

Arbitration

in 55 jurisdictions worldwide

Contributing editors: Gerhard Wegen and Stephan Wilske

2013



**Published by
Getting the Deal Through
in association with:**

- Ahdab Law Firm
- Anderson Mōri & Tomotsune
- Appleby
- ASAR – Al Ruwayeh & Partners
- Association for International Arbitration
- AZB & Partners
- Badri and Salim El Meouchi Law Firm
- Bán, S Szabó & Partners
- Barbosa, Müssnich & Aragón
- Barger Prekop sro
- Billiet & Co
- Bird & Bird LLP
- Bonn Steichen & Partners
- Cairo Regional Centre for International Commercial Arbitration
- Clifford Chance
- Crowell & Moring
- DLA Piper
- Dzungsrt & Associates LLC
- Esin Attorney Partnership
- Fangda Partners
- Formosan Brothers, Attorneys-at-Law
- Gan Partnership
- Ginestié Magellan Paley-Vincent
- Gleiss Lutz
- Habib Al Mulla & Co
- Heussen Rechtsanwaltsgesellschaft mbH
- Hoet Pelaez Castillo & Duque
- Hogan Lovells US LLP
- Houthoff Buruma
- Hughes Hubbard & Reed LLP
- Jiménez Cruz Peña
- Johnson Winter & Slattery
- Kim & Chang
- Kimathi & Partners, Corporate Attorneys
- Kosheri, Rashed & Riad Law Firm
- Kuala Lumpur Regional Centre for Arbitration
- Łaszczuk & Partners
- Law Offices Bělohávek
- LawFed Studio Legale e Tributario BRSA
- Lilla, Huck, Otranto, Camargo Advogados
- Iurisvalls
- Mamić Perić Reberski Rimac
- Meyer Fabre Avocats
- Miranda Correia Amendoeira & Associados
- Mkono & Co Advocates in association with SNR Denton
- Motieka & Audzevičius
- Niedermann Rechtsanwälte
- Norton Rose (Middle East) LLP
- Perez Bustamante & Ponce
- Pestalozzi Attorneys at Law Ltd
- Posse Herrera Ruiz
- Roosdiono & Partners
- Sandart & Partners
- Schellenberg Wittmer
- Sherby & Co, Advs
- Specht Böhm Rechtsanwalt GmbH
- Stikeman Elliot LLP
- Stockholm Arbitration & Litigation Center (SALC) Advokatbyrå
- Stoica & Asociatii
- Tilleke & Gibbins
- Vasil Kisil & Partners

Arbitration 2013

Contributing editors:

Gerhard Wegen and Stephan Wilske
Gleiss Lutz

Business development managers

Alan Lee
George Ingledew
Robyn Horsefield
Dan White

Marketing manager

Rachel Nurse

Marketing assistants

Megan Friedman
Zosia Demkowicz
Cady Atkinson
Robin Synnot

Administrative assistants

Parween Bains
Sophie Hickey

Marketing manager (subscriptions)

Rachel Nurse
subscriptions@
gettingthedealthrough.com

Head of editorial production

Adam Myers

Production coordinator

Lydia Gerges

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Subeditors

Martin Forrest
Harry Phillips

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Arbitration 2013

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

© Law Business Research Ltd 2013

No photocopying: copyright licences do
not apply.

