Brazil

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Laws and institutions

1 Multilateral conventions relating to arbitration

Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Brazil is a contracting state to the New York Convention, having acceded to it through the issuance of Federal Decree No. 4,311/2002, on 23 July 2002. No declarations or notifications under articles I, X and XI of the Convention were made by the Brazilian government.

Brazil has also agreed to the following multilateral conventions regarding international commercial arbitration:

- Geneva Protocol on Arbitration Clauses (1923);
- Panama Inter-American Convention on International Commercial Arbitration (1975);
- Montevideo Inter-American Convention on the Extraterritorial Enforcement of Foreign Court Decisions and Arbitral Awards (1979);
- Las Leñas Protocol on Judicial Cooperation and Assistance within the Mercosur (1996);
- Mercosur International Commercial Arbitration Agreement (1998); and
- United Nations Convention on Contracts for the International Sales of Goods (2013).

Brazil has not yet acceded to any multilateral conventions regarding international investment arbitration.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Pursuant to the Brazilian Ministry of Foreign Affairs, the Cooperation and Facilitation Investment Agreements (CFIAs) were created as a response to the negative experience of many countries with bilateral investment treaties (BITs), particularly with the inadequacy of the investor–state dispute settlement mechanism. In this regard, Brazil has ratified one CFIA with Angola. Furthermore, Brazil has signed, but not yet ratified, CFIAs with Chile, Colombia, Ethiopia, Malawi, Mexico, Mozambique, Suriname and Peru.

Nevertheless, there are BITs involving Brazil, which were signed but never entered into force, with the following: the Belgium-Luxembourg Economic Union, Chile, Cuba, Denmark, Finland, France, Germany, Italy, Korea, the Netherlands, Portugal, Switzerland, the United Kingdom and Venezuela.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to domestic and foreign arbitral proceedings is Federal Law No. 9,307/1996, amended by Federal Law No. 13,129/2015, known as the Brazilian Arbitration Act (the BAA), which governs both domestic and international arbitral proceedings. Federal Decree No. 4,311/2002, which introduced the New York Convention into the Brazilian legal order also represents a relevant source of law.

As to the recognition and enforcement of awards, aside from the New York Convention and the BAA, this process is currently ruled also by Federal Decree No. 4,657/1942 (the Rules of the Civil Code), Internal Regulations of the Brazilian Superior Court of Justice and the BAA – specially through articles 34 to 39. The New Brazilian Civil Procedure Code (NBCPC), which came into force in March 2016, further details the procedure of recognition and enforcement of foreign awards in articles 960 through 965.

Awards rendered in Brazil or by an arbitral tribunal seated in Brazil are automatically enforceable in the country, entitling the interested party to enforce such judgment as soon as the decision is definitely rendered by the tribunal. Awards rendered abroad, however, only acquire enforceability after undergoing a procedure of recognition before the Superior Court of Justice.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The UNCITRAL Model Law served as an important source of inspiration for the BAA and both are similar in many aspects. Notwithstanding, it is possible to identify some differences between both statutes, even though the BAA is not contrary to the Model Law in any relevant feature.

For instance, although the Model Law applies to international commercial arbitration, the BAA does not raise any distinction on the matter, applying to both domestic and international proceedings.

Another difference between these statutes is with regard to the moment the proceedings commence; under the Model Law, unless otherwise agreed by the parties, a dispute commences on the date on which a request for arbitration is received by the respondent (article 21); under the BAA, however, the arbitration shall be deemed to be initiated only when the nomination is accepted by the sole arbitrator or by all members of the arbitral tribunal (article 19).

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The parties are free to agree upon the procedure to be followed by the tribunal in conducting the proceedings, which may abide by the rules of an arbitral institution or be entirely decided by the parties (article 21 of the BAA). In conducting the proceedings, however, the arbitral tribunal shall not deviate from the core principles of Brazilian law, such as fair and equal treatment between the parties, equivalent opportunity to be heard and impartiality of the arbitrator.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

As a rule, parties to an arbitration may freely decide on the law applicable to the merits of the case, provided that there is no violation of core principles of Brazilian law or national public order (article 2(1–2) of the BAA). If no such agreement exists, the arbitral tribunal may decide on the matter (article 18 of the BAA).

