Twenty years of Brazilian Arbitration Law: overview and prospects

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I. HISTORICAL INTRODUCTION.

1. From a pragmatic standpoint we can say that Brazil has been dealing with arbitration ages before Law n. 9.307/96 came into force, on November 23, 1996[1].

Historically, Brazil has submitted to arbitration proceedings border disputes with Peru, Argentine and Guyana and indemnification claims resulting from accidents involving Brazilian and Sweden/Norwegian and North-American vessels.

Civil and commercial statutes and codes of civil procedure have provided for arbitration since the middle of the 19th century.

Brazil was even surprisingly used to obligatory arbitration of controversies arising out of insurance and services agreements since 1836. And under the Commercial Code and the Code of Commercial Procedure, both of 1850, most commercial disputes were compulsorily subject to this means of solving disputes.

Nevertheless beginning on 1866, obstacles were to be created, causing the *débâcle* of arbitration for more than a century.

2. The first restriction against arbitration came as a reaction to this obligatory nature. In 1866 it was abolished based on the argument that it contravened public policy: State courts could not be mandatorily set aside by virtue of law.

3. The same restrictive concept of public policy was also applied the very next year to voluntary arbitration although mitigated by a matter of timing: State courts could only be refrained from their jurisdiction after the controversy had already arisen and the parties had then signed an agreement to arbitrate.

Hence, in 1867, Decree n. 3.900, purporting to rule on arbitration, ended up introducing a new legal concept, namely the *compromisso* (*compromis*), tailored to be the unique legal agreement with power to enforce arbitration proceedings in lieu of State courts.

As a result, despite the previous existence of an arbitration agreement, the parties had to sign another document at the moment the dispute erupted – the so called *compromisso* (*compromis*) or submission agreement.

In other words, the arbitration agreement was not sufficient to ensure the arbitral jurisdiction and hence was viewed by scholars and case law as a non-valid clause, depending upon the fulfilment of a second step, that is, the execution of a *compromisso*.

Moreover, the parties had no legal obligation to execute the *compromisso*. This meant that the violation of the arbitration clause could not be countered through specific performance, and damages were nearly impossible to be obtained. Henceforth, the arbitration agreement was considered a *caput mortum*. Its validity was based exclusively on moral and ethical principles.

4. The second barrier was introduced later on in the legal scenario and meant to require a *state stamp* to the arbitral award. The decision issued by the arbitrators should be submitted to the State courts for review of compliance with formalities.

This meant that the party had to fulfill the judicial homologation requirement in order to confer enforceability to the arbitral award.

This second restriction (*i.e.* judicial homologation) further eliminated arbitration's advantages of celerity and confidentiality.

4. As such, from 1867 to 1996, arbitration stood undeveloped in Brazil due to these two historical barriers.

Case law and scholars were so adamant on these restrictions that isolated support from some decisions and opinions would not be enough to bring arbitration back to its tracks.

This goal would only be achieved through the enactment of new legislation, providing arbitration with an updated set of rules.

5. However, the few existing arbitration supporters would have to face yet another challenge in order to reach such goal: arbitration was not studied at Law Schools and even celebrated jurists had never heard about it. Although inserted into a variety of Codes, nobody knew it. Arbitration was a *dead rule* with absolutely no legal consequences.

Nevertheless, during the 80's a rush of fresh air came to shake the old judicial structure. Access to justice had to be modernized and enhanced. Procedural rules and myths were under debate.

II. THE 80's AND EARLY 90's.

6. During the 80's arbitration started to be re-examined in Brazil. Although still embryonic, a few discussions amongst Law Professors and some legal papers suggested a new trend.

7. A clear message was sent to the legal community from the Government: the Ministry of Justice drafted on three occasions an arbitration law attempting to clear the path for its development in Brazil in order to ease the burden on the Judiciary.

State courts had become overwhelmed and procedural changes would take time to be introduced. On the other hand, it was not feasible to increase State courts' staff and expenditures to the point required to face the increasing litigation.

For instance, in the beginning of 1986, the Minister for Labour enlarged the lower and high level courts throughout Brazil. However, statistics proved that the effort put in place was quite insufficient to deal with the large number of new lawsuits filed before the Labour Courts during the same year. Hence, the Minister had no other alternative than to send Congress a draft law whereby individual and collective labour disputes would be solved by arbitration.