ISSN 1750-9947

The information provided in this publication is
general and may not apply in a specific situation.
Legal advice should always be sought before
taking any legal action based on the information
provided. This information is not intended to
create, nor does receipt of it constitute, a lawyer-
client relationship. No legal advice is being given
in the publication. The publishers and authors
accept no responsibility for any acts or omissions
contained herein. Although the information
provided is accurate as of January 2013, be
advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Introduction Gerhard Wegen and Stephan Wilske <i>Gleiss Lutz</i>	3
CCBC André de Albuquerque Cavalcanti Abbud and Gustavo Santos Kulesza <i>Barbosa, Müssnich & Aragão</i>	7
CEAC Eckart Brödermann <i>Brödermann Jahn</i> , Christine Heeg <i>Bird & Bird LLP</i> and Thomas Weimann <i>Clifford Chance</i>	12
CIETAC Peter Yuen, Helen Shi and Benjamin Miao <i>Fangda Partners</i>	17
CMA André de Albuquerque Cavalcanti Abbud and Gustavo Santos Kulesza <i>Barbosa, Müssnich & Aragão</i>	20
CRCICA Mohamed Abdel Raouf <i>Cairo Regional Centre for International Commercial Arbitration</i>	24
DIAC Gordon Blanke and Soraya Corm-Bakhos <i>Habib Al Mulla & Co</i>	29
DIS Renate Dendorfer-Ditges <i>Heussen Rechtsanwalts-gesellschaft mbH</i>	32
HKIA Peter Yuen and Doris Yeung <i>Fangda Partners</i>	36
ICC José Rosell and María Beatriz Burghetto <i>Hughes Hubbard & Reed LLP</i>	40
ICSID Nicolas Herzog and Niccolò Gozzi <i>Niedermann Rechtsanwälte</i>	46
KLRC Sundra Rajoo <i>Kuala Lumpur Regional Centre for Arbitration</i>	52
LCIA India Shreyas Jayasimha <i>AZB & Partners</i>	56
The Polish Chamber of Commerce Justyna Szpara and Maciej Łaszczuk <i>Łaszczuk & Partners</i>	60
SCC Dan Engström & Cornel Marian <i>Stockholm Arbitration & Litigation Center (SALC) Advokatbyrå</i>	64
The Swiss Chambers' Arbitration Institution Philippe Bärtsch, Christopher Boog and Benjamin Moss <i>Schellenberg Wittmer</i>	68
Angola Agostinho Pereira de Miranda, Cláudia Leonardo and Jay Fernandes <i>Miranda Correia Amendoeira & Associados</i>	73
Australia Tony Johnson, Michael Bywell and Henry Winter <i>Johnson Winter & Slattery</i>	79
Austria Erhard Böhm and Paul Proksch <i>Specht Böhm Rechtsanwalt GmbH</i>	86
Bahrain Adam Vause <i>Norton Rose (Middle East) LLP</i>	93
Belgium Johan Billiet <i>Billiet & Co</i> and Dilyara Nigmatullina <i>Association for International Arbitration</i>	101
Brazil Hermes Marcelo Huck, Rogério Carmona Bianco and Fábio Peixinho Gomes Corrêa <i>Lilla, Huck, Otranto, Camargo Advogados</i>	110
Canada John A M Judge, Peter J Cullen, Douglas F Harrison and Lev Alexeev <i>Stikeman Elliott LLP</i>	117
Cayman Islands Jeremy Walton and Anna Gilbert <i>Appleby</i>	127
China Peter Yuen, Helen Shi and Benjamin Miao <i>Fangda Partners</i>	136
Colombia Carolina Posada Isaacs and Maria Alejandra Arboleda González <i>Posse Herrera Ruiz</i>	145
Croatia Natalija Perić and Frano Belohradsky <i>Mamić Perić Reberski Rimac</i>	152
Czech Republic Alexander J Bělohávek <i>Law Offices Bělohávek</i>	159
Dominican Republic Marcos Peña Rodríguez and Laura Medina Acosta <i>Jiménez Cruz Peña</i>	167
Ecuador Rodrigo Jijón Letort and Juan Manuel Marchán <i>Perez Bustamante & Ponce</i>	175
Egypt Tarek F Riad <i>Kosheri, Rashed & Riad Law Firm</i>	183
England and Wales Jane Wessel, Claire Stockford and Meriam N Alrashid <i>Crowell & Moring</i>	189
France Nathalie Meyer Fabre <i>Meyer Fabre Avocats</i>	200
Germany Stephan Wilske and Claudia Krapfl <i>Gleiss Lutz</i>	209
Ghana Kimathi Kuenyehia, Sr, Sika Kuenyehia and Atsu Agbemabiase <i>Kimathi & Partners, Corporate Attorneys</i>	216
Hong Kong Peter Yuen and Doris Yeung <i>Fangda Partners</i>	224
Hungary Chrysta Bán Bán, S Szabó & Partners	233
India Shreyas Jayasimha <i>AZB & Partners</i>	241
Indonesia Anderonikus A S Janis <i>Roosdiono & Partners</i>	251
Israel Eric S Sherby and Sami Sabzerou <i>Sherby & Co, Advs</i>	258
Italy Mauro Rubino-Sammartano <i>LawFed Studio Legale e Tributario BRSA</i>	267
Japan Shinji Kusakabe <i>Anderson Mōri & Tomotsune</i>	275
Korea BC Yoon, Kyo-Hwa Liz Chung and Richard Menard <i>Kim & Chang</i>	282
Kuwait Ahmed Barakat and Ibrahim Sattout <i>ASAR – Al Ruwayeh & Partners</i>	290
Lebanon Chadia El Meouchi, Jihad Rizkallah and Sarah Fakhry <i>Badri and Salim El Meouchi Law Firm</i>	298
Lithuania Ramūnas Audzevičius and Rimantas Daujotas <i>Motieka & Audzevičius</i>	310
Luxembourg Fabio Trevisan and Laure-Hélène Gaicio <i>Bonn, Steichen & Partners</i>	317
Malaysia Foo Liang <i>Gan Partnership</i>	325
Mozambique Agostinho Pereira de Miranda, Filipa Russo de Sá and Catarina Carvalho Cunha <i>Miranda Correia Amendoeira & Associados</i>	335
Netherlands D Knottenbelt and M E Koppenol-Laforce <i>Houthoff Buruma</i>	342
Poland Justyna Szpara and Pawel Chojecki <i>Łaszczuk & Partners</i>	349
Portugal Agostinho Pereira de Miranda, Cláudia Leonardo and Catarina Cunha <i>Miranda Correia Amendoeira & Associados</i>	356
Qatar Jalal El Ahdab and Myriam Eid <i>Ginestié Magellan Paley-Vincent in association with Ahdab Law Firm</i>	363
Romania Cristiana-Irinel Stoica, Daniel Aragea and Andrei Buga <i>Stoica & Asociatii</i>	371
Russia Natalya Menshikova, Julia Zaletova and Irina Anishchenko <i>Specht Böhm Rechtsanwalt GmbH</i>	378
Saudi Arabia Jalal El Ahdab and Myriam Eid <i>Ginestié Magellan Paley-Vincent in association with Ahdab Law Firm</i>	387
Serbia Dušan Rakitić and Nikoleta Vučenović <i>Specht Böhm Rechtsanwalt GmbH</i>	397
Singapore Yu-Jin Tay and David Liu <i>DLA Piper</i>	404
Slovakia Roman Prekop, Adrian Barger, Monika Simorova and Boris Halas <i>Barger Prekop sro</i>	414
Spain Ramon Mullerat <i>Jurisvalls</i>	422
Sweden Eric M Runesson and Simon Arvmyren <i>Sandart & Partners</i>	433
Switzerland Thomas Rohner and Nadja Kubat Erk <i>Pestalozzi Attorneys at Law Ltd</i>	440
Taiwan Helena H C Chen and Kitty Shen <i>Formosan Brothers, Attorneys-at-Law</i>	448
Tanzania Wilbert Kapinga, Ofotsu A Tetteh-Kujojje and Kamanga Kapinga <i>Mkono & Co Advocates in association with SNR Denton</i>	455
Thailand Kornkieat Chunhakasikarn and John King <i>Tilleke & Gibbins</i>	461
Turkey Ismail G Esin, Ali Yesilirmak and Dogan Glututan <i>Esin Attorney Partnership</i>	469
Ukraine Oleksiy Filatov and Pavlo Byelousov <i>Vasil Kisisil & Partners</i>	477
United Arab Emirates Gordon Blanke and Soraya Corm-Bakhos <i>Habib Al Mulla & Co</i>	487
United States Daniel E González and Richard C Lorenzo <i>Hogan Lovells US LLP</i>	496
Venezuela Fernando Pelaez-Pier and José Gregorio Torrealba <i>Hoet Pelaez Castillo & Duque</i>	503
Vietnam Nguyen Manh Dzong, Nguyen Thi Thu Trang and Nguyen Ngoc Minh <i>Dzungst & Associates LLC</i>	511

