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The New Brazilian Arbitration Law

Arnoldo Wald*
Ana Gerdau de Borja**

This article selects four landmark events: the enactment of Law No. 9.307 on Sept. 23, 1996 (the “1996 Arbitration Law”); (ii) the recognition of the constitutionality of such law by the Supreme Court in 2001; (iii) the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2002; and (iv) the enactment of Law No. 13.129 on May 26, 2015 (the “Amendment”). The first three events are analyzed jointly with the fourth event, in order to identify novel important legal issues involving arbitration in Brazil: (a) subject arbitrability concerning state and state entities; (b) the compromise between institutional rules and parties’ choice by means of changes at the roster of arbitrators and multiparty arbitration, focused at reduction of arbitral awards annulment risks; (c) the amendment of arbitration agreement by using terms of reference, which adjusts limitation periods by the exact date of its interruption; (d) the annulment of arbitral awards and its application in precedents; (e) the provision concerning foreign awards recognition and enforcement, which is closely identified with the New York Convention on the Recognition and Enforcement of Arbitral Awards (“NYC”), strictly interpreted by the Superior Court of Justice in several foreign arbitral decisions recognition precedents; (f) the ‘arbitral letter’, also included and provided as a mechanism of cooperation between arbitrators and courts; finally, (g) the inclusion of arbitration agreements in bylaws of Bra-

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zilian corporations, in order to face the growing disputes involving companies since the enactment of the Constitution in 1988.

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I. INTRODUCTION

In less than twenty years, arbitration in Brazil has managed to obtain an increased level of sophistication. It should therefore come as no surprise that the Global Arbitration Review (GAR) went so far as to refer to Brazilian arbitration as "*la belle of the ball*" in 2012.¹ What is deserving of particular attention are four landmark events: (i) The enactment of Law No. 9.307 on Sept. 23, 1996 (the "1996 Arbitration Law"); (ii) The recognition of the constitutionality of such law by the Supreme Court in 2001; (iii) The ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2002; and (iv) The enactment of Law No. 13.129 on May 26, 2015 (the "Amendment").

The development of Brazilian arbitration law is further evidenced by the statistics showcasing the increase in the number of

¹ See *Brazil- belle of the ball*, 7(3) GLOBAL ARBITRATION REVIEW 22 (2012).

proceedings brought before Brazilian arbitral institutions annually.² In fact, these numbers climbed following the recognition of the constitutionality of the 1996 Arbitration Law in 2001.³ In particular, the Center for Arbitration, Mediation, and Conciliation of the Brazil-Canada Chamber of Commerce (“CAM-CCBC”) reported that there were 217 ongoing proceedings as of July 2015, thirty-one of which involved at least one foreign party.⁴ Between 2005 and 2014, the CAM-CCBC estimates that the number of new arbitrations grew by twenty-two percent.⁵ As of July 2015, sixty-two new arbitration proceedings have been filed before the CAM-CCBC, as opposed to 2013 and 2014, where the total number of arbitrations commenced was ninety and ninety-five, respectively.⁶

The Chamber of Conciliation, Mediation, and Arbitration of the Federation and Center of Industries of São Paulo (“FIESP/CIESP”) reports that ninety-six ongoing arbitration procedures were initiated in July 2015, ten of which involve at least one foreign party.⁷ On average, FIESP/CIESP has administered forty new cases each year since 2009.⁸ The Market Arbitration Chamber (BOVESPA), which was founded in 2010, has also administered at least fifty cases involving corporate matters.⁹

The statistics published by the International Court of Arbitration of the International Chamber of Commerce (“ICC”) show that Brazilian parties were involved in only forty-four cases between 1950 and 1991.¹⁰ Such numbers have increased exponentially over the years, to the point where Brazilian parties now participate in hundreds of cases.¹¹ Indeed, Brazilian parties have been some of the leading users of the ICC since 2006; in 2013, Brazilian parties

² *Análise da Pesquisa Arbitragem em Números de 2010 a 2013* [About Brazilian Arbitration in Numbers From 2010-2013], <http://selmalemes.adv.br/artigos/Análise%20da%20Pesquisa%20Arbitragem%20em%20Números%20-2010-2013.pdf> [hereinafter *Brazilian Arbitration in Numbers*].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Brazilian Arbitration in Numbers*, *supra* note 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ ICC International Court of Arbitration, ‘2013 Statistical Report’ (2013) 25(1) ICC International Court of Arbitration Bulletin 5-17.

¹¹ *Id.*

ranked fourth in this group, following the United States, Germany, and France, respectively.¹² A significant number of Brazilian arbitrators have also been confirmed and appointed by the ICC.¹³

The development of arbitration in Brazil can also be measured by the volume and quality of state court decisions. Brazilian courts have exhibited a clear trend towards upholding arbitration agreements. Additionally, the Brazilian judiciary has been a major contributor to the consolidation of the arbitration practice. Overall, it has taken a mostly favorable approach to arbitration, rendering important judgments on controversial issues. Some of these issues have been clarified by the Amendment and will be discussed in this article.¹⁴ However, a few controversial matters have been left open, such as the arbitrability of labor and consumer disputes, and consent to arbitrate involving the incorporation of arbitration agreements by reference.¹⁵

The Superior Court of Justice (“STJ”) is the highest court in Brazil that deals with non-constitutional matters. The STJ, which wields exclusive jurisdiction over the recognition of foreign arbitration decisions in Brazil, has historically been favorable towards arbitration. The Court has rendered decisions on the sixty recognition proceedings of foreign arbitral awards, and it has joined the New York Convention, the earlier-described third landmark of arbitration in Brazil.¹⁶

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* For further information about numbers in arbitration with Brazilian parties, see Arnaldo Wald & Raquel Stein, *Arbitration in Brazil: Case Law Perspective*, in *ARBITRATION LAW OF BRAZIL*, at App. I; JOAQUIM T. DE PAIVA MUNIZ & ANA TEREZA PALHARES BASÍLIO, *ARBITRATION LAW OF BRAZIL: PRACTICE AND PROCEDURE* (Juris Publishing, 2nd ed. 2006).

¹⁵ The project for the Amendment of the Arbitration Law originally included two articles regarding consumer and labor arbitration; however, such provisions received a presidential veto. Hence, there is still a certain degree of uncertainty regarding such matters.

¹⁶ See also Arnaldo Wald, *A jurisprudência do STJ e a arbitragem*, ESTUDOS JURÍDICOS EM HOMENAGEM AO MINISTRO CESAR ASFOR ROCHA (Migalhas, Ribeirão Preto), 2012, at 146-62 [hereinafter *STJ Wald*]; Arnaldo Wald, *A evolução da arbitragem internacional no Brasil*, in: IV CONGRESSO DO CENTRO DE ARBITRAGEM DA CÂMARA DE COMÉRCIO E INDÚSTRIA PORTUGUESA – INTERVENÇÕES, (Almedina), 2011, at 187-210; GLOBAL ARB. REV., *International*

Because Brazilian state courts have, with few exceptions, consistently applied the 1996 Arbitration Law, the first reaction towards the need for a bill of amendment was divisive. But, the original bill was thoroughly discussed and subject to a few changes by Congress, ultimately culminating in Law. No. 13.129. While most amendment provisions incorporate the consolidated body of case decisions on the interpretation and application of the 1996 Arbitration Law, the Amendment sheds light and legal certainty on two important legal issues involving arbitration in Brazil.

II. ARBITRATION INVOLVING THE STATE AND STATE ENTITIES

The Amendment included two new paragraphs in Article 1 and a third paragraph in Article 2 of the 1996 Arbitration Law. The Amendment reads, in relevant part, as follows:

Article 1. [. . .]

1. Direct and indirect public administration may use arbitration in order to settle disputes concerning patrimonial rights over which it may dispose.
2. The authority or competent organ of direct public administration to celebrate an arbitration agreement is the same as that to celebrate agreements or settlements.”

Article 2. [. . .]

3. An arbitration that involves public administration shall always be conducted *de jure* and respect the principle of publicity.¹⁷

arbitration in Brazil in 2010, THE ARBITRATION REVIEW OF THE AMERICAS 2011, at 31-35 (2010).

