

12th
Edition

2018-2019

The
Baker McKenzie
International
Arbitration Yearbook

Brazil





Brazil

Joaquim de Paiva Muniz,¹ Luis Henrique Prates da Fonseca Borghi,² Katherina Kuramoti Ballesta³ and Lucas Prata da Costa e Silva⁴

A. Legislation and rules

A.1 Legislation

During 2018, the main discussions concerned arbitration involving governmental entities. The State of Rio de Janeiro regulated arbitral procedures between governmental entities within its jurisdiction and the city of São Paulo authorized the use of dispute boards.

A.1.1 Rio de Janeiro's state decree regulating arbitral procedures between public entities

The State of Rio de Janeiro has issued Decree No. 46,245/2018, regulating arbitrations involving state entities, especially for concession and construction agreements. For other contracts, the arbitration clause may only be included if it involves approximately USD 6 million or above).

¹ Joaquim de Paiva Muniz is a partner and head of the arbitration team of Brazil. Joaquim has an LL.M. from the University of Chicago and is the chair of the Arbitration Commission of the Rio de Janeiro Bar (OAB/RJ) and coordinator of arbitration courses of the Rio de Janeiro Bar, including a *lato sensu* graduate course. Joaquim is an officer of the Brazilian Arbitration and Mediation Center, which is the largest of its kind in Rio de Janeiro, as well as an author of many books, including *Arbitration Law of Brazil: Practice and Procedure* (Juris Publishing, 2nd Edition 2015) and *Curso Básico de Direito Arbitral* (Juruá, 4rd Edition 2017).

² Luis Henrique Prates da Fonseca Borghi is a senior associate in the arbitration and civil litigation teams at Trench, Rossi e Watanabe Advogados, São Paulo, registered at the Sao Paulo Bar. Luis Henrique has an LL.M. from the University of Pennsylvania and has also experience in US-style litigation.

³ Katherina Kuramoti Ballesta is an associate in the arbitration and civil litigation teams at Trench, Rossi e Watanabe Advogados, São Paulo. Katherina is registered at the Sao Paulo Bar and has an LL.B. from Université Paris I - Panthéon - Sorbonne.

⁴ Lucas Prata da Costa e Silva is an associate in the arbitration team at Trench, Rossi e Watanabe Advogados, Rio de Janeiro. Lucas has an LL.B. from the University of the State of Rio de Janeiro.

According to this decree, the State of Rio de Janeiro can only enter into arbitration clauses provide for institutional arbitration. The arbitral institution shall (i) have at least 5 years of experience, (ii) have held at least 15 arbitrations in the previous year; and (iii) hold premises in Rio de Janeiro for submission of petitions and documents. The arbitral institutions that meet those requirements shall request accreditation with the State of Rio de Janeiro, which will publish a list of accredited arbitration institutions, from which the private party may choose in the negotiation of the relevant contract with an arbitration clause.

Moreover, the arbitration clause shall provide for (i) Rio de Janeiro as the seat of arbitration; (ii) Brazilian Law as the applicable law; (iii) Portuguese as the language; and (iv) Rio de Janeiro courts as the venue for injunctions prior to or in aid of arbitration.

There are minimum terms for certain procedural acts, such as 60 days for statements of claims, statements of defense, statements of counterclaim, defenses to statement of counterclaim and closing arguments. The hearing shall be scheduled with a 90-day prior notice. The purpose of this is to allow the State of Rio de Janeiro plenty of time for preparation.

If the private party is the claimant, it shall advance the fees of the arbitration, the arbitral institution and the court expert, if any. Nonetheless, the final award shall order the losing party to bear or reimburse reasonable expenses of the winning party, including arbitrators' fees, institutional fees and fees of experts witnesses. Contractual lawyer fees are not recoverable, but the losing party shall pay to the counsel of the winning party mandatory success fees ("sucumbência"), depending on the amount of the success, according to the criteria set forth in article 85 of the Brazilian Code of Civil Procedure.

The arbitration will be public, but arbitral information is confidential under Brazilian law, thus it can be disclosed per request to Rio de Janeiro's State Attorney Office (Procuradoria Geral do Estado do Rio



de Janeiro). The arbitrators will decide any disagreements as to the confidentiality of information provided, with such hearings being held privately.

Although such a decree is clearly beneficial to the State of Rio de Janeiro, as one may infer from provisions such as the advance in fees and the long terms for submissions, in general it was very well received by the Brazilian arbitration community, since it establishes clear rules for arbitral proceedings.

A.1.2 Dispute boards in the city of São Paulo

The city of São Paulo enacted on 23 February 2018 Law 16.873, which regulates the use of dispute boards in its contracts, to foster the adoption of this dispute mechanism in the contracts with the municipality and their controlled entities. The parties will be free to choose among a dispute review board (to issue non-binding recommendations), a dispute adjudication board (to issue contractually binding decisions, that may be later discussed in court) or a combined dispute boards, which can issue recommendations or decisions.

