

A Glance At Arbitration In Brazil[†]

By Edson de Souza*

I. Introduction

Parties often agree to arbitrate their disputes for a multitude of reasons: arbitration is generally faster and cheaper than court litigation; confidentiality, or rather, disputes are decided out of public view, thereby preserving business reputation and protecting any trade secrets and company records; and the arbitrators may have particular expertise relevant to the dispute compared to the regular training of judges. Further, when it comes to international disputes, neither party may be comfortable with the national courts of the other party, thereby agreeing on a neutral forum.

In Brazil, the rules governing arbitration have dramatically changed and strong efforts have been made for the development and use of arbitration. In fact, it had to, since a country like Brazil, which is more and more involved in the fabric of international trade, cannot be isolated from the rest of the international community, thereby making it difficult for its businessmen to enter into international commercial agreements. Also, the interest in mediation has increased and a bill is to be presented before the Brazilian Parliament.

The new law on arbitration (Law 9,307/96) was enacted in 1996. In addition, Brazil ratified and acceded to some important international conventions, such as the Convention on Recognition and Enforcement of Foreign Arbitral Awards—The “New York” Convention (2002) and the Inter-American Convention on International Commercial Arbitration (1995). These instruments clearly demonstrate that arbitration is truly an international phenomenon in the globalized world economy.

This article seeks to cast a glance at the Brazilian legislative framework for arbitration, the existing case law in this regard, the role of the main players, and the particularities of arbitration arising from intellectual property disputes.

II. Background

The Brazilian experience with arbitration has primarily involved border and other territorial disputes with other countries. For instance, in the early 1900’s, disputes on these issues with Argentina,

Bolivia, British Guyana and Peru were resolved by arbitration.

Notwithstanding the above, the use of arbitration to resolve private commercial disputes remained dormant for many years. The reason for this was that previous law expressly conditioned the effectiveness of the arbitration clause on the execution by the parties of an agreement called *acte de compromis* or submission agreement.

Only after a dispute arose could the parties specify in said separate document the scope of their dispute and that it would be settled by arbitration. The arbitration clause in a contract was considered to be a mere promise to agree,

dependent on a later agreement to give it validity and enforceability. The *acte de compromis* thus became the only legal means to avoid jurisdiction of the Courts over disputes. Hence, despite the arbitration clause, if there was no subsequent *acte de compromis*, a party could take the dispute to Courts.

Further to that, previous law demanded that the State Court should approve the arbitral award in order for it to be enforceable. This requirement was diametrically opposite to the very fundamental purposes of arbitration: speed in the proceedings and rare (if any) Court intervention. In the case of foreign awards, this required double approval since the award had to be recognized (homologated) by the court in the jurisdiction where the award was issued for the award to be enforced by the Brazilian Court.

These requirements were major impediments to the use of arbitration, since they made a process intended to be independent of the courts heavily dependent on them, and thus more time consuming and expensive.

There were also obstacles of other natures, such as the government’s protectionism. For years, the Brazilian government has made it difficult for parties to seek independent methods of justice, particularly a private method based on the notion of party autonomy and freedom to contract.

In the mid-1990’s, however, on account of a

**Edson de Souza is a Patent Attorney at Momsen, Leonardos & Cia. in Rio de Janeiro, Brazil. E-mail: epsouza@leonardos.com.br*

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general dissatisfaction with the Brazilian courts (costs, duration of proceedings, etc.), the Parliament enacted a modern arbitration law. Law 9,307/96 apparently cleared the way for the use of arbitration, making pre-dispute arbitration agreements valid and enforceable without further ado. This should have helped flourish a favorable environment for arbitration since the enactment of that law, but a problem arose regarding the enforcement of Law 9,307/96.

Indeed, arbitration faced an enormous hindrance when Justice Sepúlveda Pertence, then president of the Brazilian Supreme Court (STF), questioned the constitutionality of Articles 6, 7, 41 and 42 of the new Arbitration Law.

Justice Pertence argued that the Arbitration Law was contrary to Article 5, Item XXXV, of the Brazilian Constitution, which states that “the law cannot exclude from the judgment of the judiciary any violation or threat to a legal right.” The gist of this argument was that waivers of the state’s jurisdiction were not permitted.