¹⁷ The original text of the Amendment reads as follows: “*Art. 1o [. . .] § 1o A administração pública direta e indireta poderá utilizarse da arbitragem para dirimir conflitos relativos a direitos patrimoniais disponíveis. § 2o A autoridade ou o órgão competente da administração pública direta para a celebração de convenção de arbitragem é a mesma para a realização de acordos ou transações.*” *Art. 2o [. . .] § 3o A arbitragem que envolva a administração pública*

The Amendment clarifies any possible doubts regarding the arbitrability of disputes involving the state and state entities. While making a few additions, the Amendment clearly incorporates previous decisions rendered by Brazilian courts. Generally speaking, the arbitrability of disputes involving the Brazilian State and state entities was already recognized by the Brazilian Federal Supreme Court (“STF”) in the leading case of *Uniao Federal v. Espolio Lage and others* in the 1970’s.¹⁸ Later on, in the early 2000s, the Brazilian Judiciary upheld the validity of an arbitration agreement, an instrument executed by Brazil in the restructuring of sovereign debt, set out in *Acordo Dois’ case*.¹⁹

In turn, the STJ has also rendered important decisions on the subjective and objective arbitrability of disputes involving mixed-capital companies. One such example is *Companhia Estadual de Energia Elétrica – CEEE v. AES Uruguaiana Empreendimentos Ltda.*²⁰ In *Companhia Estadual*, CEEE, a concessionaire for the production, transmission, distribution, and trade of electricity in the State of Rio Grande do Sul, instituted state court proceedings against AES Uruguaiana, a Brazilian subsidiary of the United States AES Group. CEEE alleged that AES Uruguaiana had failed to comply with some obligations set forth in a Power Purchase Agreement (PPA). AES Uruguaiana objected to state court jurisdiction, on the grounds that the PPA provided for ICC arbitration.

AES Uruguaiana subsequently commenced ICC arbitral proceedings against CEEE. CEEE responded by seeking an injunction against the ICC arbitration from the state courts, while arguing to the arbitral tribunal that it lacked jurisdiction. The lower court judge

será sempre de direito e respeitará o princípio da publicidade.” Lei No. 9.307, de 23 de Setembro de 1996, D.O.U. de 24.09.06 [hereinafter The Amendment].

¹⁸ T.J., Agravo de Instrumento 52.181-GB, União Federal v. Espolio Lage and others, Full Court, 68 Revista Trimestral de Jurisprudência 382-397 (1973).

¹⁹ See judgment by the first instance judge Augustinho Fernandes Dias da Silva (Federal Court of the State of Rio de Janeiro); 4 *Revista de Direito Bancário e do Mercado de Capitais*, at 277-87 (1999) subsequently affirmed by the former Federal Court of Appeal (*Tribunal Federal de Recursos*) by a vote by Justice Flaquer Scartezini: remittitur of record n. 99.824-RJ – DJU 28.02.1989); 17 *Revista de Direito Bancário e do Mercado de Capitais*, at 251-53 (2002).

²⁰ S.T.J, Resp 612.439-RS, Relator: Justice João Otávio de Noronha, 25.10.2005, 11, REVISTA DE ARBITRAGEM E MEDIAÇÃO, 177-83 (2006), see commentary by Arnoldo Wald, at 183-93.

granted the injunctive relief and ordered an immediate stay of the arbitral proceedings, fixing a daily fine to be assessed in the event of contempt of court.

The same judge held in a subsequent ruling that the State court proceedings should proceed irrespective of the arbitration clause. On appeal, the Court of Appeal of the State of Rio Grande do Sul affirmed the rulings of the first instance judge and confirmed the order to stay the arbitration. AES was thus left with no alternative but to file an appeal before the STJ. On October 25, 2005, the STJ granted AES' appeal, thereby reversing the decision of the Court of Appeal of the State of Rio Grande do Sul. Justice João Otávio de Noronha reported the case, and three other Justices concurred with his opinion.

The STJ made three particular findings. First, mixed-capital companies under the control of the State and their subsidiaries are subject to the legal regime applicable to private companies.²¹ Because rights and obligations deriving from the exercise of their respective economic activity are patrimonial, and therefore disposable as within the meaning of Article 1 of the 1996 Arbitration Law, mixed-capital companies are fully capable of executing binding arbitration agreements. Second, Article 1 of the 1996 Arbitration Law provided for legal authorization for the conclusion of binding arbitration agreements, its pre-requisite being general legal capacity to celebrate contracts. Third, because electricity constitutes a commodity, it requires safe and efficient dispute settlement mechanisms, such as arbitration.

²¹ This article, proposed back in the 1980s, established equal treatment of mixed-capital companies vis-à-vis Brazilian private corporations governed by Law 6.404 of 1976, except for concessionaires subject to special regulation. See Arnoldo Wald, *As sociedades de economia mista e a nova lei das sociedades anônimas*, 17 REVISTA DA PROCURADORIA GERAL DO ESTADO DO RIO DE JANEIRO, 63-90 (1980)

More recently, in *Compagás v. Passarelli*, the STJ reaffirmed previous decisions^{22 23} concerning the subjective arbitrability of mixed-capital companies, such as *Compagás*, which had entered into a binding submission agreement. In the Court's view, the subject-matter of the dispute was arbitrable because it related to patrimonial rights of which the parties could dispose. Notably, the arbitration provision in *Compagás* was not included in the invitation to bid, let alone in the agreement entered into by the parties. Rather, it was agreed upon by way of a submission agreement after the dispute arose. Hence, in the Court's view, the arbitration agreement constituted an ordinary provision not subject to any special regime; thus, mixed-capital companies such as *Compagás* could validly agree upon it. That is so, unless the law expressly provides otherwise, as in the case of adhesion contracts.

Law No. 11.079, which was passed on December 30, 2004, goes to public-private partnerships ("PPP").²⁴ In Article 11, subsection III, Law No. 11.079 allows arbitration agreements to be included in PPP contracts, as long as the arbitral seat is situated within Brazilian territory and the language of arbitration is Portuguese.²⁵ In turn, Law No. 11.196 of November 22, 2005, added a new provision to Law No. 8.987 of February 13, 1996, on public utilities; it authorized the

²² *STJ Wald, supra* note 16; R.S.T.J., 11.308/DF, *TMC-Terminal Multimodal de Coroa Grande SPE S/A v Ministro de Estado da Ciência e Tecnologia*, Relator: Exmo. Sr. Ministro Luiz Fux, 09.04.2008, 21, *REVISTA DE ARBITRAGEM E MEDIAÇÃO* 19.5.2008, 286-313; *see also* Arnoldo Wald and André Serrão, *Aspectos constitucionais e administrativos da arbitragem nas concessões*, 16 *REVISTA DE ARBITRAGEM E MEDIAÇÃO* 11, 20 (2008); Eros Grau, *Da arbitrabilidade de litígios envolvendo sociedades de economia mista e da interpretação de cláusula compromissória*, 18 *REVISTA DE DIREITO BANCÁRIO, DO MERCADO DE CAPITAIS E DA ARBITRAGEM* 395, 399 (2002).

²³ S.T.J., Resp 904.813-PR, *Companhia Paranaense de Gás Natural – Compagás v. Consórcio Carioca Passarelli*, Relator: Rep. Justice Nancy Andriqui, 20.10.2011; Arnoldo Wald, *Licitude de compromisso arbitral em contrato administrativo mesmo quando o edital não previu a arbitragem – Comentário ao Recurso Especial n. 904.813-PR*, 33 *REVISTA DE ARBITRAGEM E MEDIAÇÃO* 361 (2012).

²⁴ Lei No. 11.079 (2004) Article 11, *available at* http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/lei/111079.htm.

²⁵ *Id.*

inclusion of arbitration agreements in concession contracts, subject to the same conditions under Article 11, subsection III, above.²⁶

Public bids—for example, those concerning public concessions to explore the largest power plants in Brazil that will be part of the Madeira Complex in the Amazon region—expressly include arbitration clauses in the bid notices and administrative contracts. Likewise, the concessions for the exploration of the largest Brazilian airports such as Guarulhos, Campinas, and Brasília also included arbitration in the public bid documents.