8. Unfortunately, neither of the three draft laws prepared by a Committee appointed by the Ministry of Justice were delivered to Congress for analysis and approval.

Nonetheless, they allowed room for discussion on the need to improve access to justice, introducing changes in the Code of Civil Procedure to speed up court proceedings, and adopting arbitration as an alternative means to solve conflicts.

9. In the early 90's, the Superior Court of Justice faced a case where the key issue under discussion was the challenge of an arbitral award rendered without the execution of a *compromisso*.

The leading opinion upheld the arbitral award and made room for arbitration in the country.

10. In spite of the importance of the judgement, the development of arbitration in the country would still take a lot of time and be subject to dramatic legal doubt if it had to rely solely on the position of the courts.

11. On this assumption, a draft arbitration law was prepared during the second half of 1992 and submitted to Senate at the end of the first half of 1993.

This time, however, it was a direct initiative of the Senate, expressly requested by well-known Senator Marco Maciel, who had the unique opportunity to pass the law, four years later, as Vice-President of Brazil.

The draft law with minor changes was enacted and published in September 1996 to enter into force in November 1996, as Law n. 9307/96, also known as Marco Maciel Law due to his important role in filing the draft and providing support to its smooth progression through several Congress' Committees.

III. OVERVIEW OF THE BRAZILIAN ARBITRATON LAW (LAW N. 9307/96).

12. The first two issues tackled by the new arbitration law were the main obstacles that impaired the implementation of arbitration in Brazil (*i.e.* ineffectiveness of the arbitration agreement and need of judicial homologation of the arbitral award).

Henceforth, articles 5, 6 and 7[2] introduced legal mechanisms to enforce the arbitration agreement:

(a) Whenever the contract establishes an arbitration clause the dispute shall be decided by arbitrators.

(b) The arbitration shall be set up in accordance with the arbitration agreement. It can be either institutional or *ad hoc*.

(c) If the arbitration agreement does not contain the means to commence arbitration (*white* or *empty* arbitration clause) and should there be resistance by one of the parties, the other shall request the State courts to rule on the main points of the Terms of Reference and revert the parties to arbitration.

(d) If the arbitration agreement contains such means or incorporates by reference the rules of an arbitral chamber (*full* or *black* arbitration clause), the arbitration proceedings shall initiate in accordance thereof.

13. As such, there is no longer any doubt regarding the negative and positive effectiveness of the arbitration agreement. The arbitration clause is self-sufficient to impose arbitration (*positive legal effect*) and to set aside the court's jurisdiction (*negative legal effect*).

The following rulings are self-explanatory:

"*One of the innovations brought by the Arbitration Law (Law n. 9.307/96) was giving cogent force to the arbitration clause, setting aside necessarily the submission of the dispute to the courts and consequentially resulting on the extinction of the court proceedings with no decision on the merits of the dispute, according to art. 267, VII, of the Code of Civil Procedure.* (…)

It is thus clear that under Law n. 9.307/96 from the moment the parties of a contract establish an arbitration clause they are bound by this alternative dispute resolution method.

Once again, arbitration may not be unilaterally set aside, being the parties prohibited to veto the agreed proceeding. In summary, faced with an arbitration clause, a contracting party may start arbitral proceeding, and the other will be bound to accept it with no possibility to unilaterally opt for the jurisdiction of the State courts."[3]

"*Thus once invited to rule on the specific performance of an arbitration clause, the State judge must issue an award containing the necessary elements to begin arbitration, as established under art. 7 of the Arbitration Law.*"[4]

14. The enforceability of the arbitration agreement is only subject to further confirmation when inserted in the so-called adhesion contracts, where the relationship between the parties is asymmetrical, *i.e.* one or more parties is weaker than the others, such as in consumer contracts.

On those, the clause is still valid but its enforceability rests on the will of the "weaker party" at the moment the dispute has arisen out of the agreement[5].

This is basically the sole exception to the full enforceability of the arbitration clause.