Justice Pertence’s view did not receive too much support. Brazil’s Attorney General disagreed with it. He considered it to be in accordance with the Federal Constitution since the Law was not intended to deprive citizens of the ability to waive the State’s jurisdiction by electing to use arbitration to resolve private disputes. Yet, doubts about the constitutionality of the Arbitration Law lingered until December 2001, when the majority of Justices at the Supreme Court issued a decision upholding the constitutionality of the Law.¹

Stress should be laid on the following passages, which, albeit brief, show how the matter was dealt among the Justices at STF:

Supreme Court Justice Marco Aurelio Mello pointed out that “(l)aw 9307/96 is a modern law which contains provisions that preserve the parties’ rights...this is particularly relevant for those who invest in Brazil, mainly foreigners.”² (Free translation)

By turn, Supreme Court Justice Ilmar Galvão held that:

“The difficulties to solve the issues that may arise as a result of the modern technical development, mainly in the transport and communication areas,

more than ever require specific knowledge which State-Court judges without any demerit—hardly will have access.”³ (Free translation)

Moreover, according to Supreme Court Justice Ellen Gracie:

“Denying the possibility of recognizing the full validity of the arbitration clause or denying the possibility that it can be enforced before State-Courts gives a benefit to the reluctant party to evade the method of settlement of disputes that the party had already accepted when the contract was formed. Denying it offers to the recalcitrant party power to destroy the condition that—given the nature of the interests involved—may well be the basic reason for the existence of the contract.”⁴ (Free translation)

The decision holding that the 1996 Arbitration Law was in accordance with the Brazilian Constitution put an end to the unenforceability of pre-dispute arbitration clauses in Brazil. Since then there has been a significant increase in the number of either arbitration clauses incorporated into contracts with Brazilian parties and the national and international arbitration proceedings involving Brazilian parties.

III. Law 9,307/96: A General Overview

The Arbitration Law offers an alternative forum to settle disputes, and provides for the enforcement of foreign arbitral awards. Under Law 9,307/96, the arbitration clause is no longer a mere promise to agree. It is an enforceable agreement. Further, there is no need for the State Court to approve the arbitral award for it to be enforceable.

Disputes may be settled by arbitration in the following cases: a) before the dispute arises through the arbitration clause; and b) after the dispute arises through the *acte de compromis* or submission agreement.

Article 4 of Law 9,397/96 defines the arbitration clause and determines that it must be in the written form, inserted in the main agreement or in a separate related document.

Further, Article 8 of Law 9,397/96 adopts the concept of autonomy of the arbitration clause. It makes the arbitration clause independent of the contract in which it is inserted. Therefore, if the contract is declared null and void, the arbitration clause will not necessarily be upheld. In this way, a contract

1. *M.B.V. Commercial and Export Management Establishment v. Resil Indústria e Comércio Ltda.* 2001. Agravo Regimental em Sentença Estrangeira N. 5206-7, Reino da Espanha.

2. *Ibid.*

3. *Ibid.*

4. *Ibid.*

tainted by illegality or contrary to public policy does not necessarily affect the arbitration clause, which may remain valid and enforceable. If that was not the case, a party could well be encouraged to evade his obligations to take the dispute to arbitration. As Naón (1989) remarks:

“If the arbitration clause were not independent from the underlying transaction, it would suffice to question the latter’s validity to prevent the immediate effectiveness of the arbitration clause until such preliminary issue is decided by adjudicators (most likely a State Court) not chosen or designated under the arbitration clause.

If arbitrators cannot decide on the scope of their adjudicatory powers, any objection raised by any of the parties in that connection would have to be decided by a State Court and not by the arbitral tribunal. In the meantime, arbitral proceedings would be suspended with ensuing considerable delay. It is obvious that any of these situations gives ample opportunity to any party acting in bad faith to obstruct arbitral proceedings.”⁵

The above-mentioned autonomy is of particular relevance because it allows the parties to choose the law that will govern the arbitration clause. That law may differ from the law governing the contract generally. This is clear from Article 2 of the Arbitration Law, which allows the parties to choose the law applicable to the arbitration, and from Article 38, Item II, which sets out that Courts may not enforce a foreign award if the Defendant demonstrates that the award was not valid under the law to which the parties had subjected it; or, absent an indication of the applicable law, the law of the country where the award was made.