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent arbitral institutions in Brazil are:

The International Chamber of Commerce (ICC)
Rua Surubim, No. 504, 12th Floor
Brooklyn Novo
São Paulo 04571-050
Brazil
https://iccwbo.org

The Brazil-Canada Chamber of Commerce (CCBC)
Rua do Rócio, No. 220, 12th Floor, cj. 1212, Vila Olímpia
São Paulo 04552-000
Brazil
www.ccbc.org.br

The Arbitration Centre for the American Chamber in São Paulo (AMCHAM)
Rua da Paz, No. 1,431
São Paulo 04713-001
Brazil
www.amcham.com.br

The Mediation and Arbitration Chamber of São Paulo (CIESP)
Av Paulista, No. 1,313, 13th Floor, Cerqueira César
São Paulo 01311-926
Brazil
www.camaradearbitragemsp.org.br

The FGV Chamber of Conciliation and Arbitration (the FGV Chamber)
Praia de Botafogo, No. 190, 12th Floor
Rio de Janeiro 22250-900
Brazil
www.fgv.br/camara

The Market Arbitration Chamber (the CAM BOVESPA)
Rua XV de Novembro, No. 275, 5th Floor
São Paulo 01013-001
Brazil
www.bmfbovespa.com.br

All institutions mentioned above have rules that provide the parties with considerable freedom in choosing the place and language of arbitration, applicable law to the merits of the case and the members of the arbitral tribunal. Though CCBC and CAM BOVESPA require that the chair is nominated from its list, none of the others require that the arbitral tribunal be necessarily selected from their list of arbitrators.

As to fees, CAM BOVESPA calculates the administrative fees based on the amount in dispute, and the arbitrator's fees on the basis of the time spent by the arbitrators to decide the case. CIESP adopts a hybrid model, establishing the arbitrator's fees on an hourly basis or as a fixed amount depending on the value in dispute. CCBC (as of 2015), AMCHAM, the FGV Chamber and the ICC calculate all fees solely based on the amount in dispute. All information regarding this matter is available on the websites indicated above.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

As per article 1 of the BAA, a dispute may only be deemed arbitrable as long as the subject matter relates to freely transferable rights. Therefore, disputes concerning some family issues, civil status, taxes or criminal law, for example, may not be subject to an arbitration agreement. Disputes concerning competition law, antitrust, securities transactions and intracompany disputes, even though involving public interest in some level, are usually deemed arbitrable by Brazilian authorities and case law. There is some controversy on the arbitrability of IP, labour and restructuring proceedings. Nonetheless, as to labour arbitration, the new Brazilian Labour Law, dated July 2017, expressly provides for the possibility of arbitrating disputes arising from employment agreements, provided that the employee expressly consents to the arbitration clause and that it earns more than 11.291 reais per month. The constitutionality of such provision though has not yet been confirmed by the labour courts. Moreover, the BAA, as per its amendment, now expressly provides that public entities may resort to arbitration in order to solve its disputes, if such disputes concern freely transferable rights (article 1(1–2) of the BAA). In this case, the procedure may not be judged on an equity basis and shall always be public (article 1(3) of the BAA).

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Article 4(1) of the BAA states that the arbitration clause shall necessarily be in writing. Further, in adhesion contracts, the arbitration clause will only have efficacy either if the adherent initiates the arbitration proceedings or expressly agrees to the insertion of such a clause in the contract (eg, in writing, in a separate attachment, in bold, with a signature or endorsement specifically for this clause).

There is some case law in the Superior Court of Justice granting enforcement to foreign arbitral awards issued on cases in which the parties disputed the execution of the arbitration agreement.

Any aspect relating to the nullity, invalidity or inefficacy of the arbitration agreement must be argued as soon as the arbitration proceedings are initiated. If the interested party fails to do so, the lack of a formal objection may be deemed cured (article 20 of the BAA). If such objection is timely raised but dismissed by the arbitral tribunal, the state courts will have jurisdiction to entertain a challenge to the arbitral award based on this arbitration agreement (article 220(2) of the BAA).

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The BAA does not contain any disposition regarding this matter. However, it can be affirmed that the termination of the underlying contract does not affect the enforceability of the arbitration agreement, which is deemed to be autonomous under Brazilian law.