15. Marco Maciel Law also took the opportunity to remove the homologation barriers.

Article 18 establishes that the arbitral award is not subject to Brazilian State court's homologation proceedings.

Therefore, the arbitral award shall have the same effect on the parties and their successors as a judgement issued by State courts, and should it establish an obligation to pay, to do, or not to do, it shall constitute an executory title (art. 31).

Regarding foreign arbitral awards, the law also got rid of the need for the so called *double exequatur*.

Until the enactment of Law n. 9.307/96, any arbitral decision rendered abroad had to obtain homologation in the country of origin as a condition for recognition in Brazil.

Now, in order to be recognized or enforced in the country, a foreign arbitral award is subject only to homologation by the Superior Court of Justice (art. 35).

16. Party autonomy is of the essence under the Brazilian arbitration law.

The parties are free to choose *e.g.* (i) the place of seat; (ii) the rules applicable to the proceedings; (iii) the number of arbitrators; (iv) the site where the arbitration shall be performed; (v) the time period for rendering the award; (vi) institutional or *ad hoc* arbitration.

Moreover, the parties may decide upon the law applicable to the merits of the case. Even equity or *amiable compositeur* can be legally agreed upon thereto[6].

As established under article 2, the parties may freely choose the rules of law applicable to the arbitration provided that their choice does not violate good morals and public policy. The arbitration shall also be governed by the general principles of law, customs, usages and international rules of trade.

17. Other relevant rules included in the Brazilian arbitration law are the principles of *kompetenz-kompetenz* and of autonomy of the arbitration agreement[7].

Those rules close the rigid legal circle that surrounds the effectiveness of the arbitration agreement. As a general principle, whenever there is an arbitration agreement the arbitrator shall be the first to decide upon his own jurisdiction.

Moreover, the arbitration agreement is *prima facie* immune to any defect that may affect either the contract or the clause. These principles are the bottom line of a valid choice made by the parties at the time they signed the agreement.

They also represent a guarantee of the parties' autonomy and of the principle of good faith which underlies any transaction.

18. Although the adjustment to such principles could have been problematic to a judicial system historically subject to state interventions the support of the high court that retains jurisdiction to decide infra constitutional matters (Superior Court of Justice) was emphatic, as illustrated by the following decisions:

"*Under article 8, sole paragraph, of the Arbitration Law, allegations of nullity of the arbitration clause or of the contract on which it is contained must firstly be submitted to arbitral decision. It is impossible the request of the party to see the arbitration agreement declared null and void before the constitution of the arbitral tribunal, coming to the State courts to sustain defects of the freely agreed clause under which it undertook to accept arbitration. The premature judicialization of the issue is inadmissible.*"[8]

"*The "full" arbitration clause, i.e. that which contains at least the choice of the conventional authority to solve the dispute, has the power to set aside the State's jurisdiction to rule at first on questions related to the validity of the arbitration clause (art. 8, sole paragraph together with art. 20, Arbitration Law).*

Indeed, the powers of arbitrators and State judges regarding matters of existence, validity, extension and efficacy of the arbitration agreement coexist. As a matter of fact – expect for pathological arbitration clauses ('in white') – there is an alternation of powers between such authorities, as they bear such power at different procedural times, i.e. the State courts may only act after the issuance of the arbitral award, under arts. 32, I and 33 of the Arbitration Law."[9]

19. Regarding the arbitrators, the Marco Maciel Law clearly adopted the jurisdictional concept of its activities.

Although a few scholars understand that arbitration is a creature of both private and public nature, the law expressly opted to grant jurisdiction to the arbitrators.

First of all, article 18 considers the arbitrator's activities equivalent to that carried out by judges, and his award is neither subject to appeal nor homologation.

This means that arbitrators have full power to hear witnesses, assess documents and any other evidence necessary for rendering the decision. The arbitrator also has the power and jurisdiction to issue a final award, which shall not be reviewed on the merits nor subject to homologation. He has therefore *iudicium* (to apply the law), the most relevant of the five powers of jurisdiction. He acts and functions as a judge.

His award has the same legal effectiveness as State courts' judgements. It can impose payments or any other obligations to the defaulting party. It can declare, modify, create or extinguish rights.