Brazil

Hermes Marcelo Huck, Rogério Carmona Bianco and Fábio Peixinho Gomes Corrêa*

Lilla, Huck, Otranto, Camargo Advogados

Laws and institutions

1 Multilateral conventions

Is your country 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); and
- Mercosur International Commercial Arbitration Agreement (1998).

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

2 Bilateral treaties

Do bilateral investment treaties exist with other countries?

Brazil has not yet ratified any bilateral investment treaties with other countries.

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, known as the Brazilian Arbitration Act (the BAA), which rules on both domestic and foreign 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 ruled also by Federal Decree No. 4,657/1942 (Rules of the Civil Code) and Resolution No. 9 of the Brazilian Superior Court of Justice.

Awards rendered in Brazil or by an arbitral tribunal seated in

Brazil are automatically enforceable in the country, entitling the interested to enforce such judgment as soon as the decision is definitely rendered by the tribunal. Awards rendered abroad, on the other hand, only acquire enforceability after undergoing a procedure of recognition of judgment 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, while the Model Law applies to international commercial arbitration, the BAA does not raise any distinction on the matter, applying both to 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, on the other hand, 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).

It is noteworthy that the UNCITRAL Model Law is a much more detailed statute than the BAA, ruling on matters that the latter does not, such as interim measures and preliminary orders issued by the arbitral tribunal itself and default of a party, for example.