The freedom to choose the law that will govern the arbitration is limited though. Indeed, the parties may choose it provided that “their choice does not go against morality and public policy.”⁶ The parties may agree, however, that the arbitration shall be conducted under “general principles of law, customs, usages and international rules of trade”⁷ and decide on whether the rules of law or equity will be applied.⁸

The arbitration clause may indicate that the arbitration will be conducted under the rules of an

arbitral institution or specialized entity (institutional arbitration) or under the rules created by the parties themselves, tailored for each specific case (*ad hoc* arbitration).

In the case of institutional arbitration, the rules of the institution or specialized entity are automatically incorporated into the arbitration agreement. Therefore, even though arbitration is conducted in Brazil, the rules chosen may be those of LCIA, ICC set of arbitral rules. There is no case law on the choice of the parties being overturned by Courts.

If there is an arbitration clause setting out the procedures for appointing the arbitrator⁹ and one of the parties decide, notwithstanding that agreement, to bring the dispute to Courts, the other party who wishes to abide by the agreement may apply for the dismissal of such Court proceedings.

In the *Montreal Engenharia S.A.* case,¹⁰ the Court dismissed the judicial proceedings despite the Claimant’s argument that the contract had been signed before 1996, i.e. before Law 9,307/96 had been enacted. It was held that Law 9,307/96 is of procedural nature, and according to Brazilian rules of conflict of laws in time, its provisions must apply to any pending dispute involving contracts formed even before 1996.

If the arbitration clause does not recite the procedures for appointing the arbitrator¹¹ or one of the parties is unwilling to initiate the agreed arbitration,¹² the other party may take the matter to Courts to compel the other to sign the *acte de compromis*.¹³

The notion of *acte de compromis* in Law 9,307/96 is different from previous law. In fact, although Law 9,307/97 makes reference to an *acte de compromis* in Articles 6 and 7, it is clear that Courts are to enforce the parties’ agreement to submit the dispute to arbitration, even if the parties cannot agree on the terms of an *acte de compromis*. Hence, the

9. Also known as “full clause”. For example, a clause that refers to the rules of a particular arbitral institution.

10. Case published in *Revista de Direito Bancário do Mercado de Capitais e da Arbitragem (RDBA)* n° 18/385.

11. Also known as “empty clause”. Art. 6 of Law 9,307/96.

12. Law 9,307/96, Art. 7.

13. In *Compushopping v. Americel* (Recurso Especial n° 450.881, Superior Tribunal de Justiça, published in *Revista de Direito Bancário do Mercado de Capitais e Arbitragem (RDBA)* n° 20/393), Americel refused to start arbitration, regardless of the arbitration clause (empty clause) inserted in an agreement they had entered into. The *acte de compromis* was then signed at Courts and arbitration ensued.

5. Naón, H.A.G. 1989. Arbitration in Latin America: Overcoming Traditional Hostility. *Arb. Int'l.* 5:137

6. Law 9,307/96, Art. 2 (1).

7. *Ibid.*, Art. 2 (2).

8. *Ibid.*, Art. 2.

acte de compromis, as it was previously known, is an artifact of the law, which holds little or no importance in enforcing an arbitration clause or an award in Brazil.

IV. Disputes Subject To Arbitration

Law 9,307/96 sets out that only disputes related to patrimonial rights of which the parties may dispose can be subject to arbitration.¹⁴ This may include controversies that arise in the context of labor consumer or administrative law. Indeed, the arbitration law is not limited to commercial disputes.

As far as intellectual property disputes are concerned, any controversy related to the law of obligations in a contract in general, a patent/trademark license agreement, a trademark/patent assignment agreement, franchising, etc. may be arbitrated.

However, some disputes may unfold very delicate issues which cannot be arbitrated. For instance, the validity of a patent/trademark right, the forfeiture of a patent, and the grant of a compulsory license, can only be challenged before Courts. The concepts of public interest and public policy are said to underpin this prohibition.

Although there is little, if any, consensus on what exactly constitutes the public interest, some IP disputes involve issues that are intertwined with the notion of common well-being and general welfare. The tension between rights of intellectual property holders and the public interest may supposedly be better redressed by State Courts.