A number of other interesting cases by lower courts contain discussions concerning arbitration, the state, and its entities. In *Copel v. UEG Araucária*, the Court of Appeals of the State of Parana rendered conflicting decisions concerning the validity and effects of an arbitration agreement under a PPA. The first decision declared the agreement void due, among other reasons, to the lack of previous statutory authorization allowing Copel to execute it. Yet, UEG Araucária initiated ICC arbitration proceedings in Pars against Copel, having obtained an interim declaration from the Court of Appeal affirming UEG Araucária's right to proceed with the arbitration. Copel filed proceedings before that same Court in which it requested an antisuit injunction against the arbitration, which was granted in July 2004. Later on, the STJ suspended the effects of its previous decision to stay the arbitration upon UEG Araucária's request.²⁷

A case with an outcome in the opposite direction concerned the construction of the Guggenheim museum in the City of Rio de Janeiro. A Brazilian national instituted proceedings against the Mayor of Rio de Janeiro himself, seeking an the annulment of the contract executed between Rio de Janeiro's City Government and

²⁶ Lei No. 8.987 (1996) Article 23-A, available at http://www.planalto.gov.br/ccivil_03/Leis/L8987cons.htm; Lei No. 11.196 (2005), available at http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/111196.htm.

²⁷ See 3^a Vara da Fazenda Pública de Curitiba, P24.334, Judge Josely Dittrich Ribas, 15.03.2004; 2 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 312-318; T.J.P.R., Medida Cautelar Inominada 160.213-7, 3^a Vara da Fazenda Pública, Falências e Concordatas, Relator: Ruy Fernando de Oliveira, 15.06.2004, 3 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 195-96; T.J/PR, Mandado de Segurança 0161371-8, Relator: Ivan Bortoleto, 05.07.2004, 3 REVISTA BRASILEIRA DE ARBITRAGEM, 182-87; S.T.J.J. Resp 769.014-PR, Relator: Justice Aldir Passarinho Junior, 23 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 368 (2009).

the Solomon R. Guggenheim Foundation. The Court of Appeals of the State of Rio de Janeiro found that the arbitration agreement contained in the contract was null and void on public interest grounds, and thereby confirmed an injunction granted by a lower court suspending the validity and efficacy of the agreement to arbitrate.²⁸

Regardless, a number of appellate decisions and decisions of first instance favor arbitration. In one example, *Tribunal de Contas do Distrito Federal*, a writ of mandamus was filed by Brazilian companies against a decision issued by the administrative Accounts Tribunal of the Federal District. The Council to the Court of Appeal of the Federal District upheld the validity and enforceability of the arbitration clause, regardless of the Accounts Tribunal's decision on the matter, which prohibited the parties from submitting the contract claims to arbitration. According to the reporting Justice Nancy Andrighi, it was clear that public interest itself was not at risk of being disposed of, and the submission of contractual disputes arising from administrative contracts to arbitration was not in and of itself contradictory. Moreover, the latter's non-disposable character would persist irrespective of arbitration. She added that Law No. 8.666, which was passed on June 21, 1993, and related to administrative contracts, did not prevent the application of private law to such contracts. She further added that public administration ought to fulfill its contractual obligations, including the obligation to arbitrate.²⁹

The dispute in another case, *Agência Nacional do Petróleo, Gás Natural e Biocombustíveis (ANP) v. Newfield Brasil*, concerned the exploration and independent production of natural gas by Newfield in the State of Espírito Santo.³⁰ Newfield commenced ICC proceedings against the National Oil, Natural Gas, and Biofuels Agency ("ANP"), seeking damages arising from the impossibility of exploring economic activities at the site due to environmental licensing

²⁸ T.J/R.J., Agravo de Instrumento 07839/2003, Relator: Ademir Paulo Pimentel, 26.05.2003, 22 REVISTA DE DIREITO BANCÁRIO, DO MERCADO DE CAPITAIS E DA ARBITRAGEM, 423-30.

²⁹ T.J/D.F., Mandado de Segurança 1998.00.2.003066-9, Relator: Nancy Andrighi, 18.05.1999, 8 REVISTA DE DIREITO BANCÁRIO, DO MERCADO DE CAPITAIS E DA ARBITRAGEM, 359-65; *see also* commentary by Clávio Valença Filho, pp. 365-73.

³⁰ Professor Arnaldo Wald acted as co-arbitrator in the dispute *Newfield v. ANP*. The award is published in 39 REVISTA DE ARBITRAGEM E MEDIAÇÃO 311 (2013).

issues. Following a favorable award, Newfield sought to enforce it before Brazilian courts, but the parties, including ANP, agreed to settle the case, following authorization from the attorney general's office.

Petrobras, a mixed-capital company itself, instituted arbitral proceedings against ANP in 2014,³¹ which reveals a new mentality by Brazilian public administration. Definitely, the position adopted by Brazilian courts, statutory provisions, and the inclusion of arbitration as a dispute settlement method in key public bid documents, demonstrates that the Brazilian government is aware of the importance of arbitration for private investment, especially in situations involving foreign investment.

When examining Article 1, subsection 2, that has been inserted into the Arbitration Law by the Amendment, many have hoped that Brazilian courts will interpret the language, “*the same [capacity] as that to celebrate agreements or settlements,*”³² broadly. This is because the capacity of individuals or special organs of the state and state entities to celebrate contracts does not always coincide with capacity to settle rights and obligations. In any event, because the provision uses the conjunction “or,” it is implied that it requires either capacity to conclude contracts or capacity to agree upon settlement by the relevant administrative individual or body. Hence, proof of general capacity to conclude contracts should suffice under Article 1, subsection 2.

Additionally, Article 2, subsection 3, requires that the arbitration be conducted *de jure*, which derives from the principle of legality that is binding upon the Brazilian Administration. It is expected that state courts will interpret it as not preventing arbitral decisions that, while being issued *de jure*, take into account equitable principles underlying the relevant applicable law. For example, in circumstances involving political, military, and financial agreements by the Administration, public interest favoring confidentiality of arbitral proceedings could be weighed as prevailing over the pre-requisite

³¹ See Valor Econômico, *Petrobras e ANP vão à arbitragem*, available at <http://www.valor.com.br/empresas/3528714/petrobras-e-anp-vaio-arbitragem> (last visited Dec. 15, 2014).

³² “A autoridade ou o órgão competente da administração pública direta para a celebração de convenção de arbitragem é a mesma para a realização de acordos ou transações.” The Amendment, *supra* note 17, at Art. 1.

of publicity under Article 2, subsection 3. The Amendment became effective on July 27, 2015.

III. ROSTERS OF ARBITRATORS AND MULTI-PARTY ARBITRATION

The Amendment also included a fourth paragraph into Article 13 of the 1996 Law:

Article 13. [. . .]

4. The parties may, by common agreement, opt out from the application of the provisions under the rules of an arbitral institution or specialized entity that limit the choice of a sole arbitrator, co-arbitrator or president of the arbitral tribunal to its respective roster of arbitrators, authorizing the control of their choice by the competent organs of the institution; in case of failure concerning multiparty arbitration, the applicable rules shall be observed.³³

The first part of the provision seeks a compromise between institutional rules and the parties' choice. Some rules of Brazilian institutions often gave preference to chair arbitrators that were on their respective rosters for confirmation purposes. This originates from the beginning of Brazilian arbitration and various institutions' aim of ensuring that the chairman was well acquainted with arbitration or a particular industry, e.g. energy, construction, corporate law. With time and the steady growth of arbitration, the existence of rosters of arbitrators became a bit controversial.

The last part of Article 13, subsection 4, which deals with multiparty arbitration, is aimed at reducing the risk of annulment of arbitral awards on the grounds that a party belonging to a multiparty

³³ The original reads as follows: "Art. 13 [. . .] § 4o As partes, de comum acordo, poderão afastar a aplicação de dispositivo do regulamento do órgão arbitral institucional ou entidade especializada que limite a escolha do árbitro único, coárbitro ou presidente do tribunal à respectiva lista de árbitros, autorizado o controle da escolha pelos órgãos competentes da instituição, sendo que, nos casos de impasse e arbitragem multiparte, deverá ser observado o que dispuser o regulamento aplicável." The Amendment, *supra* note 17, at art. 13.

pole was prevented from exercising his or her right to nominate an arbitrator. This arose in *Paranapanema*,³⁴ where the president of the arbitral institution nominated the arbitrator on behalf of one of the multiparty poles, due to the failure by the parties pertaining to that pole to reach an agreement as to the name of a co-arbitrator. The party instituting annulment proceedings argued that it was not granted equal opportunities as far as the constitution of the arbitral tribunal was concerned, and that the arbitral institution should have appointed all members of the arbitral tribunal instead.

In any event, most recent rules issued by Brazilian institutions, such as the CAM/CCBC³⁵ and FIESP/CIESP,³⁶ provide for the appointment of the whole arbitral tribunal by their respective president in the case of a failure in the appointment of arbitrators by either pole in multiparty arbitrations.