Should the creditor seek enforcement of the award in court, it is considered a judicial title for all purposes, mainly to expedite the proceedings and restrict the matters which may be alleged by the defaulting party.

The arbitrator also has the power to issue provisional and coercive relief and may proceed to render an award even if the party opts not to appear before him (art. 22).

20. The arbitrators' right to issue provisional or interim relief is now widely recognized by State courts.

Substantial case law confirms that State court's intervention is only admitted prior to the arbitral tribunal's constitution, unless otherwise agreed by the parties.

Under Brazilian procedural regime it is admissible to file some specific kinds of lawsuit in order to obtain

an injunction to safeguard the object of the main lawsuit on an urgent basis, having the party 30 days to file the main lawsuit as a condition to maintain in force the relief previously granted.

When the parties establish an arbitral clause it is well accepted by State courts the right of the party to fulfil this 30-days condition by requesting the arbitral institution to initiate the arbitration proceedings. Moreover, when the panel is set up, the arbitrators retain jurisdiction to review the injunction issued by the State court for purposes of modifying or even revoking the provisional relief.

Henceforth, the jurisdictional nature of the arbitrators activities implies the power of granting interim relief and case law has supported such practice, as follows:

"*The arbitral tribunal has jurisdiction to adjudicate provisional requests by the parties, limited however to the granting of the measure* (…) *should there be resistance by the party, the measure must be executed by the State courts, which retains the* imperium.

Pending the constitution of the arbitral tribunal, the party may seek the aid of the State courts, through injunctive relief, to ensure the practical result of the arbitration.

Surpassed the temporary circumstances which justified the contingential intervention of the State courts and whereas the conclusion of an arbitration agreement entails as a rule derogation of State jurisdiction, the case should be promptly referred to arbitration, so that it takes over the proceeding and if necessary review the injunctive relief conferred, maintaining, altering or repealing it."[10]

21. Chapter VI of the Brazilian arbitration law rules on the recognition and enforcement of foreign arbitral awards.

It is worth noting that if on one hand the international community complained about the late acceptance by Brazil of the New York Convention, on the other hand the most important rules contained therein were already introduced in the country's legal regime by virtue of the arbitration law provisions, which are similar to those of the Convention.

Nevertheless, Brazil ratified the New York Convention in 2002 and had already ratified the Panama Convention, right before the enactment of its arbitration law.

22. It should be stressed that the Brazilian arbitration law seeks to give full effect to the international conventions over the provisions of the law. As established in article 34, a foreign arbitral award shall be recognized or enforced in Brazil pursuant to the applicable international treaties, or, if there are none, strictly in accordance with the law at issue.

23. In order to define the nationality of arbitral awards, Brazil takes into consideration the place where the award is issued, considering a foreign decision any award rendered outside of its national territory (art. 34, sole paragraph).

Hence even if arbitration is carried out between Brazilian parties, by Brazilian arbitrators and under the laws of Brazil, if the place of seat is outside Brazil's boundaries the award shall be considered non-domestic and therefore subject to recognition before the Superior Court of Justice to be enforceable in the

country.

As already mentioned, the arbitration law also got rid of notions of *double exequatur*, meaning it no longer requires prior judicial recognition at the seat of arbitration. As per article 35, in order to be recognized and enforced in Brazil, a foreign arbitral award is subject only to homologation by the Superior Court of Justice.

24. It should be further pointed out that an old procedural taboo which used to impair the access to jurisdiction was abolished by the arbitration law: the need to formally serve the Brazilian or foreign party through the use of a letter rogatory.

A violation of Brazilian public policy shall not be deemed to have occurred if process is served on the party resident or domiciled in Brazil pursuant to the arbitration agreement or the procedural laws effective in the country where the arbitration procedure was conducted; for such purpose, service of process by mail against unequivocal proof of receipt shall be admitted, provided that the Brazilian party is given enough time to exercise its right of defense (art. 39, sole paragraph).

25. Finally, it should be mentioned that Law n. 9.307/96 applies both to domestic and international arbitration.

The rules contained in the law are so broad and non-restrictive that an international procedure can easily be carried out under the same provisions applied to domestic arbitration. This legislative option seems to have been correct. As it gave full recognition to the freedom of choice and to the parties' autonomy, it imposed no specific restriction that could justify the need for further flexibility for international arbitration.