Public policy may be evoked to prevent parties from arbitrating an intellectual property dispute whenever there is a matter that concerns the structure and foundations of society as such. Matters of public policy are said to be matters of public morality.

Moreover, another principle used for preventing arbitration in IP disputes is the *inter partes* effect (effects between the parties only) as opposed to *erga omnes* effect (effects towards third parties as well).

In brief, except for the cases above mentioned and others touching the public interest and public policy, all other patrimonial aspects/issues of intellectual property transactions can be arbitrated.

V. Arbitrators And Their Jurisdiction

Law 9,307/96 establishes that “any person of legal capacity who enjoys the confidence of the parties may be appointed as arbitrator.”¹⁵ This means that

14. Law 9,307/96, Art. 1.

15. Law 9,307/96, Art. 13.

foreign arbitrators can well be appointed. Further, according to Article 18, the arbitrator is *de facto* and legally a judge.

Articles 8 and 15 provide the arbitrator with jurisdiction to decide issues concerning his independence or impartiality (in the case of institutional arbitration, the president of the tribunal will have jurisdiction over these preliminary issues), as well as the existence, validity and effectiveness of the arbitration clause and the contract into which it is inserted. In practice, these issues should be discussed at the very first opportunity after the commencement of the arbitration.¹⁶

VI. General Principles Of Arbitral Proceeding And Court Intervention

Law 9,307/96 expressly contemplates an adversarial but impartial process, calling for “equal treatment of the parties, impartiality of the arbitrator and freedom of decision.”¹⁷ Each party to a dispute must be given a fair opportunity to be adequately notified of proceedings, and the opportunity to be heard at these proceedings. In addition, the arbitrator must be - and must be seen to be - unbiased. This Law embodies a true code of ethics when providing in Article 13, (6), that in the performance of his duty, the arbitrator shall proceed diligently, efficiently, independently and shall be and remain free from bias.

State Courts can intervene in arbitration at one of the three stages as follows: a) At the beginning of the arbitration procedures in order to enforce the arbitration clause;¹⁸ b) during the course of arbitration proceedings in order to compel e.g. the attendance of a reluctant witness;¹⁹ or c) after the award has been rendered.

Although Law 9,307/96 does not require judicial homologation of the award any longer, it has enabled the interested party to go to Courts and demand, on very specific occasions, that the award should be set aside.²⁰ It should be stressed, however, that only formal aspects related to the validity of the award, the proceeding, or the arbitration clause may be subject to a claim for nullity;²¹ Courts have no power to review the merits of the award.

Further, the Courts may intervene to guarantee

16. *Ibid.*, Art. 20.

17. *Ibid.*, Art 21 (1).

18. *Ibid.*, Arts. 6 and 7.

19. *Ibid.*, Art. 22 (2).

20. *Ibid.*, Art. 33.

21. *Ibid.*, Art. 32.

compliance with the arbitrator's decision if a party does not abide by it.

VII. The Award

In accordance with Article 31 of Law 9,307/96, the award is equivalent to a decision rendered by the Judiciary. Thus, the award has the same effect as a judgment and is legal and enforceable. As mentioned above, if a party fails to comply with the award, it is necessary to seek enforcement by Courts.

Since the arbitral award is equivalent to and has the same effects as a Court decision, it has *res judicata* effect. The arbitration decision cannot be appealed, except as provided in Article 32, which states that the arbitral award will be null and void when:

1. The *acte de compromis* is null and void;
2. The award is made by a person who could not be an arbitrator;
3. The award does not comply with the requirements of Article 26;²²
4. It exceeds the limits of the arbitration agreement;
5. It does not decide the whole dispute submitted to the arbitrator;
6. Evidence attests to the fact that the award was made "through unfaithfulness, extortion or corruption";
7. The award was made after the time limit established for the conclusion of the arbitration; and
8. The award disregards the principles dealt with in Article 21 (2).²³

A claim aiming at nullifying an award must be analyzed in a restricted way. Judicial decisions generally favor upholding the award. In *Doux S.A and Frangosul S.A. Agro Avícola Industrial v. W.M. Empreendimentos Societários Ltda.*, the Court refused to nullify an award as follows:

"In court, parties do not have the ability to select the judge who will hear their case. In arbitration, they can select the arbitrators, so they will select people in whom they have confidence. A mistake

22. It contains the requirement of an award: a) the brief summarizing the case and identifying the parties; b) the reasons upon which it is made; c) the decision and the deadline for compliance therewith; and d) the date and place where it has been made).