If the parties, however, decide to specifically terminate the arbitration agreement itself, then such agreement will no longer be enforceable. The arbitration agreement will also be unenforceable if the interested party proves that it was forced to sign it and, therefore, that it has not validly waived its right to submit its pleas before state courts.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The BAA does not rule on this matter; scholars and case law, however, have not yet reached an agreement regarding the subject. Notwithstanding, Brazilian law has been construed in the sense that a non-signatory party may be bound by an arbitration agreement whenever it has somehow replaced the contracting party that actually entered into the agreement, or when it has had a relevant participation in negotiating such agreement. There is Brazilian case law recognising the possibility of extending the arbitration agreement under the doctrines of tacit consent, group of companies and to linked contracts, thereby affecting non-signatories to the clause. This position, however, is not free from opposition.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The BAA does not contain any provisions with respect to third-party participation in arbitral proceedings. Though many authorities admit the participation of a third party to the arbitration agreement, others simply forbid such intervention, in a more conservative approach. Altogether, considering that the arbitrators' jurisdiction descends from the parties' express consent to the arbitration agreement, it is safe to conclude that third-party participation of any nature unequivocally depends on the consensus of all parties involved and also on the assent of the arbitral tribunal on the matter.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The BAA does not rule on the extension of an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company. Nonetheless, some precedents have already expressly applied the group of companies doctrine, therefore admitting the extension of an arbitration agreement to a non-signatory company (see, for example, *Trelleborg v Anel Empreendimentos Participações e Agropecuária Ltda*, Court of Justice of São Paulo, Civil Appeal No. 267.450-4/6, 24 May 2006; *Matlinpatterson v VRG Linhas Aéreas*, Court of Justice of São Paulo, Civil Appeal No. 0214068-16.2010.8.26.0100, 16 October 2012; and *GP Partners and Smiles, LLC v Imbra, Court of Justice of São Paulo*, Civil Appeal No. 0035404-55.2013.8.26.0100, 26 August 2015).

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The BAA does not rule on multiparty arbitration agreements and consequently on the requirements for their validity. Parties should settle the issue on the arbitration agreement or resort to the rules of the chosen arbitration institution.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

A person may not act as an arbitrator if he or she has any relationship with the parties, with the subject matter of the arbitration or an interest of any nature in the resolution of the dispute (article 14 of the BAA). Active judges are also barred from acting as arbitrators, in accordance with Law No. 35/79. Aside from these restrictions, anyone with legal capacity who enjoys the trust of the parties may be appointed as an arbitrator, including retired judges.

Brazilian courts would very likely deem valid requirements based on nationality, especially if such requirements aim at the neutrality of the arbitral tribunal. Requirements based on religion or gender, however, may be subject to further scrutiny given that the Brazilian Federal Constitution has expressly acknowledged gender equality and religious freedom.

16 Background of arbitrators

Who regularly sit as arbitrators in your jurisdiction?

Arbitrators in Brazil are usually practising lawyers, law professors, retired judges, engineers, economists and accountants. Diversity in appointments is a topic frequently discussed by arbitral institutions in Brazil.

Furthermore, the following institutions are signatories of the Arbitration Pledge for Equal Representation in Arbitration:

- the Brazilian Centre of Mediation and Arbitration;
- the Brazilian Chamber of Commercial Arbitration and Mediation;
- AMCHAM;
- the Arbitration and Mediation Centre of the Paraná Federation of Industries;
- the CCBC;
- the Brazilian Arbitration Committee; and
- the International Court of Arbitration of the ICC.

17 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

For proceedings with a sole arbitrator, the rules of the arbitration institutions mentioned in question 7 provide that, failing agreement of the parties, the arbitrator will be appointed by the arbitral institution itself. In proceedings with three arbitrators, each party may nominate one of the co-arbitrators, who will be responsible for appointing the chair of the arbitral tribunal. If the co-arbitrators fail to appoint the chair, the institution itself will do so. If the arbitration agreement, however, is silent as to the arbitration institution before which the proceeding shall be conducted, the interested party may resort to state courts and request the appointment of the arbitrators that shall form the tribunal (article 7(4) of the BAA). The BAA, as amended, expressly provides that the parties are free to agree upon the waiver of institutional rules that limit the choice of arbitrators to those that are part of the respective institution's list, as per article 13(4) of the BAA. According to the same provision, if the parties fail to appoint the arbitrators or in case of multiparty arbitration, the matter must be settled in accordance with the rules of the arbitration institution elected to rule the procedure, such as in the *Dutco* Case.