IV. THE LAST TWENTY YEARS.

26. On an earlier revision of this article written when the Marco Maciel Law reached its ten years, it was stated that an optimistic future scenario for arbitration in Brazil was not unrealistic. Now, the future has arrived and those prospects were not only achieved but exceeded.

27. If ten years ago arbitration was viewed as necessary to further attract investment, today it is seen for all its virtues as a means to quickly and efficiently resolve disputes, making use of specialists on the issues at stake.

Veritable proof of such change is Superior Court of Justice Minister João Otavio de Noronha's opinion that "[a]*rbitration exists to help business, allowing commercial disputes to be solved quicker and more efficiently by specialists, which is not always possible before State Courts due to the excessive workload*"[11].

And that of retired Supreme Court of Justice Minister Ellen Gracie Northfleet: "*I can bet that no major contract signed by companies today leaves out an arbitration agreement. Arbitration is a very propitious way of solving disputes, as business activities absolutely demand not only certainty, but celerity and above all confidentiality to protect a number of commercial clauses*"[12].

28. Such advantages were not missed by the State itself.

On June 2015, Decree n. 8.465/15 established specific rules on the arbitration of disputes regarding port concessions; and on June and July of the same year, Decree n. 8.469/15 and Regulatory Instruction n. 4/15 created Rules on Mediation and Arbitration of Copyright Disputes before the Ministry of Culture.

Further back, on 2011, Minas Gerais – one of Brazil's 27 states – enacted Law n. 19.477/11 to further regulate arbitration involving the state itself and its direct and indirect entities.

Although such law made unequivocal the arbitrability of such disputes, it must be said that the Superior Court of Justice had already ruled on this subject on several occasions, clearly establishing that State entities – namely mixed capital companies, less emphatically the State itself – could arbitrate their economic disputes[13].

Nevertheless, the issue was definitively put to rest through recent amendment of the Brazilian arbitration law, which inserted two paragraphs under its article 1[14].

29. Speaking of legislation, on March 2015 Brazil revamped its Code of Civil Procedure[15], taking the opportunity to improve – among others – the confidentiality of arbitral proceedings[16], the recognition and enforcement of interim relief granted by foreign arbitrators[17], and the cooperation between arbitrators and State courts[18].

On the last issue, the Code of Civil Procedure created and ruled on the so-called "arbitral letter", designed to make clear that an arbitrator may request the assistance of a State court, including on the enforcement of interim relief, and may only be denied aid under very specific circumstances[19].

30. Fortunately, even before such provision, the State courts' acceptance and contribution to the development of arbitration exceeded the most optimistic expectations.

More than just issuing decisions favorable toward arbitration – and there has been an abundance of those – the State courts have mostly adopted a pro-arbitration stance, seeking to further cooperate to the development of alternative dispute resolution methods.

Illustrative of this position is the movement toward centering on specific State judges matters relating to arbitration. Starting with Rio de Janeiro's Court of Justice back in 2010, the crusade was later embraced by the National Justice Council, which established as one of its aims for the year 2015 to spread the measure throughout all 27 Brazilian states and its Federal District, with the rationale of improving arbitration's efficiency.

Several Supreme and Superior Court of Justice Ministers have also personally taken up the mantle to promote Brazilian arbitration. Along with the ones above mentioned, Minister Nancy Andrighi support was providential on the adoption of the referenced National Justice Council position, Minister Luiz Felipe Salomão has recently organized a book on the subject and retired Minister Gilson Dipp has just written an article stating that "[i]*t seems undisputed that international commercial arbitration as received by the national legal system has an extremely important role in preserving the certainty and legality of*

commercial conduct and that mitigation of judicial jurisdiction is contrary to no constitutional standard (…) *arbitration is a highly advisable form of settling disputes out of courts due to its celerity, convenience and efficiency*"[20].

31. The development of arbitration also had its impacts on the legal practice and education.

If on the earlier revision of this article it was noted that most lawyers were unaccustomed and still reluctant to go through arbitration, nowadays several law firms have legal teams entirely dedicated to arbitrating disputes. And even those firms who do not are entering into arbitral proceedings, abandoning their prejudices and habits acquired through decades of litigation.

