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## Brazil

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### A. Legislation and rules

#### A.1 Legislation

##### A.1.1 Reform of the Brazilian Labor Code

On 13 July 2017, Brazilian congress approved a bill reforming the Brazilian Labor Code (Law No. 13.467/2017), which is in force as of 11 November 2017. The amendments are aimed at making the Brazilian labor market more flexible and allowing greater negotiation of rights between employers and employees.

The bill has a new provision (Article 507-A), expressly allowing arbitration in employment agreements, provided that: (i) the monthly compensation of the employee is higher than a certain threshold (at

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least twice the cap on social security pensions); and (ii) the employee either proposes the arbitration clause or expressly agrees with it.

This is a change of position, as prevailing case law of the Brazilian Superior Labor Court (the “TST”) is against the arbitrability of individual labor rights. As mentioned in last year’s *Yearbook*, the 2015 Reform of the Brazilian Arbitration Act initially authorized arbitration in employment-related issues, provided that the employee was an officer of the company and he/she either brought the arbitration or consented to it, but, due to pressure of labor unions, such authorization was subject to a presidential veto and has never entered into force.

This legal authorization for arbitration on individual labor rights opens a new market. However, there will be many challenges, especially to obtain consent from employees, who tend to see labor courts as friendly venues. There is also the issue of cost, particularly for mid-sized labor arbitrations, considering that labor court litigation in Brazil is quite inexpensive for employees.

#### A.1.2 Law No. 13.448/2017 allowing arbitration for extension of concessions and PPPs for railway, highway and airport projects

Law No. 13.448/2017 entered in force on 6 June 2017 to regulate the possibility of extending or submitting to new bids certain current concessions of railways, highways and airports. This is an important step for the new Brazilian privatization program, as the Federal government wishes to terminate and submit to new bids certain concessions in which the concessionaires are supposedly in default, as well as to extend the term of other concessions in exchange for additional investments.

The new law allows arbitration in contracts with the public sector in these areas. The authorization comprises not only future agreements, but also current ones, which may be amended to include arbitral clauses, and even contracts that are being terminated, as to which the discussion on indemnification may be subject to arbitration.



The arbitration must be in Portuguese and the seat must be in Brazil. The private party shall advance the costs of the arbitral procedure. The new law expressly clarifies that the review of the price, the indemnification due to termination of the agreement, and discussion on contractual defaults may be subject to arbitration. Parties may choose institutional arbitration, as long as the institution is previously accredited (“*credenciamento*”). The Federal government is still to issue a decree regulating the accreditation procedure.

The 2015 Reform of the Brazilian Arbitration Act had already clarified that the Public Administration may submit disputes to arbitration so this new law is far from being a novelty. However, it is a clear indication of a public policy choice to resolve sensitive issues in the areas of railways, highways and airports through arbitration.

## A.2 Institutions, Rules and Infrastructure

The ICC has established an office and a case management team located in Sao Paulo as of 4 May 2017.

Pursuant to ICC dispute resolution statistics,<sup>4</sup> Brazil ranks third in the 2016 top ten countries with most the parties involved in ICC arbitrations, accounting for almost 30% of all parties in the Latin American and Caribbean region. With the office now open in Brazil, the trend is likely to be for a further increase in the number of ICC arbitrations in Brazil.

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<sup>4</sup> <https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/>

## B. Cases

### B.1 Brazilian Superior Court of Justice acknowledges the principle of competence-competence in the *Parque das Baleias* case

In the *Parque das Baleias* case,<sup>5</sup> the Brazilian Superior Court of Justice (the “STJ,” the highest court for non-constitutional matters) issued a decision on 11 October 2017 acknowledging the principle of “competence-competence” (ie, that arbitrators have the first say on their own jurisdiction) and establishing a broad interpretation on arbitrability of rights involving state entities.

The decision arises from a “conflict of jurisdiction” (a specific measure under Brazilian civil procedure) on whether an arbitral tribunal constituted under the ICC Rules or the federal courts of Rio de Janeiro would be competent to decide whether a certain conflict could be resolved through arbitration. National Brazilian oil and gas company Petrobras first filed an injunction before the federal courts of Rio de Janeiro to have its right to arbitrate the matter acknowledged. As soon as the federal courts of Rio de Janeiro granted a favorable decision, Petrobras commenced arbitration before the ICC to challenge certain abusive decisions of the Brazilian Oil and Gas Agency (“ANP”) on the fields of Parque das Baleias, in violation of the concession agreement and aimed solely to increase the value of royalties. ANP then filed an anti-suit injunction before the federal courts of Rio de Janeiro to suspend the arbitration because ANP contended that the specific issues under dispute could not be resolved through arbitration. Petrobras therefore filed the conflict of jurisdiction to seek to confirm the competence of the arbitral tribunal, and not a judicial court, to decide on the arbitrability of the dispute.

The STJ, in a majority decision, recognized the applicability under Brazilian law of the principle of competence-competence, according

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<sup>5</sup> STJ, 1<sup>st</sup> Section. Conflict of Competence No. 139.519/RJ, Reporting Justice Napoleão Nunes Maia Filho, 11 October 2017.



to which, if the parties agreed to arbitration, the arbitral tribunal should be the first to evaluate arbitrability issues. The STJ went a step further and stated that, in cases where there is specific law authorizing arbitration, such as for oil and gas concessions, in principle the issues arising from the agreement are arbitrable.

