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Brazil: Trends & Developments
Justen, Pereira, Oliveira & Talamini - Advogados Associados

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Trends and Developments

Contributed by Justen, Pereira, Oliveira & Talamini - Advogados Associados

Justen, Pereira, Oliveira & Talamini - Advogados Associados originated in Curitiba in 1986 and now it has its main places of activity in São Paulo, Curitiba and Brasilia. Its services generally combine teams from all offices, depending on the nature of the activities and the requirements of the case. The arbitration and mediation department is headed by senior partners Cesar Pereira and Eduardo Talamini and features a team of junior partners and associates.

The partners often serve as co-arbitrators, presiding arbitrators or legal expert witnesses in international and domestic arbitration procedures under various institutional rules. The department has an active practice representing private and government clients in mediation or arbitration and related litigation. The firm's long-established practice in public law and corporate disputes has made it the primary choice both for mediation and arbitration involving state parties and in private or government-related corporate dispute resolution. On many occasions, the firm's expertise has led to its selection as a single-source specialist firm representing government entities. Notwithstanding the above, the firm's main clientele is comprised of international and domestic private companies involved in commercial disputes and claims against the federal or local governments. As scholars, the firm's partners have been active in the development of the Brazilian arbitration practice since its inception in the 1990s.

Authors

Eduardo Talamini acts as counsel, arbitrator or consultant in litigation, arbitration and transactions involving domestic and international parties in projects or disputes in Brazil that involve contract, business, administrative law and corporate law. His extensive expertise in civil procedure, arbitration and constitutional law, his long list of publications and a established career as an academic and scholar in these fields lead to his frequent appointment as legal expert or consultant in complex disputes or transactions. He is a senior partner, head of the firm's litigation practice and co-head of its arbitration and mediation practice.

Cesar Pereira is a senior partner. He is head of the firm's infrastructure practice and co-head of its arbitration and mediation practice. He is a Fellow of the Chartered Institute of Arbitrators (FCIArb) and the Chair of the CIArb Brazil Branch. He is in the roster of arbitrators of the most active Brazilian arbitral institutions. His practice as counsel, arbitrator, legal expert or consultant focuses on infrastructure projects, construction, regulated industries and public procurement, in domestic and international matters. He holds a doctorate in public law from PUC-SP and has been a visiting scholar at Columbia University and University of Nottingham.

Arbitration and other non-judicial dispute resolution mechanisms are a reality in commercial contracts in Brazil. It is unusual to find a large-scale contract that does not rely on some form of mediation or arbitration. The business community vigorously embraced arbitration after the enactment of the Brazilian Arbitration Act (BAA) in 1996. By 2019, Brazil had grown into one of the keenest users of arbitration in both international and domestic contexts, having developed from virtually no use at all before the 1990s.

This growth has prompted a series of positive developments. Arbitral institutions have evolved to become internationally recognised, such as CAM-CCBC and CIESP-FIESP. Others have opened offices in various locations in the country, like CAMARB, which in 2019 added a Brasilia office to its list of offices in Belo Horizonte, São Paulo, Rio de Janeiro and Recife. Many have taken advantage of connections and business associations with the entrepreneurial community to administer dispute resolution processes at local and regional level. CBMA, in Rio de Janeiro, is the most successful example, which started from an association between manufacturing and commercial business organisations. This thriving market has attracted the International Chamber of Commerce (ICC), which in 2017 opened their Latin American office in São Paulo. Brazil has recurrently been one of the most representative jurisdictions in the ICC statistics in terms of parties, venues and the nationality of arbitrators. In 2018 Brazil had the 3rd largest number of parties and the 6th largest number of confirmed appointments of arbitrators. São Paulo was the 7th most popular venue in ICC arbitration proceedings.

The community of arbitrators, mediators and specialised law firms has also grown remarkably. Think tanks such as the CBAr, the Brazilian arbitration committee, have become sophisticated and active players in the legislative and regulatory processes involved in dispute resolution. The Chartered Institute of Arbitrators (CIArb) formed its Brazil branch in July 2019, which is poised to bring to Brazil the Institute's sophisticated assessments and specialised training programmes for arbitrators, mediators and experts. Domestic arbitral institutions include some of the most well-known international arbitrators and mediators, alongside Brazilian specialists. Diversity is a special concern; 30% of CAMFIEP's roster is comprised of women. In the past ten years, several boutique arbitration firms have emerged whose partners specialise in only serving as arbitrators. This illustrates a trend in work specialisation that reflects the potential growth of the market for arbitrators and the community's awareness of potential conflicts. Both in terms of regulations or guidelines and of actual practice, the ethics of Brazilian arbitrators and specialised law firms follow international best practice.