As to arbitrators the somewhat limited pool that existed ten years ago has been much expanded with more and more practiced lawyers, knowledgeable scholars and retired judges – among those even some from the Superior and Supreme Courts – experiencing arbitration for the first – or the eleventh – time.

The number of Law Schools that teach arbitration has also grown exponentially, and even those who do not have regular courses on the subject increasingly join moot arbitration competitions, Brazil being the third country with most universities taking part in the Willem C. Vis International Commercial Arbitration Moot, surpassing France and the United Kingdom and only behind Germany and the United States of America.

32. Furthermore, if ten years ago the existence of national arbitral institutions was worth noting, the sheer amount of arbitrations proceedings under their administration – and the values involved – are now staggering for a developing country.

At the end of 2013, Brazil's most prolific arbitral institution was administering 153 proceedings, 90 of which had been instituted that same year. Combining the 6 most relevant Brazilian institutions, there were 348 proceedings taking place, out of which 174 had been commenced the same year. This amounted to an average 89% increase in the span of 6 years.

Equally impressive were the amounts in dispute, that reached US$1,518,952,148.95[21] in the proceedings initiated in 2013 at the 6 most relevant Brazilian institutions.

Much of this improvement is due to the consistent effort by the Brazilian arbitral institutions to improve the quality of its services through a series of measures, including but not limited to the revision of its arbitration rules, the expansion and training of its secretariat, and the establishment of modern hearing centers.

33. It is worth noting that even the kinds of dispute subject to arbitration have cemented and expanded during the last ten years.

The arbitrability of corporate disputes through the inclusion of arbitration clauses in the company's bylaws has gone through substantial resistance during the first years of arbitration in Brazil. However, along the years some scholars revisited their previous opinions and concluded on its admissibility, a process that climaxed on a recent ruling of the United States Southern District Court of New York[22] and

on a change to the Brazilian Corporate Law to specifically address the issue[23].

Said change accompanied several other on the Brazilian arbitration law, having the draft approved by Congress attempted to clarify the admissibility of consumer and labor arbitration – the last one only for directors and administrators –, should the consumer or employee initiate or expressly agree with its commencement after the dispute had arisen. Although unfortunately vetoed, the tried change ignited a spark of hope for such proceedings.

Likewise there have been efforts to introduce arbitration and other alternative dispute resolution methods to the resolution of tax disputes. On this front, several bills have been submitted to Congress in order to increase the efficiency of tax recovery, including among its proposals the further admissibility of negotiation[24] and arbitration[25].

34. Finally, the recognition and enforcement of arbitral awards has trodden a golden path with a bright horizon ahead.

Back in 2005, right after the Superior Court of Justice took over the responsibility to rule on the subject, it issued Resolution n. 9, debunking with the stroke of a pen several detrimental taboos. For instance, it specifically allowed the granting of provisional relief while the homologation proceedings took place and the partial recognition of foreign awards[26].

Over the past ten years, Brazil's Superior Court of Justice has seen over seventy requests for recognition of foreign arbitral awards facing opposition by the counterparty. Among those, only five have been denied, mainly due to applicant's failure to prove the existence of an arbitration agreement. It is worth mentioning that 21 of those decisions were issued over the last two and a half years, and that none had its recognition denied.

Moreover, on several of its decisions, the Superior Court of Justice has made clear for instance that no review on the merits shall take place, that procedural requirements for summons and length of motivation are those of the applicable law, that recognition may take place in spite of the existence of judicial proceedings in Brazil, and that frugal allegations of public policy violation shall not suffice to deny enforcement.

As such, the Superior Court of Justice has adopted an overall pro-arbitration stance.

35. All those considerations make clear that, although there is still room for improvement, Brazil has fully embraced arbitration and is a viable regional and international arbitration hub in the near future.