18 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Article 14 of the BAA provides that arbitrators may be challenged and replaced should they have a relationship with one of the parties or a connection to the subject matter of the arbitration that would lead to the disqualification of a state judge, such as, for example, personal interest in the matter, a familial or intimate relationship with one of the parties, enmity with one of the parties, and so on. As from March 2016, the matter is disciplined by articles 144 and 145 of the NBCPC, which include provisions on intimate relationship and enmity with lawyers.

In 2017, for instance, the Superior Court of Justice refused to recognise an arbitral award rendered in New York because, inter alia, the presiding arbitrator failed to disclose that his firm had received considerable fees from a company belonging to the same group of one of the parties during the arbitration (Superior Court of Justice, SEC No.9.412/US, 19 April 2017).

The party interested in challenging the arbitrator shall file the respective plea directly to the arbitrator or the chair of the arbitral tribunal, setting forth its reasoning and pertinent evidence (article 15 of the BAA). Should the challenge be accepted, the disqualified arbitrator shall be removed and replaced by its substitute as set forth in article 16 of the BAA or in the rules of the arbitration institution chosen by the parties.

In the event that an arbitrator should die or become unable to carry out his or her duties, a substitute indicated by the parties or the arbitration institution will take over (article 16 of the BAA). However, in the event of the death or illness of an arbitrator, if the parties have expressly declared that they would not accept a substitute, the arbitration agreement will be considered terminated (article 12 of the BAA).

Additionally, the IBA Guidelines on Conflicts of Interest in International Arbitration may be applied, but this does not yet represent a strong trend in Brazil.

19 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Parties and arbitrators are bound by a contractual relationship, and both party-appointed and non-party-appointed arbitrators must, in the performance of their duty, proceed diligently, efficiently, independently and free from bias of any nature (article 13(6) of the BAA). Arbitrators' remuneration usually falls within the rules of the arbitral institutions and is defined on a case-by-case basis. The terms of reference of the arbitration usually set forth the procedure for the reimbursement of the expenses of arbitrators.

20 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Pursuant to article 17 of the BAA, when carrying out their duties, arbitrators shall be considered comparable to public officials and judges for the purpose of criminal legislation, which further reinforces the compliance with their duty of impartiality.

Jurisdiction and competence of arbitral tribunal

21 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If court proceedings are initiated despite an existing arbitration agreement, the interested party must raise this issue, as a preliminary objection, when presenting its answer to the claim submitted to the state court. The time limit for raising such an objection is either 15 days from the defendant's service of process or from the preliminary hearing in court, should the judge hold it in accordance with article 335 of the NBCPC. Once the arbitration agreement between the parties has been raised, the state judge must dismiss the claim, as per article 337, section X of the NBCPC. If the interested party, however, fails to bring to the knowledge of the state judge the existence of the arbitration agreement in the 15-day term, the state judge may proceed with the judgment on the merits, for it is presumed that both parties have waived their right to resort to an arbitral tribunal.

22 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

As per article 20 of the BAA, the party interested in raising an objection as to the jurisdiction of the arbitral tribunal must do so at the first opportunity once the proceedings have been initiated. The arbitral tribunal will then rule on its own jurisdiction and if it accepts the challenge, the parties shall be directed to the proper judicial court to settle the dispute. If the challenge is not accepted, however, the arbitral proceedings shall proceed. Nevertheless, in this case, once the arbitration proceedings are over, the interested party may still claim the nullity of the award on the grounds that the arbitral tribunal did not have jurisdiction to settle the matter (article 33 of the BAA).

Arbitral proceedings

23 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Provided that the parties have not chosen a set of institutional rules that settles this matter, the arbitral tribunal may decide upon the place and language of the proceedings (article 21(1) of the BAA).

24 Commencement of arbitration

How are arbitral proceedings initiated?

An arbitral proceeding is deemed initiated when the nomination is accepted by the sole arbitrator, in the event that there is only one, or by all members of the arbitral tribunal. Such criteria is expressly stated in article 19 of the BAA and was adopted by the rules of the arbitration institutions listed in question 7. For the purposes of statute of limitations, the BAA provides that the arbitration is deemed as commenced on the date of the filing of the request for arbitration (article 19(2) of the BAA).