³⁴ A similar discussion took place in *GP v. Fernando Soares*; in this case, however, there was a specific provision on multi-party arbitration in the relevant contract and the parties that applied for annulment had expressly consented to nomination of the co-arbitrator by the president of CAM/CCBC in the course of the arbitration proceedings. T.J/S.P., Apelação 0002163-90.2013.8.26.0100, *Paranapanema S.A. v. Banco Santander S.A. e Banco BTG Pactual S.A.*, 11ª Câmara de Direito Privado, Relator: Gilberto dos Santos, 03.07.2014, 44 REVISTA DE ARBITRAGEM E MEDIAÇÃO 237, 244-60; see also commentary by Riccardo Giuliano Figueira Torre, pp. 238-243; 2ª Vara de Falências e Recuperações Judiciais do Foro Central Cível da Comarca de São Paulo, Proceedings 0035404-55.2013.8.26.0100, *GP Capital Partners V, LP and other v. Fernando Correa Soares and others*, Judge Paulo Furtado de Oliveira Filho, 18.06.2014, 43 REVISTA BRASILEIRA DE ARBITRAGEM, 116-23; see also the French courts' decision in the *Dutco* case (Cour de Cassation, *Siemens AG and BKMI Industrienlagen GmbH v. Dutco Construction Company*, Première Chambre Civile, 07.01.1992); 29 REVISTA BRASILEIRA DE ARBITRAGEM, 211-13, 2011.

³⁵ CAM/CCBC Arbitration Rules 2012, available at <http://ccbc.org.br/Materia/1067/regulamento>; “4.12. If either of the parties fails to appoint an arbitrator or the arbitrators appointed by the party fail to appoint the third arbitrator, the President of the CAM/CCBC will make this appointment from among the members of the List of Arbitrators.”

³⁶ FIESP/CIESP Arbitration Rules, available at <http://www.camaradearbitragemsp.com.br/index.php/us/rules/arbitration-rules>: “2.5. Should either party fail to name an arbitrator within the time limit stipulated under item 2.2, the President of the Chamber shall do it. The President of the Chamber shall also appoint, preferably from among the members included in the Chamber's List of Arbitrators, the arbitrator who shall exercise the function of Chairman of the Arbitral Tribunal, in the absence of such appointment.”

IV. ADDENDUM TO ARBITRATION AGREEMENT, LIMITATION PERIODS, PARTIAL AWARDS AND EXTENSION OF TIME LIMIT TO RENDER AN AWARD

Article 19 has been amended to include two additional paragraphs as an addendum to arbitration agreements and interruption of limitation periods. These paragraphs provide that:

Article 19. [. . .]

1. Once arbitration is instituted and in the event that the arbitrator or the arbitral tribunal finds it necessary to explain a question set out in the agreement to arbitrate, an addendum shall be elaborated, together with the parties, to be signed by all, which will become an integrating part of the arbitration agreement.
2. The institution of the arbitration interrupts the limitation period, retroacting as of the date of the request for arbitration, even if the proceedings are terminated on the basis of lack of jurisdiction.³⁷

While it was already a common practice within the world of Brazilian arbitration to amend the arbitration agreement by using terms of reference, it is still useful that the law now expressly provides for this by way of the addendum. Furthermore, the Amendment touched on the issue of the exact date of interruption of the limitation periods, which was previously a matter of debate. The Amendment was welcomed for its clarification that limitation periods are interrupted retroactively as of the date of filing the request for arbitration, regardless of whether the tribunal finds that it lacks jurisdiction at a subsequent stage.

³⁷ The original text reads as follows: “Art. 19 [. . .] § 1o Instituída a arbitragem e entendendo o árbitro ou o tribunal arbitral que há necessidade de explicitar questão disposta na convenção de arbitragem, será elaborado, juntamente com as partes, adendo firmado por todos, que passará a fazer parte integrante da convenção de arbitragem. § 2o A instituição da arbitragem interrompe a prescrição, retroagindo à data do requerimento de sua instauração, ainda que extinta a arbitragem por ausência de jurisdição.” The Amendment, *supra* note 17, at art. 19.

Moreover, it was previously common practice to include the arbitrators' power to render partial awards and to allow for the extension of the time period to render the final award in terms of reference in Brazilian arbitration. This is now expressly authorized under Article 23, subsection 1, and Article 23, subsection 2, of the amended law.³⁸ In particular, several arbitral institutions already conferred such powers upon the tribunals instituted under their rules. Additionally, it is implied from that authorization that partial awards are also subject to requests for clarifications.

V. ANNULMENT OF AWARDS

The Amendment also contains the following provisions on the annulment of arbitral awards:

Article 32. [. . .]

I. where the arbitration agreement is void. [. . .]³⁹

“Article 33. An interested party may request a declaration of annulment of an arbitral award before the competent organ of the Judiciary, in the cases provided in the present Law.

1. The request for annulment of a partial or final arbitral award shall follow the rules of common procedure, set out in Law No. 5,869 of Jan. 11, 1973 (Code of Civil Procedure), and shall be filed within 90 (ninety) days subsequent to receipt of the notice of the respective partial or final award, or of the decision on the request for clarifications.

2. The judgment upholding the request for annulment shall declare the arbitral award annulled, in the cases provided in Article 32, and shall determine, as the

³⁸ The original text reads as follows: “Art. 23[. . .] § 1o Os árbitros poderão proferir sentenças parciais. § 2o As partes e os árbitros, de comum acordo, poderão prorrogar o prazo para proferir a sentença final.” The Amendment, *supra* note 17, at art. 23.

³⁹ The original text reads as follows: “Art. 32. [. . .]I - for nula a convenção de arbitragem.” The Amendment, *supra* note 17, at art. 32.

case may be, that the arbitrator or the arbitral tribunal render a new arbitral award.

3. The declaration of annulment of the arbitral award may also be sought by way of objections, within the meaning of Article 475-L et seq. of Law No. 5,869, of Jan. 11, 1973 (Code of Civil Procedure), or in the event of judicial enforcement.

4. An interested party may institute proceedings seeking the issuance of an additional award, in the event that the arbitrator failed to decide all claims submitted to arbitration.⁴⁰

Pursuant to Article 34 of the 1996 Arbitration Law, all arbitral awards rendered within Brazilian territory are considered domestic.⁴¹ While the 1996 Arbitration Law does not distinguish between

⁴⁰ The original text reads as follows: “Art. 33. A parte interessada poderá pleitear ao órgão do Poder Judiciário competente a declaração de nulidade da sentença arbitral, nos casos previstos nesta Lei. § 1o A demanda para a declaração de nulidade da sentença arbitral, parcial ou final, seguirá as regras do procedimento comum, previstas na Lei no 5.869, de 11 de janeiro de 1973 (Código de Processo Civil), e deverá ser proposta no prazo de até 90 (noventa) dias após o recebimento da notificação da respectiva sentença, parcial ou final, ou da decisão do pedido de esclarecimentos. § 2o A sentença que julgar procedente o pedido declarará a nulidade da sentença arbitral, nos casos do art. 32, e determinará, se for o caso, que o árbitro ou o tribunal profira nova sentença arbitral. § 3o A declaração de nulidade da sentença arbitral também poderá ser arguida mediante impugnação, conforme o art. 475-L e seguintes da Lei no 5.869, de 11 de janeiro de 1973 (Código de Processo Civil), se houver execução judicial. § 4o A parte interessada poderá ingressar em juízo para requerer a prolação de sentença arbitral complementar, se o árbitro não decidir todos os pedidos submetidos à arbitragem.” The Amendment, *supra* note 17, at art. 33.

⁴¹ The original text reads as follows: “Art. 34. A sentença arbitral estrangeira será reconhecida ou executada no Brasil de conformidade com os tratados internacionais com eficácia no ordenamento interno e, na sua ausência, estritamente de acordo com os termos desta Lei. *Parágrafo único. Considera-se sentença arbitral estrangeira a que tenha sido proferida fora do território nacional.*” The Amendment, *supra* note 17, at art. 34; *See* S.T.J., Resp., 1.231.554 *Nuovo Pignone* do RJ, 24.05.2011 (The Superior Court of Justice’s decision in *Nuovo Pignone*, in which the court found that Article 34 of the Law adopted the territorial criterion set out in the general rule of Article I(1) of the New York Convention); *see also* S.T.J., MC 17.607 *Nuovo Pignone* do RJ, 03.02.2011; *see also* Arnoldo

international and domestic arbitration, the territorial criterion under Article 34 specify the place where annulment proceedings can be instituted, i.e. before Brazilian courts or foreign courts of the seat of arbitration. Accordingly, Brazilian courts can entertain jurisdiction over annulment proceedings that concern domestic awards.