Brazilian arbitral institutions are sophisticated and efficient, as are its community of arbitrators, mediators and practitioners. The third pillar for a successful dispute resolution system is also in place. The court system is arbitration-friendly and the higher courts (STF for constitutional matters and STJ for non-constitutional matters) are consistently supportive of arbitration. In April 2019, the STJ issued 14 statements that reflect its prevailing case law in various issues relating to arbitration, ranging from the interpretation of arbitration agreements to the admissibility of arbitration involving state parties. The arbitration legal framework offers mechanisms to avoid anti-arbitration injunctions and to compel a recalcitrant party to arbitrate, which the courts invariably apply with efficacy and swiftness. Statistics show a minimal rate of success in challenges to arbitral awards, which illustrates the deference courts generally grant to an arbitral tribunal's findings and final decision.

Some recent developments in the Brazilian arbitration practice are worth mentioning: (i) flexibility in the assessment of a party's consent to arbitrate; (ii) interplay between dispute resolution and technology; and (iii) a variety of new issues related to the participation of state parties and the discussion of public law in arbitration.

Consent is generally acknowledged as a requirement for arbitration; the legal framework generally rejects the notion of mandatory arbitration. However, in recent times several manifestations of a more flexible approach to consent have arisen.

In the wake of a 2018 STJ opinion in which the court considered that disregard of the corporate veil should be argued before the arbitral tribunal rather than at the enforcement stage, there is a growing tendency for parties to try and bring possible third parties into arbitration proceedings. It has become commonplace for tribunals to resolve issues relating to the personal scope of an arbitration agreement or the financial liability of third parties.

The STJ resolved an important case in May 2019, dealing with the subrogation of an insurance company in an arbitration agreement existing in the underlying contract. In the Alstom v Mitsui case, the STJ rejected allegations of breach of public policy relating to consent and recognised a New York ICC award that considered the insurer to be bound by an arbitration agreement signed between the insured and the beneficiary of the insurance.

Class arbitrations in corporate disputes are also becoming more frequent. As a consequence of multiple accusations of wrongdoings arising from criminal investigations, large Brazilian corporations are facing complaints from minority shareholders. Most corporations have included arbitration agreements in their bylaws, a move that started as a market practice and later found its way into the Brazilian Corporations Act through a legislative change in 2015. Therefore, many complaints are now being arbitrated either in cases with multiple claimants or in which the claimants are asso-

ciations formed by injured individual shareholders. The 2015 change allows a corporation to include an arbitration agreement in its bylaws through a majority vote, in which case the dissenting minority will only be entitled to redeem their shares and leave the corporation: if the minority choose to remain as shareholders, they will be bound by the arbitration agreement.

Other expressions of a more flexible view of consent include a greater acceptance of arbitration agreements in adhesion contracts and arbitration agreements formed implicitly through a standing offer to arbitrate into which the opposing party may unilaterally opt. An example of such a standing offer subject to unilateral acceptance appeared in 2017 when Law 13.448 allowed concessionaires of railways, highways and airports in existing contracts, regardless of any previous arbitration agreement, to compel the federal government to arbitrate matters regarding the economic and financial equilibrium of the contracts, financial settlements due to termination or assignment of the concession and the breach of contractual obligations (for more, see Cesar Pereira, Luísa Quintão, "Has Brazil made a unilateral binding offer to arbitrate in the 2016 Investment Partnership Program (PPI)", Kluwer Arbitration Blog, 24 March 2017).

Another area that has drawn a great deal of attention is technology. Digital transformation and the perspectives for radical changes in dispute resolution are the main focus of a number of 2019 conferences and seminars in Brazil, and many Brazilian arbitral institutions are contemplating strategies to take advantage of technological developments. Although such topics are currently still the subject matter of academic discussion fostered by such institutions or limited piloting initiatives, the growing awareness of technology and data protection issues suggests that institutions may quickly move to incorporate blockchain technology and machine learning into their practice. An important aspect is that the Brazilian personal data protection legislation will enter into force in August 2020, and this will bring about new challenges for arbitral institutions and arbitrators. The most active Brazilian institutions are already working on the necessary technological adjustments to live up to such new obligations and to offer the parties and arbitrators the required level of data security.

Lastly, an area that has grown steadily over the past fifteen years, but especially so in recent times, is arbitration involving state parties. This continues to be an important trend in Brazilian arbitration practice. Arbitration in government disputes is the subject matter of industry discussions, academic works and conferences, regulatory consultations and bills in Congress. In the second semester of 2019, a change in Brazilian public procurement legislation is expected to be enacted to reinforce the admissibility of arbitration in government contractual disputes.

Also, in August 2019, Brazil enacted Law 13.867, which provides for the option to arbitrate the amount of compensation for expropriation of assets.