25 Hearing

Is a hearing required and what rules apply?

A hearing is not mandatory for the validity of the proceedings. The BAA and the rules of the above-mentioned arbitration institutions leave this issue to the discretion of the arbitral tribunal (article 22 of the BAA). If deemed necessary, the tribunal, at the request of the parties or on its own initiative, may take depositions, hear witnesses, carry out expert examinations and determine the production of any other evidence it may deem necessary. The parties and the tribunal may freely determine upon the procedural rules applicable to the hearing, and the sole requirement under the BAA is that the deposition of the parties and witnesses be taken at a time, place and date previously informed, and be reduced to a written transcript, signed by the deponent or at his or her request, and by the arbitrators.

26 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The arbitral tribunal is free to decide on every aspect relating to the taking of evidence, to the extent that it is free to form its opinion (article 21(2)). Such freedom can be inferred from article 22 of the BAA, which states that the arbitrators, at the request of the parties or on their own motion, may take depositions of the parties, hear witnesses, carry out expert examinations (both of party-appointed experts and tribunal-appointed experts) and determine the production of any other evidence deemed appropriate. Although the oral evidence is produced at the hearing, the hard evidence must be presented with the parties' submissions. The IBA Rules on the Taking of Evidence in International Arbitration are gradually becoming more popular in Brazil, especially in proceedings where there is a party originally from or controlled by a legal or natural person from a common law system.

27 Court involvement

In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

The BAA provides for two hypotheses in which the arbitral tribunal may request assistance from a state court, as per articles 22 and 22-C (the latter having been introduced in the amendment of the BAA). The first, stated in article 22, refers to the absence of a witness from the deposition session. In this situation, the arbitral tribunal may request the judicial authority to subpoena the reluctant witness for a new hearing. The second hypothesis refers to the possibility of the arbitral tribunal requesting the assistance and cooperation of the state court that would originally have jurisdiction to trial the case, by means of an arbitral letter, in accordance with article 22-C of the BAA.

28 Confidentiality

Is confidentiality ensured?

Confidentiality is not expressly ensured by the BAA, but such a provision is commonly inserted in the arbitration agreement. Much in the same manner, the rules of the arbitration institutions listed above contain a confidentiality duty that applies to both the parties and the arbitrators. The NBCPC ensures confidentiality to judicial proceedings for enforcement of an arbitral decision or award, and also for recognition or nullity of the latter, provided that the interested party demonstrates before the state court that the arbitral proceedings are confidential (article 189, section IV). However, as per article 2(3), of the amended

BAA, confidentiality does not apply to arbitral proceedings in which public entities are involved.

Interim measures and sanctioning powers

29 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Before arbitration proceedings have been initiated, courts may grant any types of interim measures seeking to preserve parties' rights. After the proceedings have been initiated, state courts may intervene in very specific situations, such as on the subpoena of a witness that fails to appear to court (articles 22, section 2, and 22-A of the BAA). As a rule, once the proceedings have commenced, the arbitral tribunal has exclusivity on ruling every aspect of the matter, including to maintain or reconsider decisions previously rendered by state courts (article 22-B of the BAA), but there may be some exceptions where state proceedings commence before the arbitration.

30 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The BAA does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. Usually, interim measures are sought by the parties before state courts, as per article 22-A of the BAA. However, the CCBC, CAM BOVESPA and ICC do provide for an emergency arbitrator procedure (administrative resolution No. 32/2018, articles 5.1 and 29, respectively).

31 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The BAA does not set limits to the arbitral tribunal's power to issue interim measures within its jurisdiction (article 22-B of the BAA), neither does it establish cases in which security for costs are required. Besides those measures mentioned above, the arbitral tribunal may issue temporary restraining orders or interim relief sought by the parties. It is not usual for the arbitral tribunals to order security for costs.

32 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

As per article 27 of the BAA, the arbitral award shall decide the parties' responsibilities, as well as any amount (penalty) resulting from bad-faith conduct during the proceedings, such as the use of 'guerrilla tactics', as the case may be, following the provisions of the arbitration agreement, if any. Further, the arbitral tribunal is empowered to communicate to the criminal authorities on any conduct that constitutes a crime under Brazilian law, such as harassment of witnesses. The BAA lacks provision regarding penalties applicable to conduct that would amount to contempt of court.

