

Arbitration Notes To The Oral Presentation At American Arbitration Association (D.C. AND N.Y.)

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1. In my presentation I intend to update the audience basically with the legal aspects involving a new investment law and the new jurisdiction for the recognition and enforcement of arbitral award.

Public-Private Partnership

2. On December 30, 2004, after political debate about the role of State and the ground of its intervention in the economic sector, it was enacted the public-private partnership law ("PPP LAW").

3. Such law authorizes the use of arbitration to solve disputes arising out of or related to the PPP' Agreement.

4. In fact, in my opinion, the law much more than only authorizes it really encourages arbitration as a means of solving conflicts involving public entities.

5. I say that the law encourage the use of arbitration mainly because, if we take an overview on all recent legislation related to public law issued on the last 8/10 years, we will see that the State has been very supportive to arbitration.

6. For example, Permission/Concession Law (1995); Petroleum Law (1997); Telecom Law (1997); and, more recently, Water Transportation Law.

7. Hence, it wouldn't be different with PPP legislation. Even more when the government already tried, although unsuccessfully, to establishes for real estate business purposes, the compulsory arbitration which is a matter subject to an old taboo.

8. However, even though the PPP law encourage arbitration, on the other hand it imposes certain restrictions in the arbitration proceeding:

9. - It must take place in Brazil;

10. - The language shall be Portuguese.

11. Regarding the first restriction – that is arbitration must be carried out in Brazil – I should stress that the wording of such provision fails on the legal technicality.

12. I mean that the provision does not clearly say that Brazil shall be the seat of arbitration

13. Although scholars have said that this has been the implied intention of the legislation, in true, the law says that the proceeding shall be performed in Brazil.

14. My view is that this point will be clarified in the bid prospectus or in the draft PPP agreement and, hence, the private partner still has some room to persuade the State entities.

15. However, on the other hand, nothing prevents the bidder to try to expand the scope of the provision and say that not only the seat shall be in Brazil but also the proceedings shall be carried out in the country. This is an open point to be clarified in due time.

16. What is positive and negative on fixing Brazil as the place of arbitration?

17. From a positive standpoint, being Brazil the seat of arbitration, I can say that Brazilian Courts have been very supportive to arbitration.

18. For example, positive and negative legal effects of the arbitration agreement have been fully recognized; freedom to choose the applicable rules have been confirmed by Rio de Janeiro and São Paulo's courts even against an old law supposedly of public order which restrict such freedom.

19. The other positive point in fixing Brazil the seat of arbitration is that enforcement of provisional relief by foreign investor will be much easier, first because of the support of the Brazilian Courts as we can observe from current jurisprudence and, secondly because the provisional relief shall not be enforced through Superior Court proceedings since the remedy will be rendered within the Brazilian jurisdiction.

20. From a negative standpoint, I see the lack of freedom to choose a neutral venue by the private investor and also the fact that the proceeding to set aside or suspend the award can be subject to 3 level of appeal and even to a 4th level (Supreme Court) in case of violation of Brazilian Constitution.

21. However, in this regard it seems that the Courts won't be flexible in accepting request for annulment of arbitral award unless based on strong legal arguments.

22. And I base this opinion on a recent decision of Rio de Janeiro's Court.

23. The second restriction of PPP law deals with the language.

24. The law is clear in imposing Portuguese as the applicable language.

25. The preliminary understanding is that all documents, procedural order, depositions, etc. shall be carried out in Portuguese.

26. If such strict interpretation of the law prevail, it will jeopardize abilities of the parties to appoint arbitrators.

27. Nevertheless, I think that nothing would prevent the use of a foreign language in the proceeding, including depositions, provided that all parties agree and the costs of translations are borne by the foreign investor.

28. So, moving on to the second updating issue...

29. As a general standpoint I would like to say arbitration law was well received by the community.
30. The enactment of the Law 9.307/96 was followed by conferences; variety of books and articles; constitution of important chambers sponsored by well known Brazilian institutions, including the Bar Association of Rio de Janeiro State.
31. 2 Arbitration and Mediation Reviews published on a quarterly basis and another one annually. Arbitration will be studied at Law Universities.
32. Mediation got ride of arbitration and increased its use because of the success of arbitration.
33. Judiciary is dealing well with arbitration law and has issued a very good and supportive decisions and jurisprudence.
34. Unfortunately, the main problem are the attorneys' lack of culture. They are still reluctant to accept a mean of solving disputes that do not allow them to appeal.
35. Hence, attorneys are the main focus to get the culture change in favour of alternative dispute resolution mechanisms.
36. But there is a light at the end of the day: 900 attendants in a short course sponsored by Rio's Bar Association in 2004!!!

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