1. The Arbitration Law was published on September 24, 1996 and provided for a 60 days *vacatio legis*. ?
2. *"Art. 5. When the arbitration clause makes reference to the rules of a particular arbitral institution or specialized entity, the arbitration shall be commenced and conducted in accordance with such rules, unless otherwise agreed by the parties.*

   Art. 6. In the event of absence of provision as to the means of commencing arbitration, the

interested party shall serve the other party with a written notice by registered letter or by any other means which provides a record of delivery, calling for the other party to appear at a set date, time and place in order to sign the compromisso.

Sole Paragraph. Where the party to whom notice is served fails to appear or refuses to sign the compromisso, the other party can, pursuant to article 7 of this law, seek assistance from the State court which originally would have had jurisdiction to hear the case.

Art. 7. Where there is an arbitration clause but one of the parties shows resistance as to the initiation of arbitration, the interested party may petition the courts to serve notice on the other party to appear in court in order to sign the compromisso, whereupon the judge shall schedule a special hearing for such purpose.

§ 1. The claimant shall indicate precisely the object of the arbitration, including the document which contains the arbitration clause.

§ 2. The judge, previously to the signature of the compromisso, shall try to bring the parties into a settlement. Failing such agreement, the judge shall lead the parties to approve, by mutual agreement, the compromisso.

§ 3. When the parties fail to agree as to the terms of the compromisso, the judge, after hearing the defendant at the same hearing or within 10 days therefrom and pursuant to articles 10 and 21 § 2º of this law, subject to the provisions of the arbitration clause, shall decide the issue.

§ 4. If the arbitration clause makes no express reference to the appointment of arbitrators, the judge shall hear the parties in this respect and then decide on the issue with powers to appoint a sole arbitrator for the resolution of the conflict.

§ 5. Should the claimant, without reasonable excuse, fails to appear at the hearing to sign the compromisso, the proceedings shall be deemed to have been terminated without judgment on its merits.

§ 6. Should the defendant fail to appear, it will be up to the judge, having heard the claimant, to rule with respect to the content of the compromisso, nominating a sole arbitrator.

§ 7. The judge's decision favorable to the petition shall be deemed to be the compromisso itself." (free translation). ?

3. Superior Court of Justice, Recurso Especial n. 612.439, decision rendered on 25 October 2005, free translation. ?
4. Superior Court of Justice, Recurso Especial n. 1.082.498, decision rendered on 20 November 2012, free translation. ?
5. *"Art. 4. An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract.*

§ 1. The arbitration clause shall be in writing and it can be inserted in the main contract or in a document to which it refers.§ 2. In adhesion contracts, the arbitration clause shall only be

effective if the signee takes the initiative of commence the arbitration or if he expressly agrees to its commencement thereof, in an attached written document or on boldface, and provided that such clause bears his signature or initial." (free translation). ?