Awards

33 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

A unanimous vote is not required and the existence of a dissenting opinion does not affect the validity of the award. Under article 24(1) of the BAA, when there are several arbitrators, the award may be rendered by majority vote. Failing majority agreement, the vote of the chair of the arbitral tribunal shall prevail.

34 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

As per article 24(2), the arbitrator who dissents from the majority may, if he or she so wishes, state his or her vote separately. However, if the dissenting arbitrator does not state his or her vote separately, this does not have an influence on the validity of the award rendered by majority vote, as long as the majority award clearly states the limits of the dissenting opinion.

35 Form and content requirements

What form and content requirements exist for an award?

As to the form, the award shall be expressed in a written document (article 24 of the BAA). The mandatory requirements for an award are the following, as per article 26 of the BAA:

- a report containing the names of the parties and a summary of the dispute;
- the grounds for the decision where questions of fact and law shall be analysed, with an express mention as to whether the arbitrators are judging the case on an equity basis;
- the opinion wherein the arbitrators shall resolve the specific questions that were submitted to them by the parties and also establish the time frame for compliance with the decision; and
- the date and place where the award was rendered.

Further, the award shall be signed by all members of the tribunal and will also state the responsibility of the parties regarding costs and expenses for the arbitration, as well as fees of any other nature. In exceptional circumstances, the absence of the signature of an arbitrator in the award may be justified.

The NBCPC contains provisions that may enhance the content of an award, including its mandatory reasoning and the possibility of issue preclusion (collateral estoppel).

36 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The award shall be rendered within the time limit stipulated by the parties. If no agreement has been made in this sense, the time limit for rendering the award shall be six months from the commencement of the proceedings, as per article 23 of the BAA. The parties and the arbitrators, by mutual agreement, may extend the stipulated time period. Usually, arbitration institution rules set a time limit of 60 days for the tribunal to issue the award after the close of the proceedings and such time limit can be extended once, for the same period or for a shorter period of 30 days, by the arbitral tribunal.

37 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The applicable time limits for a challenge or for a request for correction or interpretation of the award commence only from the date of its delivery to the parties (articles 30 and 33(1) of the BAA). Also, any party interested in setting aside an arbitral award shall submit its challenge in state court within 90 days of the date of receipt of the arbitral award or from the receipt of the decision on the request for correction or interpretation of the award, if applicable (article 33(1) of the BAA).

38 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Final awards, partial awards, interim awards and consent awards are valid and possible under the BAA. Up until the amendment of the BAA,

Update and trends

An emerging trend in Brazil is the appointment of the chair of the arbitral tribunal based on a list of candidates previously prepared by the arbitrators, of which the parties may veto a few names. A hot topic in arbitration is the impact of the new Civil Procedure Code provisions regarding binding precedents and the existence of the arbitrators' duty to apply such precedents. To the best of the authors' knowledge, there is no current attempt to revise the Brazilian Arbitration Act. However, AMCHAM has recently revised its arbitration rules. Brazil has never been involved in an investor–state arbitration, and thus there is no Brazilian case law on international investment arbitration.

there was much controversy among Brazilian scholars regarding the validity of partial awards, especially because article 32, section 5 of the BAA used to state that an award will be null and void if it does not settle the entire dispute submitted to arbitration. However, through Federal Law No. 13,129/2015, such provision was revoked and a specific provision expressly authorising arbitrators to issue partial awards was incorporated (article 23(1) of the BAA). There are no limitations as to the type of relief an arbitral tribunal may grant, and awards may dismiss the arbitration without prejudice or be definitive as to the merits of the dispute.

39 Termination of proceedings

By what other means than an award can proceedings be terminated?

Proceedings may be terminated by default, in accordance with the rules of the arbitration institutions mentioned above. Proceedings may also be terminated by means of a settlement and, even though legally there are no formal requirements for such termination, parties may request the tribunal to ratify such fact in an award, as per article 28 of the BAA.

40 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

In accordance with article 27 of the BAA, the award shall decide the responsibility of the parties regarding costs and expenses for the arbitration. The tribunal is absolutely free to decide upon this matter, following the provisions of the arbitration agreement, if any, or alternatively the rules of the arbitration institution chosen by the parties. Arbitrators are not by any means bound to the rules or standards for cost allocation established in domestic court proceedings and may rule on this matter as they deem appropriate. The award on costs encompasses not only the attorney's fees, but also the arbitrators' fees, the administrative costs and, if any, the experts' fees.