The city and the parties can select institutional dispute board rules to apply, such as ICC Dispute Board Rules, as long as this is contemplated in the relevant administrative law contract. The parties can also agree on specific rules of procedure for the dispute board.

The procedure should be public. The annual budget of the city shall contemplate the expense with the fees of the dispute board members. The private party shall advance the full amount of the fees, but as the works are approved, the city of São Paulo shall reimburse the private party of half of such fees.

The dispute board shall be composed of three members, preferably two engineers and one lawyer, jointly appointed by the city of São Paulo and the private parties. The members shall be vested in the office within 30 days from the execution of the contract, through the signature of a term of commitment between them and the parties.

The members of the dispute board shall be independent, impartial, diligent and competent for the assignment. The members shall be deemed not to be impartial if they meet any of the causes of suspiciousness or impediment of judges under the Brazilian Code of Civil Procedure. The members shall disclose to the parties any fact that can trigger justifiable doubts on their independence or impartiality. In the exercise of their duties, the members will be subject to the same crimes of a public servant, such as corruption.

Although this new law does not bring any novelty, it is very important to promote dispute board for contracts with state entities, since São Paulo is the largest city of Brazil and its budget for investment is greater than any other Brazilian public entity, except for the Federal Union and the State of São Paulo. The other larger cities and even federal states tend to follow the example and will probably start considering the use of dispute boards.

A.2 Institutions, rules and infrastructure

Some Brazilians arbitral chambers edited important administrative resolutions during 2018.

A.2.1 CAM-CCBC new resolution creating the emergency arbitrator

By the Administrative Resolution No. 32/2018, the Arbitration and Mediation Center of the Chamber of Commercial Brazil Canada (CAM-CCBC), which is the largest in Brazil, has created its own emergency arbitrator proceedings.

These provisions shall apply when a party intends to request an injunction that cannot await the constitution of the arbitral tribunal. For such requirements, the decision about the injunction relief shall be made by an emergency arbitrator appointed by the president of the CAM-CCBC. The choice of an emergency arbitrator procedure is “opt-in,” meaning that it should be either contemplated in the arbitration clause or later agreed by all parties. The emergency arbitrator shall, in principle, issue the decision within 15 days from his/her appointment.



After its constitution, the arbitral tribunal may revoke, amend or maintain the emergency arbitrator's decision.

A.2.2 The Brazilian Center for Mediation and Arbitration resolution for labor causes

The Brazilian Center for Mediation and Arbitration (“CBMA”) enacted a specific resolution for labor matters, which entered in force on 11 June 2018. Following the new article 507-A of the Brazilian Labor Code, labor conflicts are to be solved by arbitral proceedings at the CBMA if: (i) the employee has agreed with the arbitration clause; and (ii) the employee's salary is more than twice the maximum amount established for the benefits of the Social Security Regime. In case the amount involved is less than circa USD 1.5 million, the arbitration will be subject to a fast-track procedure and be resolved in a few months. Joaquim de Paiva Muniz was one of the drafters of this resolution.

B. Cases

B.1 The possibility for an arbitral tribunal to pierce the corporate veil and impose its jurisdiction to a non-signatory party

In the *Continental* case,⁵ the Brazilian Superior Court of Justice (the “STJ,” the highest court for non-constitutional matters) issued a ruling, on 8 May 2018, recognizing the silent consent to an arbitration clause of a non-signatory party who abused a company's legal personality.

The decision arises from a situation where the officer and majority shareholder of the construction company Serpal Engenharia e Construtora Ltda. (“Serpal”), Mr. Quirós transferred to himself company's assets and pocketed amounts paid by Continental do Brasil Produtos Automotivos Ltda. (“Continental”) to Serpal under a

⁵ STJ, Special Appeal (REsp) No. 1.698.730/SP, 3rd section, Reporting Justice Marco Aurélio Bellizze, 8 May 2018.

services agreement. Continental filed a precautionary lawsuit against Sepal and Mr. Quirós, including a request to freeze Mr. Quirós' assets, although he was not a signatory of the agreement. Later the arbitration panel confirmed the injunction against Mr. Quirós. Although he was not a signatory, the STJ understood that Mr. Quirós was bound by both the agreement and the arbitration clause, as the owner and manager of Sepal, and as the person who negotiated the deal.

This is a relevant precedent authorizing the piercing of corporate veil in arbitration, extending the jurisdiction of the arbitral tribunals to do so in cases of fraud and abuse of rights, especially when the individual partner has negotiated the arbitration agreement.

B.2 Arbitration clauses in consumers agreements

In the *MRV* case,⁶ the STJ refused to recognize the validity of an arbitration clause inserted in a standard form contract which did not meet the formal requirements of enforceability.