23. It provides that "the principles of adversary system, equal treatment of the parties, impartiality of the arbitrator and freedom of decision, shall always be respected".

on the part of the arbitrators is an insufficient basis to annul an award."²⁴ (free translation)

Not to mention that Brazilian Courts may use the doctrine of *forum non conveniens* to dismiss an action seeking to declare an award null and void. There is some case law in this regard set by the Court of Justice of São Paulo.²⁵ The Court declared itself an inconvenient forum to decide on whether an award issued abroad should be nullified and found that the Court at the place of arbitration had competence to decide the case.

VIII. Foreign Awards

Law 9,307/96 defines a foreign award as one issued outside the domestic territory.²⁶ The Brazilian Constitution provides that foreign arbitral awards are subject to recognition (*exequatur*) by the *Superior Tribunal de Justiça* (STJ). Article 105, I, (i) of the Constitution and article 35 of the Arbitration Law, as amended by Amendment 45/2004, set out that the STJ will be responsible for the recognition of foreign Court decisions and the granting of *exequatur* to letters rogatory. After the recognition, the foreign award may be enforced in the country.

The recognition of foreign awards is a *giudizio di delibazione*, inspired by the Italian system, in which the merits of the award are not examined. However, the recognition process must ensure that i) certain legal requirements are duly met; and ii) there is no offense to public policy.²⁷

The Arbitration Law provides that any interested party may apply for the recognition of a foreign award before the STJ.²⁸ Article 38 of the Law sets out that the request for recognition or enforcement cannot be rejected unless the defendant attests that:

1. The parties to the agreement lacked capacity;
2. The arbitration agreement was not valid under the law to which the parties have subjected

24. *Doux S.A and Frangosul S.A. Agro Avícola Industrial v. W.M. Empreendimentos Societários Ltda.* 2002. Declaratory Action of Nullity Related to Arbitration Award, No. 2000.001.154-978-5-44a. District Court of Rio de Janeiro.

25. *Carlos Alberto de Oliveira Andrade, C.A. de Oliveira Andrade-Comércio, Importação e Exportação Ltda., CAO Comercio de Veículos Importados Ltda. e outros v. Renault S.A., Renault do Brasil S.A. e Renault do Brasil Comércio e Participações Ltda.* 2003. AgIn 285.411-4/0-5a. Câm. de Direito Privado-TJSP.

26. Law 9,307/96, Art. 34, sole paragraph.

27. Araujo, N. 2006. *Direito Internacional Privado, Teoria e Prática Brasileira*. 3ª Edição. Rio de Janeiro: Renovar.

28. Law 9,307/96, Art. 37.

it, or, in the absence of any indication of that, under the law of the country where the award was made;

3. The respondent was not given proper notice of the appointment of the arbitrator or the arbitral procedure, or the adversary system was not respected;
4. The award goes beyond the contents of the arbitration agreement and the excess portion cannot be separated from the rest of the award;
5. The commencement of the arbitration was not made in accordance with the *acte de compromis* or the arbitral clause; and
6. The arbitral award is not yet binding on the parties, or has been set aside or been suspended by a Court of the country in which the arbitral award was made.

Additional grounds for rejection are set forth in Article 39. It establishes that the STJ shall reject the recognition of the award if, under Brazilian law, the dispute is not subject to settlement by arbitration or the decision offends public policy.

Also, in accordance with Article 39, first paragraph, in international arbitrations, a Brazilian resident may be served with a summons (including via mail). This possibility is no longer considered to be an offense to national public policy provided that three conditions are met: (1) the arbitration is commenced in accordance with the terms established by the parties in their arbitration agreement or the procedural law of the country where the arbitration took place, (2) the Brazilian resident holds unequivocal proof of the receipt thereof, and (3) that party is provided with enough time to exercise its defense.