Arbitration has become part of the government practice, since agencies, especially in sophisticated sectors such as energy and airports, have come to embrace dispute resolution mechanisms as an appropriate means to resolve contractual disputes in an effective, specialised and expeditious manner.

Transparency in arbitration with state parties is one of the main focuses of debate. Although it is undisputed that some level of transparency is legally required, it is not fully clear how broad such transparency should be and, most importantly, who is responsible for promoting it: arbitral institutions, both parties or the state? Certain arbitral institutions, such as CAM-CCBC, have regulated this issue in their rules. In addition, government regulations such as the 2018 Rio de Janeiro executive order and a 2019 ANTT resolution govern transparency by placing on government agencies the bulk of transparency obligations. This is consistent with a related opinion adopted by an official meeting of specialised scholars held by the STJ in 2016.

In addition, the compliance investigations mentioned above have created a practice of discussing corruption issues in arbitration. In several cases, state parties have alleged corrupt practices as a defence against claims by contractors accused of wrongdoing. In other cases, violation of compliance obligations is argued as a principal ground for claims in arbitration. This environment has prompted an evolution in the way tribunals face corruption allegations, and one of the main current topics for discussion is the extent to which compliance violations may affect the enforceability of contractual obligations or prevent a contractor from retaining or obtaining payment for duly performed obligations.

Brazil is unique in Latin America because of the size of its economy and its domestic market. It is also unique in not adopting investment treaty arbitration or arbitration based on national investment protection laws. It has recently signed a number of investment treaties, one of them already ratified, but they only provide for state-to-state arbitration and do not grant standing directly to the interested investor. This is also the case of the European Union–Mercosur free trade agreement, signed in 2019 and currently under approval and ratification procedures, which only provides for arbitration between states. Brazil offers international and domestic investors alike an investment protection system that is comprised of its national administrative law, the independence of its federal and state courts and contractual dispute resolution, including international and domestic arbitration (for more, see Marçal Justen Filho et al, Brazil Infrastructure Law, Eleven International Publishing, 2016).

Arbitration with state parties has also undergone significant changes over the past 20 years. Around the same time the BAA was enacted, the first pieces of legislation providing for arbitration in specific sectors of government activity (such as power and oil and gas) started to appear. This led to a rapid succession of new laws that culminated with an amendment to the BAA in 2015 to expressly allow for the arbitration of any contractual or non-contractual disputes with state parties (government departments or state-owned or state-controlled companies) that involved economic disposable rights. Although arbitration with state parties was already a thriving reality by then, the enactment of this amendment consolidated the idea that arbitration in such matters had statutory grounds (for more on the arbitrability of government disputes, see Eduardo Talamini, Diego Franzoni, "Arbitragem nas empresas estatais" in Marçal Justen Filho (org), Estatuto Jurídico das Empresas Estatais, Revista dos Tribunais, 2016, p565–596).

The prospects now are for a more detailed and sophisticated regulation of the participation of state parties in arbitration. A clear and sound basis for arbitration with the government evolved from the existing legislation. However, it is foreseeable that government agencies will resort more and more to arbitration. This has led to initiatives by the federal government, by federal regulatory agencies and by local (state and city) governments to discipline and organise their participation in arbitration. As mentioned above, in February 2018, the state government of Rio de Janeiro issued an executive order (decree) to define the conditions under which the government and state-owned or controlled companies may agree to arbitrate. Other state and local governments followed suit and have taken Rio de Janeiro's decree as a template for their own regulations. In February 2018, the city of São Paulo enacted a law providing for dispute boards in certain city government contracts, which inspired similar bills currently in the Brazilian Congress that may become federal law soon. Congress is also considering a bill to entitle parties that are affected by expropriation to seek compensation through arbitration regardless of any submission agreement.

In 2019, the transport regulator (ANTT) issued a resolution containing detailed regulation for dispute resolution in its sector. The oil and gas regulator (ANP), after a public consultation which took place in 2017, adopted an arbitration clause in its 2018 and 2019 rounds of new concession contracts, providing for a two-step mechanism for selecting the arbitration institution to administer any possible dispute: in the event of a dispute, the parties are expected to agree on an institution; if there is no agreement, the ANP will choose one among three pre-selected institutions, namely the ICC, LCIA or PCA. In 2018, the airport regulator (ANAC) also launched its 5th round of concessions with new and thorough dispute resolution provisions, which provide for the same two-step selection procedure.

These three main areas of recent development – flexible approach to consent; digital transformation and technology; arbitration and state parties – illustrate the level of sophistication of Brazilian arbitration practice. The success of arbitration in Brazil reflects a combination of sophisticated arbitral institutions, well-prepared professionals and practitioners and supportive, arbitration-friendly courts.

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