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, paragraph 2, of the BAA). If no such agreement exists, the arbitral tribunal may decide on the matter (article 21, paragraph 1, of the BAA).

7 Arbitral institutions

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

The most prominent arbitral institutions in Brazil are:

The Brazil-Canada Chamber of Commerce (the CCBC)

Rua do Rócio, No. 220, 12º andar, cj. 1212, Vila Olímpia
São Paulo 04552-000
Brazil
www.ccbc.org.br

The Arbitration Center 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, 13º andar, 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, 12º andar
Rio de Janeiro 22250-900
Brazil
www.fgv.br/camara

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. While CCBC requires that the chairman is nominated from its list, none of the others requires that the arbitral tribunal be selected from their list of arbitrators.

As to the fees, CCBC, AMCHAM and CIESP calculate them on the basis of the time spent by the arbitrators to decide the case, which may vary according to the amount in dispute. The FGV Chamber, on the other hand, charges 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 family law, civil status, taxes or criminal law, for example, may not be subject to an arbitration agreement. Disputes concerning competition law, antitrust, securities transactions and intra-company 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.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Article 4, paragraph 1, of the BAA states that the arbitration clause shall necessarily be in writing. Furthermore, 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 separated 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 requirement may be deemed cured (article 20 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, on the other hand, have not yet reached an agreement regarding this subject. Notwithstanding, Brazilian scholars have been considering 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. 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. Brazilian scholars and case law, on the other hand, have not yet reached a consensus regarding this matter, and while 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 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. Brazilian scholars and case law, on the other hand, have not yet reached a consensus regarding this matter. However, 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).

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 interest of any nature in the resolution of the dispute (article 14 of the BAA). Active judges are also barred from acting as an arbitrator, in accordance with Law No. 35/79. Aside from these restrictions, anyone with legal capacity and 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 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 above provides that, failing agreement of the parties, the arbitrator will be appointed by the institution itself. In proceedings with three arbitrators, each party may nominate one of the co-arbitrators, which will be responsible for indicating the chairman of the arbitral tribunal. If the co-arbitrators fail to indicate the chairman, the institution itself will make such indication. 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, paragraph 4, of the BAA).

17 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 with one of the parties or with the subject matter of the arbitration any relationship falling into the cases that would lead to the disqualification of a state judge, such as personal interest in the matter, family or intimate relationship with one of the parties, enmity with one of the parties etc (see articles 134 and 135 of the Brazilian Code of Civil Procedure). The interested party in challenging the arbitrator shall file the respective plea directly to the arbitrator or the chairman of the arbitral tribunal, setting forth its reason and presenting 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 also take over (article 16 of the BAA). However, in case of death or illness of an arbitrator, if the parties have expressly declared that they would not accept a substitute, the arbitration agreement shall be deemed to be terminated (article 12 of the BAA).

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

18 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, paragraph 6 of the BAA).

19 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 in exercise of their duties, the 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**20 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 of 15 days from the defendant's service of process. Once the execution of an arbitration agreement between the parties has been raised, the state judge must dismiss the claim, as per article 267, section 7 of the Brazilian Code of Civil Procedure. 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 in the trial of the case, for it is presumed that both parties have waived the faculty to resort to an arbitral tribunal.

21 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, however, is not accepted, the arbitral proceedings shall proceed. In this case, nevertheless, 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

22 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, paragraph 1, of the BAA).

23 Commencement of arbitration

How are arbitral proceedings initiated?

The 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 on article 19 of the BAA and was adopted by the rules of the arbitration institutions mentioned above.

24 Hearing

Is a hearing required and what rules apply?

A hearing is not mandatory to 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.

25 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. Such freedom is expressly provided in 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 by party-

appointed experts and tribunal-appointed experts) and determine the production of any other evidence deemed appropriate. While 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 from a common-law system.

26 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, both stated in article 22. The first, stated in section 2, 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 hypotheses refers to the possibility of the arbitral tribunal requesting interim measures to the state court that would have originally been competent to trial the case, as per section 4 of article 22 of the BAA.

27 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. It should be noted, however, that judicial proceedings for enforcement, recognition or nullity of an arbitral award are not, as a rule, confidential, considering that in camera proceedings are an exception in Brazilian law.

Interim measures

28 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 type 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 (article 22, section 2 of the BAA). As a rule, once the proceedings have commenced, the arbitral tribunal has exclusivity on ruling every aspect of the matter, but there may be some exceptions when state proceedings commence before the arbitration.

29 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?

Neither the BAA, nor the rules of the arbitration institutions mentioned above 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 section 4 of article 22 of the BAA.