In particular, the Amendment replaced Paragraph I and removed the former Paragraph V to Article 32 of the 1996 Arbitration Law. The Amendment merely replaced the expression “convention to arbitrate” with “agreement to arbitrate,” which, if held as void, can substantiate a claim for annulment. Furthermore, the Amendment excluded the former Paragraph V on annulment in the event that the award was *infra petita*, i.e. failed to decide all claims submitted to arbitration.

The amended text of Article 32 provides that the following are grounds for annulment:

- (i) The arbitration agreement is void;
- (ii) The arbitrator lacked capacity to arbitrate the dispute;
- (iii) There is a lack of independence or impartiality of an arbitrator;
- (iv) The appointment of an arbitrator is inconsistent with the rules under the arbitration agreement;
- (v) The award fails to provide for the report, reasons, decision(s), date and place of issuance, signature by arbitrators – Article 26 pre-requisites;
- (vi) The award exceeds the limits of arbitral jurisdiction – *extra petita* and *ultra petita* awards;
- (vii) The award was rendered after the applicable time limit; and/or
- (viii) There was a due process violation.⁴²

Wald, *Nuovo Pignone v. Petromec: Amicus Curiae by the ICC Brazilian Committee*, 53 WORLD ARBITRATION AND MEDIATION REVIEW 339 (2011).

⁴² The Amendment, *supra* note 17, at art. 32.

In addition to the annulment grounds under Article 32 of the Law, Brazilian courts are likely to annul an award, which is considered contrary to public policy.⁴³ Pursuant to Article 33, subsection 1, and Article 33, subsection 3, parties can challenge the validity of an award via annulment proceedings or at the enforcement stage, respectively. In particular, a party in enforcement proceedings can object to the enforcement (*embargos à execução*) or file a request for advance dismissal of enforcement (*exceção de pré-executividade*). If the 90-day time limit for filing annulment proceedings has already elapsed, a court may reject objections to enforcement on the basis of Article 32.

Article 32 sets forth the grounds for an Article 33, subsection 1, or Article 33, subsection 3, annulment. Applying this provision, the STJ confirmed a previous decision by the Court of Appeal of the State of Parana in *Compagás v. Consórcio Carioca-Passarelli*. There, the consortium sought enforcement against Compagás, who objected to it on the grounds that the award was null and void under Article 32.⁴⁴ Likewise, in *Aginaldo Luiz de Campos v. Procred Tecnologia and Fomento Mercantil Ltda.*, the Court of Appeal of the State of São Paulo held that a party can rely upon Article 32 annulment grounds in objection to enforcement proceedings.⁴⁵

There is not much precedent regarding Brazilian courts' approach towards annulment proceedings and objections made in enforcement proceedings running parallel. It is probable that in light of the principle of *res judicata*, courts will give precedence to the decision first rendered on the challenge based upon Article 32. The institution of annulment proceedings does not automatically suspend the effects of an arbitral award. Rather, it is up to the interested

⁴³ Likewise, foreign awards are not recognized and enforced in Brazil in case they are contrary to public policy. See The Amendment, *supra* note 2, at art. 39(II); see Decreto No. 4.657, de 4 de Setembro de 1942, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 04.09.1942 (Braz.); see Decreto No. 13.105, de 16 de Março de 2015, [D.O.U.] de 17.03.2015 (Braz.).

⁴⁴ S.T.J., Recurso Especial 639.219-PR, 3ª Turma, Relator: Nancy Andrighi, 19.04.2005, 6 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 252-56; Resp. 639.219, Consorcio Passarelli v. Compagas do PR, 19.04.2005.

⁴⁵ T.J/S.P., Ap. Civ. No. 0041293-79.2008.8.26.0224, Relator: Alexandre Lazzarini, 15.03.2011, DIÁRIO DA JUSTICA [D.J.], 07.04.2011, 227 (Braz.).

party to request provisional measures aimed at the suspension of the effects of the award subject to ongoing challenge.

In particular, the Court of Appeal of the State of Rio de Janeiro has rendered two conflicting decisions on the subject. In *Petróleo Brasileiro S.A – Petrobras v. Luiz Tavares de Oliveira*, the Court granted an injunction that suspended the effects of an arbitral award issued against Petrobras, on the grounds that the lack of the arbitration agreement was manifest and that allowing for immediate payment would pose excessive burden upon the opposing party.⁴⁶ However, in annulment proceedings of an award concerning a lease agreement of a Rio de Janeiro hotel, the same Court refused to grant an injunction.⁴⁷ The Court held that, similar to judicial decisions, an award is fully effective from the moment that notice is given to the parties.⁴⁸

In another case, *Renuka do Brasil S.A. v. International Paper do Brasil Ltda.*, a Sao Paulo court deciding the case of first instance initially issued an interim injunction suspending the effects of the award. However, the request for annulment was dismissed on the merits and the order was subsequently revoked. *Renuka* relied upon the inclusion in the terms of reference of new claims as grounds for annulment under Article 32, which was rejected by the court.⁴⁹

Brazilian courts have generally interpreted Article 32 restrictively, refusing to review the merits of arbitral awards. A joint study by the Brazilian Arbitration Committee (CBAr) and the FGV Law School found that of the 700 Brazilian court decisions concerning arbitration rendered between 2001 to 2007, only 14 went so far as to actually set aside arbitral awards.⁵⁰

⁴⁶ T.J/R.J., Ap. Civ. 2004.002.04323, Relator: Elisabete Filizzola Assunção, 14.3.2004, 3 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 243-46.

⁴⁷ T.J/R.J., Ap. Civ. 2001.001.07617, Relator: Roberto de Abreu e Silva, 31.07.2001, 4 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 255-57.

⁴⁸ *Id.*

⁴⁹ D.J.S.P. 583.00.2011.200971-0, Relator: Dimitrios Zarvos Varellis, 07.07.2012, 1, DIÁRIO OFICIAL DOS ESTADOS DE SÃO PAULO [D.O.E.S.P.], 18.10.2011, 182 (Braz.); 36 REVISTA DE ARBITRAGEM E MEDIAÇÃO 391-400 (2013).

⁵⁰ There will be an update to this study that will be current up to 2014, though the results are not available at this time. *Research “Arbitration and the Judiciary,”* CBAr.ORG, available at <http://cbar.org.br/site/pesquisa-cbar-fgv-2007>, (last visited Jun. 22, 2015).

Several Brazilian decisions illustrate courts' reluctance to set aside arbitral awards. In *Doux/Frangosul v. W.M. and others*, the applicants alleged that the award was null and void on the grounds that it exceeded the limits of arbitral jurisdiction (*extra* and *ultra petita*) and that the arbitrators decided *ex aequo et bono*. Both the court of first instance and the court of appeals rejected the request for annulment by refusing to review the merits of the award. In its decision, the judge of first instance pointed out that state courts should act carefully when sitting on annulment proceedings in support of the principle of peaceful settlement of disputes; in the judge's view, an annulment decision would ultimately restore the dispute.⁵¹ Furthermore, in *Interclínicas Planos de Saúde S.A. v. Saúde ABC Planos de Saúde*, the Court of Appeal of the State of São Paulo refused to review the merits of the award, thereby rejecting the request for annulment of an award that concerned a party in extrajudicial liquidation. While the arbitrability of a company in insolvency proceedings had already been affirmed by the STJ in the same case, the Court of Appeal rejected annulment founded upon alleged lack of jurisdiction and procedural irregularities.⁵²

In one final example, Brazilian courts refused to grant injunctions in a request for annulment of a partial foreign liability award in the landmark case of *Renault v. CAO A*. CAO A had argued that the arbitrators did not respect the time limit for rendering the award and that they failed to decide the entire dispute. In particular, the Court of Appeal of the State of São Paulo confirmed a lower court decision finding that it lacked jurisdiction to entertain annulment proceedings of awards rendered abroad.⁵³

⁵¹ T.J/R.J., 2000.001.154-978-5, Relator: Márcia C.S.A. de Carvalho, 01.06.2002, 19 REVISTA DE DIREITO BANCÁRIO, DO MERCADO DE CAPITAIS E DA ARBITRAGEM, 359-65; T.J/R.J., Ap. Civ. 20.942/02, Relator: Reinaldo Pinto Alberto Filho, 22.10.2002, 19 REVISTA DE DIREITO BANCÁRIO, DO MERCADO DE CAPITAIS E DA ARBITRAGEM, 365-71; see commentary by Selma M. Ferreira Lemes on these decisions, pp. 371-76.