41 Interest

May interest be awarded for principal claims and for costs, and at what rate?

Interest and restatement may be awarded for principal claims and costs. In general, the interest rate is equivalent to the rate applicable for federal tax debts in Brazil (article 406 of the Brazilian Civil Code), unless the parties have agreed otherwise.

Proceedings subsequent to issuance of award

42 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

In accordance with article 30 of the BAA, within a period of five days as from the notification of the award or within the period provided by the parties or the arbitration rules chosen by them, the interested party may request the tribunal to rectify clerical errors that may affect the judgment or any obscurity, doubt, omission or contradiction in the award. The arbitral tribunal may also take these measures by its own initiative. The tribunal shall decide on the amendment within 10 days, unless otherwise provided by the parties or the arbitration rules chosen by them.

43 Challenge of awards

How and on what grounds can awards be challenged and set aside?

In Brazilian law, arbitral awards may be challenged and set aside by means of a judicial proceeding that claims the nullity of the judgment or as a defence in an enforcement proceeding.

To succeed in such claim or defence, the interested party must demonstrate, as per article 32 of the BAA, that the award:

- was rendered by someone who could not have served as an arbitrator;
- does not contain the requirements stated in article 26 of the BAA;
- does not respect the limits established in the arbitration agreement;
- was rendered in a context of breach of duty, passive corruption or graft;
- was rendered after the time limit previously established, provided that one of the parties has notified the tribunal pursuant to article 12, section III of the BAA; or
- violates the core principles stated in article 21(2) of the BAA, such as equal treatment between all parties, opportunity to be heard and the impartiality of the arbitrator. An award may also be set aside if the arbitration clause is considered null and void.

The claim for nullity must be filed within 90 days of the receipt of the notification of the award or from the receipt of the decision on the request for correction or interpretation of the award, if applicable (article 33(1) of the BAA).

44 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Considering that the claim for nullity follows the ordinary proceeding provided by the NBCPC, there are basically two levels of appeal. The challenge in a trial court may take one to three years to be decided. If the interested party appeals, a challenge may take one to five years to be definitely settled before a higher court (a state court of appeals, federal court of appeals or Supreme Court of Brazil). However, the filing of the claim for nullity does not suspend the enforcement of the award, unless otherwise ruled by a court of law. The costs incurred in such proceedings may be appraised in at least 4 per cent of the value of matter in controversy. The defeated party may also be required to pay attorney fees to the winning party, which will vary according to the NBCPC and the judge's discretion. The delay in state court proceedings may vary according to the state, and in extreme cases it may take up to eight years to issue a final decision.

45 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic awards are automatically enforceable, entitling the interested party to begin the enforcement of judgment as soon as the decision is definitely rendered by the tribunal. The enforcement procedure is structured to be a fast and cost-efficient solution. Foreign awards, however, only acquire enforceability after undergoing a procedure of recognition of judgment (or confirmation of judgment) by means of which the Superior Court of Justice scrutinises its validity and conformity in relation to national public policy and, ultimately, decides upon the possibility of granting the exequatur required by the interested party. An award that is deemed to be contrary to Brazilian core principles of law will not be recognised and enforced in Brazil. However, there are very few cases in which the exequatur has not been granted. In fact, in the past few years, the Brazilian Court of Justice has repeatedly positioned itself in a manner favourable to the development of arbitration, enforcing foreign awards exactly as they were rendered, with very specific exceptions.

46 Time limits for enforcement of arbitral awards

Is there a limitation period for the enforcement of arbitral awards?

The limitation period for enforcement will vary according to the nature of the rights and obligations under discussion. In this sense, precedent 150 of the Federal Supreme Court states that the limitation period applicable to enforcement is the same of the lawsuit itself. It may also be considered that, once the arbitral award becomes liquid and due, the time limit of five years, set forth by article 206(5)(I), of the Brazilian Civil Code, may be applied (*MAC Empreendimentos Imobiliários v Lindinalva Domingues de Oliveira, Court of Justice of Goiás*, Civil Appeal No. 0301249.06.2015.8.09.0051, 29 June 2017). According to the mentioned article, the interested party should observe the time limit of five years to exercise its right to charge a net debt recognised in a public or private instrument. The interpretation of the limitation periods is a controversial matter in the Superior Court of Justice and the fiver-year time limit may not apply to all cases.