30 Interim measures by the arbitral tribunal

The BAA does not set limits to the arbitral tribunal's power to issue interim measures within its jurisdiction, 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.

Awards
31 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, paragraph 1 of the BAA, when there are several arbitrators, the award may be rendered by majority vote. Failing majority agreement, the vote of the chairman of the arbitral tribunal shall prevail.

32 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

As per article 24, paragraph 2, the arbitrator who dissents from the majority may, if he or she so wishes, state his or her vote separately. This, however, is not mandatory, and it does not have an influence on the validity of the award rendered by majority vote.

33 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, on the other hand, are the following, as per article 26:

- 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.

Furthermore, the award shall be signed by all members of the tribunal and shall also decide upon 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.

34 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, 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, which can be extended once by the arbitral tribunal.

35 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 31, paragraph 1, of the BAA).

36 Types of awards

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

Final awards, interim awards and consent awards are valid and possible under the BAA. As to partial awards, there is much controversy among Brazilian scholars regarding their validity, due to the fact that article 32, section 5 of the BAA states that an award will be null and void if it does not settle the entire dispute submitted to arbitration. There are no limitations as to the type of relief an arbitral tribunal may grant and awards may be terminative or definitive as to the merits of the dispute.

37 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.

38 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.

39 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 of 1 per cent per month, unless the parties have agreed otherwise.

Proceedings subsequent to issuance of award
40 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, 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 rules of the arbitration institutions.

41 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 on article 26 of the BAA;
- does not respect the limits established in the arbitration agreement;
- does not settle the dispute submitted to the arbitral proceeding in its entirety;
- 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 on article 21, paragraph 2 of the BAA, such as equal treatment between all parties, opportunity to be heard and 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 from the receipt of the notification of the award or its amendment (article 33, paragraph 1 of the BAA).

42 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 Brazilian Code of Civil Procedure, there are basically two levels of appeal. The challenge in a trial court may take one to three years to be decided. In the event that the interested party appeals, a challenge may take three to five years to be definitely settled before a higher court (ie, 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 Brazilian Code of Civil Procedure 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.

43 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 a speedy and cost-efficient solution. Foreign awards, on the other hand, only acquire enforceability after undergoing a procedure of recognition of judgment (or confirmation of judgment) by means of which the Brazilian Superior Court of Justice scrutinises its validity and conformity in relation to national public order and, in the end, 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 recent 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.

Update and trends

The arbitration community has devoted some time to prepare itself for the arbitrations that may arise from the World Cup and the Olympic Games in Brazil. The economic aspects of the arbitration have also been focus of the Brazilian practitioners. In addition, the Brazilian Senate has recently constituted a task force to draft an amendment to the BAA. Since the members of this task force were only recently appointed, it is too soon to anticipate the changes that will be proposed.

44 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. Recently, 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 has not yet issued its opinion on this matter.

45 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 matter in controversy and are borne by the defeated party.

Other

46 Judicial system influence

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

One of the most relevant features is the freedom to evaluate the 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.

47 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 Maria Beatriz Rizzo for her assistance with this chapter.*

Lilla, Huck, Otranto, Camargo Advogados

Hermes Marcelo Huck
Rogério Carmona Bianco
Fábio Peixinho Gomes Corrêa

m.huck@lhm.com.br
rogerio.bianco@lhm.com.br
fabio.peixinho@lhm.com.br

Avenida Brigadeiro Faria Lima, n.º 1.744, 6th floor
São Paulo, SP, 01451-910
Brazil

+55 11 3038 1000
+55 11 3038 1100
www.lhm.com.br



Annual volumes published on:

Air Transport	Licensing
Anti-Corruption Regulation	Life Sciences
Anti-Money Laundering	Mediation
Arbitration	Merger Control
Asset Recovery	Mergers & Acquisitions
Banking Regulation	Mining
Cartel Regulation	Oil Regulation
Climate Regulation	Patents
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Client
Corporate Immigration	Private Equity
Data Protection & Privacy	Product Liability
Dispute Resolution	Product Recall
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Enforcement of Foreign Judgments	Restructuring & Insolvency
Environment	Right of Publicity
Foreign Investment Review	Securities Finance
Franchise	Shipbuilding
Gas Regulation	Shipping
Insurance & Reinsurance	Tax on Inbound Investment
Intellectual Property & Antitrust	Telecoms and Media
Labour & Employment	Trade & Customs
	Trademarks
	Vertical Agreements



**For more information or to
purchase books, please visit:**
www.gettingthedealthrough.com



The Official Research Partner of
the International Bar Association



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Strategic research partners of
the ABA International section