## B.2 Brazilian Superior Court of Justice denied recognition of a foreign arbitral award in the *Abengoa* case due to the lack of impartiality of the chair

In the *Abengoa* case,<sup>6</sup> the STJ denied recognition of an ICC arbitration seated in New York filed by Abengoa Bionergia Agrícola Ltda (“Abengoa”), a Spanish company, against Adriano Ometto Argícola Ltda (“Ometto”) regarding the acquisition of an ethanol plant. Abengoa won the arbitration, but the parties later discovered that the law firm of the chair of the panel had provided services to another company of the Abengoa group, on an unrelated matter and without the knowledge of the chair.

Ometto filed an action before the Federal District Court of the Southern District of New York seeking annulment of the award due to the chair’s alleged lack of impartiality. The US court dismissed the case for lack of evidence. Afterwards, Abengoa sought recognition of the award before the STJ and Ometto opposed it.

On 19 April 2017, the STJ denied recognition of the arbitral award due to the lack of impartiality and independence of the chair. The STJ also found that the arbitral award calculated the indemnification due to Abengoa based on criteria that was manifestly different from Brazilian law, which was the applicable law under the agreement between the parties. As such, the STJ found that the arbitration panel exceeded the powers granted to it in the arbitration clause.

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<sup>6</sup> STJ, Special Formation, SEC No. 9412/US, Reporting Justice Felix Fischer, 4 April 2017.

### B.3 Brazilian Superior Court of Justice recognized the jurisdiction of an arbitral tribunal to decide matters involving a stay of execution and third-party motion

The *Agra* case<sup>7</sup> is a decision issued by the STJ on 9 February 2017 regarding another conflict of jurisdiction. Construction company Leal Moreira Engenharia Ltda. (“Leal Moreira”) filed an execution judicial lawsuit (a fast-track Brazilian law procedure for collection of due and certain amounts) before the 1<sup>st</sup> Business Court of Belém, State of Pará, against certain real estate developers (“Agra”). Agra, in its turn, filed an arbitration before the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (the “CAM-CCBC”) against Leal Moreira regarding the contract that gave rise to the alleged credit. The conflict of jurisdiction motion aimed at determining which court would be competent to judge Agra’s defense in the execution lawsuit, be it the arbitral tribunal (given the arbitration clause) or the judicial court (given the special fast-track Brazilian law procedure).

The STJ concluded that the arbitration tribunal had jurisdiction and suspended the execution judicial lawsuit while the arbitration was in course. This precedent shows that the existence of this special Brazilian law procedure does not affect the enforceability of an arbitration clause.

### B.4 Paraná State Court annulled the arbitral award for lack of previous negotiation

In the *Interportos* case,<sup>8</sup> on 22 August 2017, the Appellate Court of the State of Paraná set aside an arbitral award as requested by Interportos Ltda. (“Interportos”) against Terminais Portuários da Ponta do Félix S.A. (“Terminais”).

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<sup>7</sup> STJ, Special Formation, CC No. 150.830/PA, Reporting Justice Marco Aurélio Bellizze, 9 February 2017.

<sup>8</sup> TJPR, Appeal No. 0001233-28.2013.8.16.0043, Reporting Judge Luiz Antônio Barry, 22 August 2017.



The claimant alleged that the contract provided for a mandatory negotiation period before the beginning of the arbitral proceedings, which the respondent failed to follow. In a two-against-one decision, the judges considered that Terminais should have respected the mandatory “cooling off” period and should not have commenced arbitration beforehand. This precedent indicates that the parties should be careful to abide by any mandatory negotiation and/or mediation covenant set out in arbitration clauses.

## C. Funding in international arbitration

### C.1 Introduction

Third-party funding has become a hot topic in Brazil. A few players have come to the market, with Leste Investimentos, owned by Emmanuel Hermann, the most active. Up to November 2017, Leste had analyzed 98 arbitration cases and funded 13.

### C.2 Potential issues with third-party funding

There are two main potential issues that can arise from the third-party funding: (i) the perception that funding leads way to “commercialization” of the legal profession, which is prohibited by Article 7 of the Ethics Code of the Brazilian Bar Association; and (ii) the effects on conflict of interests involving arbitrators.

To avoid the first issue, to our knowledge, the most active third-party funders in Brazil are not organized as law firms, nor do they provide legal services to the clients even if they have their own in-house arbitration experts, who usually focus on analyzing cases for internal purposes. The third-party funders usually help the client hire outside law firms that will handle the legal work.

As for potential conflicts of interest involving arbitrators, the main issue is whether the arbitrators are independent and impartial vis-à-vis a third-party funder, which might be difficult to assess if there is no disclosure on third-party funding. To address this point, the CAM-CCBC has issued Resolution CAM-CCBC No. 18, whereby it orders

the parties, at the outset of arbitral proceedings, to disclose: (i) the existence of a third-party funder; (ii) the identity of such third-party funder; and (iii) any relationship between the arbitrators and the third-party funder that may potentially affect the arbitrator's impartiality and independence. The duty to disclose continues throughout the arbitral proceedings. This is an interesting way to address this risk and it is likely that other institutions in Brazil will adopt the same approach.