⁵² T.J/S.P., 583.00.2008.224372-5v, Relator: Anderson Cortez Mendes, 15.12.2008, 22 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 250-58; S.T.J.J., MC 14.295, Relator: Nancy Andrighi, 08.06.2008, 19 REVISTA DE ARBITRAGEM E MEDIAÇÃO 167-72; see commentary by Arnaldo Wald, pp. 183-90.

⁵³ T.J/S.P., 124.217.4/0, Relator: Rodrigues de Carvalho, 16.09.1999, 7 REVISTA DE DIREITO BANCÁRIO, DO MERCADO DE CAPITAIS E DA ARBITRAGEM,

Today, Brazilian law expressly authorizes partial awards under Article 23. It also provides that the fact that an award has not decided all of the claims that were submitted to arbitration (*infra petita* awards) does not serve as grounds for annulment, due to the exclusion of Article 32, subsection V. Instead, an interested party may institute proceedings under Article 33, subsection 4, in order to obtain a decision on matters that were undecided by the state courts.

VI. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS

Article 35 and the introductory paragraph of Article 39 of the Law have been amended to read as follows:

Article 35. In order to be recognized or enforced in Brazil, a foreign arbitral awards is subject, solely, to recognition proceedings before the Superior Court of Justice.

Article 39. Recognition and enforcement of a foreign arbitral award shall be refused if the Superior Court of Justice finds that: [. . .]⁵⁴

Like foreign court decisions, foreign arbitral awards must be recognized by the STJ for them to be internalized and incorporated into Brazilian legal order. Previously, Brazil utilized a centralized system of recognition for foreign decisions. Until December 2004, the STF had jurisdiction over the recognition of foreign judicial decisions and awards. This jurisdiction was subsequently transferred via the passage of Constitutional Amendment No. 45. Accordingly, the amendment to Article 35 made the relevant adjustment by replacing

336-47; *see also* commentary, pp. 347-48; S.T.J., 249.255-SP, Relator: Aldir Passarinho Junior, 6.12.2001, 16 REVISTA DE DIREITO BANCÁRIO, DO MERCADO DE CAPITAIS E DA ARBITRAGEM, 381-82 (2002).

⁵⁴ The original text reads as follows: “Art. 35. Para ser reconhecida ou executada no Brasil, a sentença arbitral estrangeira está sujeita, unicamente, à homologação do Superior Tribunal de Justiça . . . Art. 39. A homologação para o reconhecimento ou a execução da sentença arbitral estrangeira também será denegada se o Superior Tribunal de Justiça constatar que [. . .].” The Amendment, *supra* note 17.

the term “Federal Supreme Court” (STF) with “Superior Court of Justice” (STJ).

The Amendment to the introductory clause to Article 39 replaced the expression “may” with “shall.” Therefore, when no international agreement that is more favorable than the amended provisions recognizing foreign arbitral awards under the Arbitration Law exists, the latter prevails. However, Article 960 § 3° of the new Brazilian Code of Civil Procedure (“CPC”) does provide that when it does exist, the international treaty will prevail over the internal law.

The substantive grounds for the refusal of recognition under Article 39 are virtually identical to those set forth in the New York Convention on the Recognition and Enforcement of Arbitral Awards (“NYC”). Nonetheless, in most of the official versions of the introductory paragraph of Article V, NYC uses the expression “may” and its equivalent, as opposed to “shall.”

Generally, the STJ has strictly interpreted the grounds for non-recognition. The Court has examined more than 60 foreign arbitral decisions between 2005 and 2014, taking a favorable approach to arbitration. In particular, parties objecting to recognition have made the following arguments:

- (i) The award violates Brazilian public policy;
- (ii) Service of the arbitration proceedings was invalid;
- (iii) The award lacks reasons;
- (iv) Failure to comply with formalities for recognition, e.g. lack of certified translation;
- (v) Parallel judicial proceedings in Brazil or abroad;
- (vi) The underlying contract does not exist; and/or
- (vii) The arbitration agreement does not exist.

The STJ has refused to review the merits of the awards in recognition proceedings, the landmark cases being *L’Aiglon S.A. v. Têx-*

til União S.A.,⁵⁵ Thales Geosolutions Inc. v. Fonseca Almeida Representações e Comércio Ltda.,⁵⁶ Atecs Mannesmann GmbH v. Rodrimar S/A Transportes Equipamentos,⁵⁷ and Weil Brothers Cotton Inc v. Pedro Ivo De Freitas - Espólio.⁵⁸

In *Thales Geosolutions Inc.*, a Brazilian party resisting enforcement argued that the award was null and void because of the arbitrators' failure to apply a particular rule of Brazilian civil law, which allegedly constituted a violation of Brazilian public policy. The STJ found that the arbitral tribunal's non-application of a given statutory provision could not result in breach of public policy.⁵⁹

Furthermore, there are a few cases in which the parties have objected to enforcement, alleging that the arbitration agreement does not exist because the contract containing the arbitration clause was not signed by the parties. According to these parties, proof of express consent to arbitrate, as allegedly required under the 1996 Arbitration Law, can only be proved by way of signature and thus constitutes a public policy rule. In *L'Aiglon S.A. v. Têxtil União S.A.*, the STJ took into account the parties' behavior during the proceedings when determining whether the parties consented, despite the fact that the parties had never signed the contract. The Court referred to Article II, subsection 2, of the NYC, which provides that an arbitration clause may be inserted in the contract that is signed by the parties or "*contained in an exchange of letters or telegrams.*"⁶⁰ Of note, this was the first decision in recognition proceedings where the NYC was applied.

⁵⁵ S.T.J., SEC 856/EX, Relator: Min. Carlos Alberto Menezes Direito, 18.05.2005, 6 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 227-38; see commentary by Arnoldo Wald and Valeria Galindez, pp. 238-45.

⁵⁶ 7 REVISTA DE ARBITRAGEM E MEDIAÇÃO 196-204 (2010); see commentary by Arnoldo Wald, pp. 204-11; S.T.J., SEC 802/US, Relator: Min. Jose Delgado, 17.08.2005 [D.J.], 19.09.2005, 175 (Braz.).

⁵⁷ S.T.J., SEC 3035/EX SEC 3035-EX, Relator: Min. Fernando Gonçalves, 19.08.2009, 25 REVISTA BRASILEIRA DE ARBITRAGEM 119-31; see commentary by Rabih A. Nasser, pp. 131-37.

⁵⁸ S.T.J., SEC 4213/EX, Relator: Min. João Otávio de Noronha, 16.06.2013.

⁵⁹ S.T.J., SEC 802/US, Relator: Min. José Delgado, 17.08.2005, 7 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 198.

⁶⁰ S.T.J., SEC 856/EX, Relator: Min. Carlos Alberto Menezes Direito, 18.05.2005 [D.O.E.S.P.], 02.10.2015, 856 (Braz.); 6 REVISTA DE ARBITRAGEM E MEDIAÇÃO 233 (2005).

The dispute in *Oleaginoso Moreno Hermanos Sociedad Anónima et al. v. Moinho Paulista Ltda.* arose from commodities purchase and sale agreements that were concluded over the phone. The opposing party opposed enforcement, alleging that there was no written agreement to arbitrate. The party participated in the proceedings, but continued to plead lack of jurisdiction. While admitting that the agreement could be oral, the Court held that the evidence presented did not contain proof of express agreement by the party—accordingly, recognition of the agreement would be contrary to public policy.⁶¹

Another interesting case is *GE Medical Systems Information Technologies Inc. v. Paramedics Electromedicina Comercial Ltda.*, which involved parallel proceedings before Brazilian and U.S. courts. While the Brazilian party sought an anti-suit injunction against arbitration in Brazilian court, the U.S. party obtained an injunction from a U.S. court enjoining the parties to arbitration. In recognition proceedings of the award, the STJ took notice of the pending Brazilian proceedings, while recognizing the award on the basis of *res judicata* in the case of concurrent jurisdiction.⁶²

The STJ has consistently referred to NYC provisions in its most recent decisions.⁶³ To illustrate these references, the Court held that the burden of proof concerning the grounds for refusal of recognition of foreign arbitral awards under Article V, subsection 1, of the Convention and Article 38 of the Arbitration Law lies with the party that objects to recognition.⁶⁴

⁶¹ S.T.J., SEC 866/EX, Relator: Felix Fischer, 17.05.2006, 12 REVISTA DE ARBITRAGEM E MEDIAÇÃO 256-64.