As to the enforcement of awards rendered by foreign state courts, the Superior Court of Justice has rejected the application of article 206(5)(I), of the Brazilian Civil Code. The Superior Court decided that the limitation period to enforce a foreign decision in Brazil is a matter outside the limits of the Court in the recognition of foreign awards (*Sena Transportes do Brasil SA v Hassan Houjeije Aboc Raya and other*, Superior Court of Justice, SEC No. 8,554-UY, 5 November 2014; *WJP v PMGD*, Superior Court of Justice, SEC No. 10,043-EX, 4 June 2014). There is no case law rendered by the Superior Court of Justice on the application of limitation periods to the recognition and enforcement of foreign arbitral awards.

47 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Article 38, section 6 of the BAA states that enforcement of an arbitral award may be refused when the award has been set aside or suspended by a state court at the place of arbitration. The federal attorney general acting in the Superior Court of Justice issued an opinion denying enforceability to a foreign award that has been set aside by a state court at the place of arbitration (see SEC No. 5,782/AR). The Superior Court of Justice issued its opinion on this case, in which, by unanimous decision, it denied enforceability to a foreign award that was set aside by a state court at the place of arbitration.

48 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

As per question 30, the BAA does not provide for any rule related to emergency arbitrator proceedings or orders. Even though the CAM BOVESPA and ICC provide for such proceedings, they do not have any specific rule on the enforcement of orders issued by emergency arbitrators. Likewise, although the CCBC has issued an administrative resolution (No. 32/2018) specifically for the procedure to be adopted by the emergency arbitrator, the resolution merely sets forth that the award rendered should comply with the general requirements for the enforcement of awards.

49 Cost of enforcement

What costs are incurred in enforcing awards?

The enforcement of foreign awards may vary according to the state jurisdiction. Nonetheless, attorney fees may vary from 10 to 20 per cent of the value of the matter in controversy and are borne by the defeated party.

Other

50 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

One of the most relevant features is the freedom to evaluate evidence. Since the civil law tradition has waived strict rules of evidence, arbitrators are not bound to any kind of previous set of rules of evidence and usually they have different approaches to evidence production. Another relevant feature is related to the absence of discovery rules and of any provision for witness written statements.

It is understood that parties should rely on the documents in their possession, unless they have agreed to a specific discovery proceeding. In the same sense, witnesses are not required to issue prior written statements, with an exception made for parties' agreements or the arbitral tribunal's orders. Finally, party officers shall testify if ordered to do so by the arbitral tribunal, but they are not bound to a duty to tell the truth, as the Brazilian Federal Constitution grants the parties the right not to produce evidence against themselves.

51 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Although there are no specific professional or ethical rules applicable to counsel in international arbitration in Brazil, Brazilian lawyers are regulated by the Brazilian Bar Association Ethical Code. Even though best practice in Brazil does not contradict the IBA Guidelines on Party Representation in International Arbitration, rules regarding, for example, witness interviews, information exchange, and disclosure and production of documents may be sometimes faced differently by civil law tradition lawyers.

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52 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding of arbitrations in Brazil is not subject to any express legal restriction. The Brazilian Bar ethics regulations may apply in certain circumstances. CCBC is the only Brazilian arbitration chamber that has expressly regulated this subject through an administrative resolution dated 20 July 2016. Also in 2016, the ICC issued a Guidance Note on Disclosure and Third-Party Funding.

53 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There are no particularities concerning visa requirements, work permits or taxes when functioning as a foreign arbitrator or counsel in proceedings seated in Brazil. However, in order to physically attend hearings or meetings held in the Brazilian territory a regular visa is required. Even though counsels are not required to enrol with the Brazilian Bar Association to function in international arbitration proceedings, this is necessary to any judicial measure, such as procedures to claim the nullity or the recognition and enforcement of the arbitral award.

There are no unusual ethical rules that one should be aware of; when exercising their duties, arbitrators are considered comparable to public officials and judges for the purpose of criminal legislation (article 17 of the BAA) and counsels are subject to Federal Law No. 8,906/1994.

* *The authors would like to thank Laura Ghitti for her assistance with this chapter.*