Brazil's legislature attempted to ensure the supremacy of international treaties when it provided in the Arbitration Law that foreign awards will be recognized in accordance with international treaties effective in Brazil's legal system; if such treaties are not in force, the foreign awards will be strictly recognized in accordance with the terms of the Arbitration Act.²⁹

As far as international treaties are concerned, it should be mentioned that the Panama Convention entered into force in Brazil four months before the 1996 Arbitration Law, and in July 2002, Brazil became a signatory to the New York Convention.

29. Ibid., Art. 34.

IX. Case Study

In order to illustrate how arbitration operates in practice in Brazil, a case study will be presented herein below.

ABC Biocare Inc., an American biotech company, with its principal place of business in Seattle, USA, and FarmaBiocom S.A., a Brazilian pharmaceutical company, with its principal place of business in São Paulo, Brazil, entered into a patent license agreement (patent BR xyz for histamine H3-receptor agents useful for treating cognitive deficiencies) and decided to insert an arbitration clause reciting that all disputes arising out of the agreement or any breach thereof shall be governed by and construed under the Brazilian law, and resolved by arbitration, in accordance with the procedures of the Arbitration and Mediation Chamber of São Paulo (*Câmara de Mediação e Arbitragem de São Paulo*).

During the life of the agreement, FarmaBiocom S.A. wishes to contest before the Arbitration and Mediation Chamber of São Paulo: i) the validity of the licensed patent; ii) the amount paid as step-down royalties; and iii) the obligation on its part to buy from ABC Biocare Inc. unpatented articles together with the licensed products.

Notwithstanding the full arbitration clause inserted in the agreement, ABC Biocare Inc. refuses to resolve the dispute by arbitration. FarmaBiocom S.A., therefore, with grounds on Article 7 of the Arbitration Law, may take the matter to a local Court in order to have the other party sign the *acte de compromis* and the arbitration commenced.

At the very beginning of the arbitration, ABC Biocare Inc. argues, as preliminary matter, that the arbitrator cannot decide on the validity of the patent at issue, since this issue is not subject to arbitration in Brazil. The arbitrator recognizes that the decision on this matter can only be rendered by a State Court and issues a decision exclusively on whether the step-down payments are due and the validity of the tie-in clause.

Although ABC Biocare Inc. did not argue during the course of the arbitration that the tie-in clause could not be discussed at that forum either, it may file an appeal against the arbitral award within 90 days counting from the date of the notification thereof. The reason underpinning ABC Biocare Inc.'s request is that tie-in clauses involve matters of competition law that generally touch upon public policy and public

interest. If the State Court agrees that this matter could not be subject to arbitration, the award will be declared partially null-the remainder of the award will not be contaminated by the Court's decision and will be held valid.

X. Conclusion

The Brazilian Arbitration Law, enacted ten years ago, has provided an effective means of dispute resolution in Brazil. Some important developments inserted in the Arbitration Law have contributed to that, such as the binding force of the arbitration clause, and the immediate effect of the award, that is, there is no need to have the award recognized by a judge before being enforced (except for foreign awards).

In addition, another important development was Brazil's accession to the New York Convention in 2002, thereby fostering arbitration on both national and international levels and making Brazil an attractive venue for arbitration of international disputes. Indeed, many international companies will not agree to settle any disputes through arbitration in a country that is not a member of the New York Convention.

Further, there are many characteristics in arbitration that compare favorably against traditional court litigation, such as flexibility and informality, confidentiality and faster decisions.

Not to mention that the possibility of choosing specialized arbitrators, in contrast to judges with regular training, has placed arbitration at the forefront when it comes to complex disputes.

The consolidation of arbitration in the country may be demonstrated by the large number of arbitration clauses currently inserted in agreements. In fact, the arbitration clause has become common practice in contractual negotiations, especially international transactions.

There has also been a significant growth in the number of cases resolved by arbitration in the past ten years in Brazil. Arbitration chambers in Brazil have been successful in acquiring solid experience and consolidating their status as entities that are reliable and capable of administering both domestic

and international arbitration cases. Although these chambers are not yet internationally well-known, their current organization and resources show that this goal may be achieved in the near future.

In conclusion, national and international arbitration is frequently being conducted in Brazil. The new legislative framework for arbitration has brought more enthusiasm for foreign companies to enter into commercial agreements with Brazilian parties and to resolve their disputes by choosing Brazil as the venue for arbitration.

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