⁶² S.T.J., SEC 854-US, Relator: Massami Uyeda, 16.10.2013, 41 REVISTA BRASILEIRA DE ARBITRAGEM, 133-53.

⁶³ For example, the following decisions by the STJ present direct references to the Convention: Direct reference to Article I(1): R.S.T.J., 1.231.554, Relator: Nancy Andrighi, 24.05.2011, 30 REVISTA DE ARBITRAGEM E MEDIAÇÃO 271-379, and commentary by Francisco Cláudio de Almeida Santos, at 280-86; Direct reference to Article V(1)(a): S.T.J., 3.709/US, Relator: Teori Albino Zavascki, 14.06.2012, 34 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 363-77; See ARNOLDO WALD AND SELMA FERREIRA LEMES, ARBITRAGEM COMERCIAL INTERNACIONAL: A CONVENÇÃO DE NOVA IORQUE E O DIREITO BRASILEIRO, (Saraiva 2011).

⁶⁴ S.T.J., 3.709/US, Relator: Teori Albino Zavascki, 14.06.2012, 34 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 363-77; see commentary by Ana Gerdau de Borja, at 377-84.

The STJ's recent judgments demonstrate the Court's unequivocal contribution to arbitration in Brazil. Justice Castro Meira's vote in *Comverse v. American Telecommunication*⁶⁵ illustrates STJ's vision in this regard, while stating that the Court's effort to refer to the NYC in its decision is vital in order to ensure that its judgments echo internationally.

Furthermore, Article 26, subsection III, of the 1996 Arbitration Law requires that the arbitral tribunal explain the grounds for its decision in the award. The provision does not specify, however, whether it applies exclusively to domestic awards or if it also applies to foreign awards. However, the STJ confirmed in *Newedge v. Garcia* that failure to provide the grounds for the decision in a foreign arbitral award does not necessarily constitute valid grounds for refusal of recognition.⁶⁶

The above decision is in line with a former dissenting opinion by Justice Massami Uyeda in *Kanematsu v. ATS*, in which the American Arbitration Association (AAA) had expressly stated that the award need not specify the underlying reasons and that this would not warrant refusal of recognition.⁶⁷ The STJ Court did not have to decide this issue in *Kanematsu* because it found that there was no consent to arbitrate by ATS. In any event, both *Newedge* and *Kanematsu* demonstrate that when parties have agreed upon arbitration rules allowing arbitral tribunals to omit the reasons underlying their decisions, said rules cannot serve as a valid basis to object to recognition and enforcement.

Lastly, and in regards to public policy, the STJ partially recognized the foreign ICC award in *Ferrocarriles v. Supervia*,⁶⁸ where it recognized that certain items in a section of the decision regarding damages fixed in U.S. dollars were subject to conversion into Bra-

⁶⁵ S.T.J., 3.709/US, Relator: Castro Meira, 14.06.2012.

⁶⁶ S.T.J., SEC 5692-EX, Relator: Ari Pargendler, 20.08.2014, 43 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 372-84; see commentary by Bruno Barreto Azevedo Teixeira and Ana Victoria Pelliccione da Cunha, at 372-80.

⁶⁷ S.T.J., SEC 885-EX, Relator: Francisco Falcão, 18.04.2012.

⁶⁸ S.T.J., SEC 2410-EX, Relator: Nancy Andrichi, 19.02.2014.

zilian reals on the date of payment in addition to monetary adjustment (*correção monetária*).⁶⁹ While partial recognition seems detrimental to the party seeking enforcement, this decision, as it relates to the concept of public policy, was in line with a previous judgment in *Thales Geosolutions v. Farco*.⁷⁰ While recognizing the award, the Court noted that the following matters could result in non-recognition on public policy grounds: constitutional, administrative, tax, criminal, family law, civil procedure, insolvency proceedings, the police, formalities concerning certain acts, wage, currency, and fraud.

The Amendment also clarified jurisdiction to grant interim measures by stipulating a new chapter on the subject:

CHAPTER IV-A

Provisional and Urgent Relief

Article 22-A. Before the arbitration is instituted the parties may resort to the Judiciary in order to obtain provisional or urgent measures.

Sole Paragraph. The efficacy of provisional or urgent measure terminates where the interested party does not request the institution of arbitration within the time period of 30 (thirty) days counting from the date of effectiveness of the respective decision.

Article 22-B. Once instituted the arbitration, the arbitrators shall maintain, modify or terminate the provisional or urgent measure granted by the Judiciary.

⁶⁹ See Roberto Rosas, *Sentença arbitral estrangeira. Homologação no STJ. Ofensa à ordem pública. Limites EDcl na SEC 2410*, 43 REVISTA DE ARBITRAGEM E MEDIAÇÃO 386 (2014).

⁷⁰ S.T.J., SEC 802-US, Relator: Justice José Delgado, 17.08.2005, 7 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 196-204 (in which the Court found that the principle of *exceptio non adimpleti contractus* was not enshrined in the concept of public policy.); see commentary by Arnaldo Wald, at 204-11.

Sole Paragraph. Where arbitration is already instituted, the provisional or urgent measures shall be directly requested before the arbitrators.⁷¹

Before the Amendment, Brazilian courts had already affirmed state courts' jurisdiction over provisional and urgent measures before the institution of arbitration.⁷² However, there was still discussion regarding the status of such measures after the commencement of arbitration.⁷³ Specifically, there was disagreement as to whether or not: (i) state courts kept jurisdiction to maintain the order they had previously issued until arbitrators ruled otherwise; (ii) state court proceedings had to be immediately terminated; and (iii) if arbitrators could modify and terminate that injunction order.

In 2012, the STJ definitively ruled upon such matters in *Itarumã v. PCBIO*.⁷⁴ According to the Court, arbitrators possess jurisdiction to order interim measures. However, because arbitrators lack coercive powers, when a party resists compliance with such an order, they may request the courts' assistance in enforcement. In addition, the Court held that once the arbitral tribunal is constituted, state

⁷¹ The original text reads as follows: "CAPÍTULO IV-A–DAS TUTELAS CAUTELARES E DE URGÊNCIA

Art. 22-A. Antes de instituída a arbitragem, as partes poderão recorrer ao Poder Judiciário para a concessão de medida cautelar ou de urgência. Parágrafo único. Cessa a eficácia da medida cautelar ou de urgência se a parte interessada não requerer a instituição da arbitragem no prazo de 30 (trinta) dias, contado da data de efetivação da respectiva decisão. Art. 22-B. Instituída a arbitragem, caberá aos árbitros manter, modificar ou revogar a medida cautelar ou de urgência concedida pelo Poder Judiciário. Parágrafo único. Estando já instituída a arbitragem, a medida cautelar ou de urgência será requerida diretamente aos árbitros." The Amendment, *supra* note 17.

⁷² T.J/SP., 494.408-4/6, 4ª Câmara de Direito Privado, Relator: Ênio Zuliani, 28.06.2007, 17 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 274-77.

⁷³ In this case, the reporting Justice, whose opinion was followed by the majority of the members of the Court of Appeal of the State of São Paulo, despite having recognized the arbitral jurisdiction, noted that the provisional order should be maintained and that the suit should not be dismissed until the arbitral award was rendered. T.J.S.P., 280.034-4/3-00, 6ª Câmara de Direito Privado, Relator: Reis Kuntz, 27.02.2003, 1 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 215-17; *see also* commentary by Carlos Augusto da Silveira Lobo and Rafael de Moura Rangel Ney, at 217-20.

⁷⁴ S.T.J., Resp 1.297.974/RJ, Relator: Nancy Andriighi, 12.06 2012, 36 REVISTA DE ARBITRAGEM E MEDIAÇÃO, 377-84; *see* commentary by Juliana Barbosa Pechincha, at 384-90.

courts no longer have jurisdiction to rule on the interim measure; where an interim order has already been issued by a state court, it remains in force, subject to review by the arbitral tribunal, which has the power to maintain, modify, or set aside such a court order. Of note, the Amendment has made the STJ's findings in *Itarumã* black letter law.