6. Except for arbitration involving State entities, which under recently added article 2, § 3 must always adopt rules of law. ?
7. "*Art. 8. An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision that the contract is null and void shall not entail ipso iure the invalidity of the arbitration clause.Sole paragraph. It shall be up to the arbitrator to decide on its own motion or per request of the parties, the issues concerning the existence, validity and efficacy of the arbitration agreement and of the contract which contains the arbitration clause."* (free translation). ?
8. Superior Court of Justice, Recurso Especial n. 1.355.831, decision rendered on 19 March 2013, free translation. ?
9. Superior Court of Justice, Recurso Especial n. 1.278.852, decision rendered on 21 May 2013, free translation. ?
10. Superior Court of Justice, Recurso Especial n. 1.297.974, decision rendered on 12 June 2012, free translation. See, also, Superior Court of Justice, Agravo Regimental na Medida Cautelar n. 19.226, decision rendered on 21 June 2012. ?
11. Free translation.Available at: <http://www.stj.jus.br/sites/STJ/default/pt_BR/noticias/noticias/R%C3%A1dio/Especial-STJ:-os-avan%C3%A7os-da-arbitragem-no-Brasil>. ?
12. Free translation.Available at: <http://www.stj.jus.br/sites/STJ/default/pt_BR/noticias/noticias/R%C3%A1dio/Especial-STJ:-os-avan%C3%A7os-da-arbitragem-no-Brasil>. ?
13. *E.g.* Superior Court of Justice, Recurso Especial n. 612.439, decision rendered on 25 October 2005; Superior Court of Justice, Recurso Especial n. 606.345, decision rendered on 17 May 2007; Superior Court of Justice, Mandado de Segurança n. 11.3089, decision rendered on 9 April 2008; Superior Court of Justice, Recurso Especial n. 904.813, decision rendered on 20 October 2011. ?
14. "*Art. 1* (...) *§ 1. Direct and indirect government entities may make use of arbitration to settle disputes regarding commercial and disposable rights.§ 2. The authority or competent body to sign arbitration agreements for direct government entities is the same than for the performance of agreements or transactions.*" (free translation). ?
15. Brazil's new Code of Civil Procedure shall come into force on March 2016, under Law n. 13.105. ?
16. "*Art. 189. All procedural acts are public; however, the following proceedings shall take place under judicial secrecy:* (…) *IV – those regarding arbitration, including the enforcement of arbitral letters, as long as the confidentiality of arbitration is proven before the court.*" (free translation). ?
17. "*Art. 962. Foreign decisions granting interim relief are enforceable.§ 1.The enforcement of foreign interlocutory decisions granting interim relief shall take place through letter rogatory.§ 2. Interim relief granted* ex parte *may be enforced, as long as respondent is granted the opportunity to reply at a later date.§ 3. Only the jurisdictional authority that granted the foreign decision shall judge on the urgency of the relief granted.*" (free translation).Arguably, Art. 7 of Superior Court of Justice's Resolution n. 9 already allowed the enforcement of interim relief through letter rogatory since 2005. Nevertheless, Art. 962 has the merit of putting to rest any doubts on the issue. ?
18. "*Art. 237. The following letters may be issued:* (…) *IV – arbitral letter, for a judicial body to enforce or to grant enforcement on its jurisdictional territory to a request for cooperation made*

by an arbitrator, including those regarding enforcement of interim relief." (free translation). ?

19. "*Art. 267. The judge will deny enforcement to letter precatory or arbitral letter, sending it back with its reasoning, when:I – the letter does not fulfill the legal requirements;II – the judge lacks jurisdiction due to the subject matter or the hierarchy;III – the judge has doubts as to its authenticity.*" (free translation). ?
20. Free translation.Available at <http://www.conjur.com.br/2015-jun-22/gilson-dipp-arbitragem-comercial-internacional-contexto-brasileiro>. ?
21. R$3.569.537.550,04; exchange rate of 2,35. ?
22. Case 1:14-cv-09662-JSR, decision rendered on 30 July 2015, pp. 37-43. ?
23. "*Art. 136-A. The approval of insertion of an arbitration agreement into the company's bylaws, subject to the quorum of art. 136, binds all shareholders. The dissenting shareholder shall have the right to withdraw from the company upon reimbursement of the value of its shares, pursuant to art. 45.§ 1. The arbitration agreement will only be effective after the lapse of 30 (thirty) days from the publication of the minutes of the general meeting that approved it.§ 2. The right to withdraw established at* caput *shall not apply if:I – the inclusion of the arbitration agreement into the bylaws is a condition for the securities issued by the company to be traded on a stock listing or over-the-counter organized market segment that requires minimum 25% (twenty five percent) free float of the shares of each type and class;II – the inclusion of the arbitration agreement is made in the bylaws of a public company whose shares have liquidity and dispersion in the market, according to art. 137, II, "a" and "b" of this Law.*" (free translation). ?
24. Bills 2412/2007 and 5082/2009 before the House of Representatives. Due notice must be given to the fact that after years of slowly crawling its way through several Committees those bills saw a rapid development in 2015, including consultations with the Brazilian Bar Association and some of the most well-regarded professors and scholars. ?
25. Bill 469/2009 before the House of Representatives. The bill has already gone through several Committees and on 2012 received a favorable opinion at the Committee on Finance and Taxation, where it now stands. Such opinion suggested the inclusion of Art. 171-A to the Brazilian Tax Code, as follows:"*Art. 171-A. Tax disputes may be settled through arbitration, in accordance with the law, being the arbitral award binding to the parties.*" (free translation). ?
26. On December 2014, Resolution n. 9 was set aside, having its rules incorporated into the Superior Court of Justice Statutes under Arts. 216-A to 216-X. ?