Mrs. Renata Maximo Rabelo (“Mrs. Rabelo”) and MRV Engenharia e Participações S.A. (“MRV”) executed a standard form contract for the sale of an apartment. Mrs. Rabelo alleged that the sales agreement should be deemed to be a standard agreement with a consumer and, under article 51 of the Brazilian Consumers’ Code, arbitration is not mandatory against the consumer unless he/she expressly agrees with the choice. The STJ unanimously ruled that Mrs. Rabelo’s choice to file a lawsuit before the state courts, rather than requesting for arbitration, proved her disagreement to the arbitration clause.

This is a key precedent on the enforceability of arbitration clauses in consumers’ relationships. It is clear now that the choice of arbitration is only binding on the consumer if he/she brings the claim or otherwise agrees with it after the execution of the arbitration agreement.

⁶ STJ, Special Appeal (REsp) No. 1.628.819/MG, 3rd section, Reporting Justice Nancy Andrichi, 27 February 2018.



B.3 The possibility to request a company's bankruptcy because of unpaid credits arising from an agreement with an arbitration clause

In the *Volkswagen* case,⁷ the STJ issued a decision on 06 November 2018, acknowledging the possibility of coexisting arbitral and state jurisdiction in the context of unpaid credit and bankruptcy.

Volkswagen do Brasil Indústria de Veículos Automotores Ltda. (“Volkswagen”) filed a judicial request for the bankruptcy of Metalzul Indústria Metalúrgica e Comércio Ltda. (“Metalzul”) because of unpaid credits due to Volkswagen, arising from an agreement executed between the parties with an arbitration clause. In its defense, Metalzul alleged that only the arbitral tribunal had jurisdiction to solve disputes arising from the agreement. However, STJ unanimously determined that, for purposes of requesting bankruptcy, the judicial courts would be the competent venue, given the specificity of the matter, without prejudice to the jurisdiction of the arbitration panel to discuss contractual issues.

This precedent indicates that, under Brazilian law, the existence of an arbitration clause does not prevent a creditor from requesting the bankruptcy of the other party in default before the state courts.

B.4 The extension of the arbitration clause to other contracts of the same economic transaction

In the *Paranapanema* case,⁸ the STJ issued a decision denying the request of annulment of an arbitration award and establishing the possibility of extending an arbitration clause in an agreement to certain related contracts.

Paranapanema S.A. (“Paranapanema”) filed judicial proceedings to set aside an arbitral award, alleging that the arbitral tribunal lacked

⁷ STJ, Special Appeal (REsp) No. 1.733.685/SP, 4th section, Reporting Justice Raul Araújo, 06 November 2018.

⁸ STJ, REsp. No. 1.639.035/SP, 18 September 2018.

jurisdiction because the dispute was related to the swap contract, which did not have an arbitration clause. The defendant, Banco Santander (“Santander”), alleged that the swap contract had obligations directly related to the main contract executed between the same parties, and thus, it was part of the same economic transaction. For that reason, Santander alleged that the arbitration clause of the main contract should be extended to the swap contract. By a majority decision, the STJ ruled in favor of extending the arbitration clause of the main agreement to the swap contract, denying Paranapanema’s request for annulment of the arbitral award.

This precedent recognized the possibility, under Brazilian law, to extend an arbitration clause to contracts that are linked and economically dependent, given that they are part of the same economic transaction.

C. Diversity in arbitration⁹

Although there is a trend towards a more diverse pool of arbitrators and arbitration practitioners, Brazil still has a long way to reach a fairer proportion of gender in arbitral proceedings.

According to the statistics of the Arbitration and Mediation Center of the Chamber of Commercial Brazil Canada (“CAM-CCBC”), in the year of 2013, 145 arbitrators were appointed, 116 were men and 29 were women. Whereas in 2017, among 191 appointed arbitrators, 148 were men and 43 were women. This demonstrates a positive but slow-moving trend towards greater gender parity. In the last few years, many Brazilian arbitration centers and institutions have signed the Pledge, including the Federal Bar, following a recommendation by partner Joaquim de Paiva Muniz. As a result, these institutions have committed to using their best efforts in order to increase women’s participation in the arbitral community in Brazil.

⁹ Special thanks to Mrs. Ana Carolina Weber, a Brazilian arbitrator who helped with this research.



For instance, the CAM-CCBC has edited its Administrative Resolution No. 30/2018, by means of which, the arbitral chamber established a target of 30% of women at its list of arbitrators. Many other institutions, such as CBMA, CAMARB and CCMA CIESP/FIESP have revised their respective list of arbitrators to include more women.

We believe this is just a starting point. Not only in the appointment of arbitrators but also in the teams to represent clients in arbitral proceedings, attention should be paid both to gender as well as ethnicity, nationality and age, so that the Brazilian arbitration community becomes more representative and diverse.