosures, seizures, mortgages, and transfers of properties to settle debts, by amending certain sections of Law 8,935/1994 (which regulates notary and registration services). Some argue that the inclusion of a legal provision authorizing public notaries to act as arbitrators had two objectives: to eliminate doubts regarding the possibility of them acting as arbitrators, and to popularize and democratize arbitration.

However, not only might the objective of popularizing arbitration not be achieved with this provision, but it could also negatively impact dispute resolution methods, as explored below.

Challenges Posed by the Legislative Change

The original wording of the previous legislation (Law 8,935/1994) established that the activity of notaries is incompatible with acting as a lawyer, or with the intermediation of this kind of service, and with any other public function.

The incompatibility of the practice of law for notaries is aimed at protecting the integrity, impartiality, and efficiency of the legal system, promoting public trust, and ensuring equitable justice for everyone involved. That is because notaries may have access to sensitive information and may be involved in decisions or processes that directly affect the parties involved, which might lead to conflicting interests if they also acted as lawyers, intermediates of this kind of service, or other public functions.

The amendment, however, established that acting as an arbitrator does not fall within the impediments and incompatibilities provided for in the original rule (Law 14,711/2023, Art. 7º-A, III).

According to a [technical note](#) recently published by the [Brazilian Arbitration Committee – CBAr](#), this legislative change (i) was unnecessary: acting as an arbitrator only requires legal capacity and no specific impediment related to the case; (ii) creates reverse discrimination, as the individualization of a particular and unique category of agents, among all others qualified for a particular practice, does not seem appropriate; and (iii) is misleading, given that a provision like

this may appear to be a supposed preference of the legislator for public agents to exercise of the arbitrator's function.

Firstly, clarifying the possibility of public notaries serving as arbitrators was, above all, pointless since the [Brazilian Arbitration Act](#) establishes only the legal capacity and the trust of the parties as requirements for someone to act as an arbitrator. Thus, the provision in the Arbitration Act was already sufficient.

Including a legal provision regarding a single professional category may also create a perception of preference or encouragement for appointing notaries as arbitrators. Besides diminishing all others, the individual treatment of a single group deviates Brazil from the international consensus on good arbitration practices.

A similar exception is found in the French legislation. This country also permits notaries to conduct mediations and arbitrations. In fact, there is also a [Centre de Médiation et d'Arbitrage des Notaires de Paris](#) ("CMANOT-Paris") or Paris Notaries' Mediation and Arbitration Centre. As such, it is reasonable to affirm that only a minority of jurisdictions allow this kind of service to be provided by notaries.

Concerning the appearance that the notary is performing a public function when acting as an arbitrator, the paper mentioned above emphasizes that this assimilation is absurd, because arbitration is essentially a private activity, incompatible with the competencies of a notary. Thus, if the holder of the delegation of public power acts as an arbitrator, they will perform this function as a natural person and not as the holder of a delegation of public power, and their actions will therefore be completely unrelated to the registry office under their responsibility.

Furthermore, concerning the goal of popularizing arbitration, the amendment may have unintended consequences, as average citizens may be encouraged to sign a contract containing an arbitration clause. However, this encouragement is not necessarily followed by the required clarification regarding the dispute resolution method being agreed upon, which can lead to error and, in the long term, cause people to move away from the method.

The understanding of the ordinary citizen about the dispute resolution procedure to which they are subject is crucial. It is necessary, for example, to highlight that by choosing arbitration, the dispute can no longer be submitted to Brazilian courts.

Additionally, awareness of the costs associated with arbitration is essential. Because arbitration can have high administrative costs, this method might be better suited for complex and high-value contracts. The ordinary citizens who want to litigate small claims must be aware that, by signing a contract with an arbitration clause, they are waiving their right to access Brazilian courts.

Conclusion

Specifying the possibility of a professional category acting as an arbitrator could distance Brazil from the international consensus around good practices in arbitration. Even though parties can agree on who will act as an arbitrator – which means that, theoretically, any adult can be nominated – in practice, arbitrators are very often lawyers, retired judges, or business professionals specialized in a particular field.

The legal provision included in the Brazilian law creates the individualization of a specific and unique category of agents. No legislation in the world has privileged any category. Also, arbitration is intended to serve foreign investments, so this change could generate international discredit towards other countries.

As the legislative change has now been made, we will need to increase awareness about arbitration and continue ensuring its good application in the country.

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