VII. THE ARBITRAL LETTER ('CARTA ARBITRAL')

There is another new chapter that has been included in the Arbitration Act:

CHAPTER IV-B

THE ARBITRAL LETTER

Article 22C. The arbitrator or the arbitral tribunal may issue an arbitral letter so that the body of national State jurisdiction enforce or determine enforcement within the area of its territorial jurisdiction of an act requested by the arbitrator.

Sole Paragraph. In such enforcement shall observe confidentiality, so long as the confidentiality of the arbitration is demonstrated.⁷⁵

The Arbitral Letter set out in Chapter IV-B provides for a mechanism of cooperation between arbitrators and state courts, as arbitral tribunals lack the police powers to be able to ensure that arbitral decisions are enforced. Procedural rules on the Arbitral Letter are set out in the new Code of Civil Procedure.⁷⁶

⁷⁵ The original text reads as follows: "CAPÍTULO IV-B—DA CARTA ARBITRAL

Art. 22-C. O árbitro ou o tribunal arbitral poderá expedir carta arbitral para que o órgão jurisdicional nacional pratique ou determine o cumprimento, na área de sua competência territorial, de ato solicitado pelo árbitro. Parágrafo único. No cumprimento da carta arbitral será observado o segredo de justiça, desde que comprovada a confidencialidade estipulada na arbitragem." The Amendment, *supra* note 17.

⁷⁶ C.P.C., Lei No. 13.105, Art. 237 §4 (Braz.).

VIII. ARBITRATION AND CORPORATE LAW

Finally, the Amendment's Law No. 6.404 of 1976 included special provisions concerning the inclusion of arbitration agreements in bylaws of Brazilian corporations. The relevant provisions read that:

Article 136-A. The approval of the inclusion of an arbitration agreement into bylaws, with due regard to the quorum set out in Article 136, is binding upon all shareholders, while it ensured the dissenting shareholder the right of withdrawal of the corporation subject to reimbursement of the value of its shares, within the meaning of Article 45.

Paragraph 1. The agreement will only be effective after 30 days have elapsed from registration of the proceedings of the shareholders' meeting approval.

Paragraph 2. The right of withdrawal set out in the introductory paragraph is not applicable:

I – where the inclusion of the arbitration agreement in the bylaws represents a condition in order for the shares to be admitted to trade in a listed segment of the Stock Exchange or over the counter market requiring diffuse shareholding control of minimum 25% of the shares of each category or class.

II – where inclusion of the arbitration agreement concerns bylaws of a public corporation whose shares possess liquidity and are dispersed on the market, within the meaning of letters 'a' and 'b' of Subparagraph II of Article 137 of this Law.⁷⁷

⁷⁷ The original text reads as follows: "Art. 136-A. A aprovação da inserção de convenção de arbitragem no estatuto social, observado o quorum do art. 136, obriga a todos os acionistas, assegurado ao acionista dissidente o direito de retirar-se da companhia mediante o reembolso do valor de suas ações, nos termos do art. 45. § 1o A convenção somente terá eficácia após o decurso do prazo de 30 (trinta) dias, contado da publicação da ata da assembleia geral que a aprovou. § 2o O direito de retirada previsto no caput não será aplicável: I - caso a inclusão da convenção de arbitragem no estatuto social represente condição para que os valores

The enactment of Law No. 6.404 on corporations and the creation of the Brazilian Securities Commission (CVM)⁷⁸ in 1976 (Law No. 6.385/76) promoted the expansion of Brazilian capital markets in one phase, in addition to strengthening the rights of minority shareholders. Until 1980, only some publicly traded companies existed, and the majority shareholders considered themselves the owners of the assets of their respective companies. There was virtually no state court litigation nor arbitrations that involved corporate matters.

Corporate law disputes grew following the enactment of the Constitution in 1988 (which re-established the rule of law in Brazil), the enactment of new pieces of legislation on financial and capital markets, the entry of foreign capital into the stock exchange and private equity, joint ventures between Brazilian and foreign companies and, lastly, the privatization process in the mid-1990s. Such disputes concerned the interpretation and application of shareholders' agreements and the purchase and sale of shares. The São Paulo Stock Exchange (BM&F/BOVESPA) has become renown worldwide, and the shares of numerous Brazilian corporations are now traded in the New York Stock Exchange.

Article 109, subsection 3, of Law No. 6.404/76 (as amended by Law No. 10.303/2011) sets forth the possibility of providing for arbitration in the corporation's bylaws in order to settle disputes between the company and its shareholders, as well as majority and minority shareholders.⁷⁹ The companies which participate in the New

mobiliários de emissão da companhia sejam admitidos à negociação em segmento de listagem de bolsa de valores ou de mercado de balcão organizado que exija dispersão acionária mínima de 25% (vinte e cinco por cento) das ações de cada espécie ou classe; II - caso a inclusão da convenção de arbitragem seja efetuada no estatuto social de companhia aberta cujas ações sejam dotadas de liquidez e dispersão no mercado, nos termos das alíneas "a" e "b" do inciso II do art. 137 desta Lei." Lei No. 6.404/76 Art. 136-A.

⁷⁸ The CVM has concluded international agreements such as the Memorandum of Understanding signed with the U.S. Security Exchange Commission [SEC] on July 1, 1988, by David S. Ruder, SEC Chairman, and Arnaldo Wald, CVM Chairman. *Memorandum of Understanding: United States Securities and Exchange Commission and Comissão de Valores Mobiliários*, SECURITIES AND EXCHANGE COMMISSION OF BRAZIL, (July 1, 1988), available at <http://www.cvm.gov.br/export/sites/cvm/menu/internacional/acordos/anexos/us-sec-in.pdf>.

⁷⁹ Lei No. 6.404/76 Art. 109 §3.

Market (“Novo Mercado”) of BOVESPA are subject to the New Market Rules, which provide for arbitration in broader terms than Article 109, subsection 3, expressly stating that the company’s senior managers and fiscal council members are also subject to arbitration in order to settle disputes concerning listing and sanctions regulations, as well as listing agreements.⁸⁰

The Amendment also adopted, in principle, the majority vote rule that generally applies to disperse shareholding control, e.g. public companies.⁸¹ However, the right of withdrawal of dissenting shareholders exists in corporations whose shares are not publicly traded and do not participate in certain listing segments of the Stock Exchange.

The Amendment did not address the question of party representation in arbitration involving disputes between controlling and minority shareholders in companies with widely traded stock. One solution to this problem could be the creation of a trust. The trustee would represent the minority interests, giving them the right to sue, be sued, appoint lawyers, and receive summons. Another possible solution could be the presumption adopted by German law, which provides that this type of dispute constitutes a multiparty arbitration, which should be carefully regulated in the arbitration agreement.⁸² Alternatively, it is possible to think of the use of class action, which is accepted in Brazilian law in the case of capital markets fraud (Law No. 7.913/89).

In addition, the effects of an arbitral decision upon third parties concerning the annulment of shareholders’ general meetings and their resolutions has also caused concern in Brazil. Such parties are not subject to the arbitration clause contained in the company’s by-

⁸⁰ NOVO MERCADO LISTING RULES, Art. 13.1 (2008), available at <http://www.bmfbovespa.com.br/en-us/markets/download/regulamento.pdf>.

⁸¹ See Pedro Batista Martins, *A arbitrabilidade subjetiva e a imperatividade dos direitos societários como pretenso fator impeditivo para a adoção da arbitragem nas sociedades anônimas*, in *A EVOLUÇÃO DO DIREITO NO SÉCULO XXI: ESTUDOS EM HOMENAGEM AO PROF. ARNOLDO WALD* 445-63 (Coimbra, Diogo Leite de Campos, Gilmar Ferreira Mendes, Ives Gandra da Silva Martins eds. 2007).

⁸² Hilmar Raeschke-Kessler, *Objective Arbitrability of Corporate Disputes: The German Perspective*, 3 *EUROPEAN BUSINESS ORGANIZATION LAW REVIEW* 2002, at 553-67.

laws—thus, arbitral decisions would not be binding on them. In cases where the arbitral award impinges upon third parties' rights, the latter may file a declaratory action, a third-party defense, or a writ of mandamus, in order to avoid the effects of the arbitral award.