



Arbitration Guide
IBA Arbitration Committee

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

It is undoubtful that the use of arbitration in Brazil has been increasing rapidly and steadily since the enactment of the Brazilian Arbitration Act (Federal Law n. 9307/1996, the “BAA”) in 1996, especially after December 2001/July 2002, when the Brazilian Supreme Court confirmed its constitutionality and Brazil ratified and internalized the 1958 New York Convention¹. In this context, Brazilian courts have been playing an important role over the last 20 years, turning the country into an arbitration-friendly jurisdiction by applying the BAA and refraining from deciding on the merits of cases in which the parties have opted for arbitration as their dispute resolution mechanism. As a result of this movement, a vast number of sophisticated contracts executed in the country have chosen arbitration as the mechanism for dispute resolution, especially when dealing with energy, oil & gas, infrastructure and M&A transactions. Brazil has seen the rise of local arbitral institutions with very good reputation and experience in administering international cases, as well as the arrival of the International Court of Arbitration of the International Chamber of Commerce (“ICC”), which established an office in São Paulo in 2018.

Considering that lawsuits in general tend to last several years until a final judgment is rendered, and that very few courts have specialized judges on sensitive matters such as complex corporate cases and infrastructure disputes, the main advantages of arbitration in Brazil are still the speed of the proceedings and the qualification of the adjudicators. The main disadvantage of arbitration in Brazil is still associated with costs, which can be mitigated by a mutual effort from the parties to reach an agreement to reduce such costs. In recent years, arbitrations in Brazil started to last longer than the parties usually expect, due to several factors such as Brazilian lawyers’ insistence in using guerilla tactics to delay the proceedings, arbitrators’ due process paranoia and the very busy schedule of the most renowned Brazilian arbitrators and counsel. This is a feature of the Brazilian arbitration market, which has been concentrated in a sort of “arbitral small club,” where the same law firms and arbitrators are usually selected for a vast number of relevant cases. In response to such difficulty, the users are starting to appoint a younger generation of arbitrators and law firms,

¹ In this regard, for example, the number of cases administered by the Center for Mediation and Arbitration of the Brazil-Canada Chamber of Commerce (“CAM-CCBC”), one of the most renowned arbitral institutions in Brazil, jumped from 2 in 2001 to 141 in 2017 and 101 in 2018.

Source: <<https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/sobre-cam-ccbc/estatisticas-gerais/>>. Access on March 02, 2020.

with a solid experience in arbitration and less busy schedules and more strict control of the parties' conduct during the proceedings.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Ad hoc arbitrations remain rare in Brazil. Most arbitration proceedings, whether domestic or international, follow institutional rules and, as of today, domestic arbitrations vastly outnumber international cases². It is important to point out that the BAA does not distinguish between domestic and international arbitration (the only existing criterion is the one used to define an “international arbitral award,” as an award rendered outside Brazil. This issue will be further addressed in item II.ii below).

The Center for Mediation and Arbitration of the Brazil-Canada Chamber of Commerce (“CAM-CCBC”)³ and the Chamber of Conciliation, Mediation and Arbitration CIESP/FIESP (“CIESP/FIESP”), both in São Paulo, stand out for handling most of the domestic arbitral proceedings in Brazil. Other institutions, such as (i) the Market Arbitration Chamber – the arbitration institution administered by the São Paulo stock exchange B3 (“CAM”), (ii) the Chamber of Corporate Mediation and Arbitration (“CAMARB”), in Minas Gerais, (iii) the Brazilian Center of Mediation and Arbitration (“CBMA”), in Rio de Janeiro, and (iv) the Mediation and Arbitration Chamber of Fundação Getúlio Vargas (“FGV Mediation and Arbitration Chamber”), also in Rio de Janeiro, have also been playing an important role, not to mention the ICC office in São Paulo, which is responsible not only for international arbitrations, but also for domestic cases.

(iii) What types of disputes are typically arbitrated?

Article 1 of the BAA has adopted a broad approach to arbitrability, allowing all disputes regarding disposable property rights to be arbitrated. Therefore, disputes arising from general contract and corporate matters, mergers and acquisitions and infrastructure projects are very often referred to arbitration.

Disputes involving listed companies and their shareholders are also frequent, given that Article 109 of the Brazilian Corporations Act specifically provides that corporations can include arbitration agreements in their by-laws. Besides, in 2001,

² Professor Selma Lemes, one of the coauthors of the draft which eventually became the BAA, conducts periodic research on arbitration-related matters in Brazil. According to Professor Lemes' 2018 research, CAM-CCBC, which is the arbitral institution with the highest number of international cases in Brazil, had only 13 international arbitrations that year. Source: <<http://selmalemes.adv.br/artigos/An%C3%A1lise-%20Pesquisa-%20Arbitragens%20Ns.%20e%20Valores-%202010%20a%202017%20-final.pdf>>. Access on March 02, 2020.

³ In the 2018 survey conducted by the Queen Mary University, the Center for Mediation and Arbitration of the Brazil-Canada Chamber of Commerce (“CAM-CCBC”) was ranked as the 8th preferred arbitral institution worldwide.

the São Paulo stock exchange B3 introduced “its own arbitral institution” (the “CAM”) for listed companies in its top two levels of listing. Since then, any company within those levels must agree to submit to arbitration any dispute between the company, its shareholders and managers, and the São Paulo stock exchange itself.

Further, arbitration agreements are usually included in several state contracts as permitted by the concessions act and the public private partnership (“PPP”) act. In 2011, the State of Minas Gerais was a pioneer with the issuance of Law n. 19477/2011, allowing the use of arbitration to solve disputes involving the State. Confirming this trend, the 2015 amendment to the BAA (“2015 Amendment”) included a general provision in that statute allowing the public administration to use arbitration to resolve some of its conflicts. As a result, the number of arbitration proceedings involving state entities have increased over the last years.

The public administration has been reacting favorably to the 2015 Amendment and the possibility to use arbitration. For example, São Paulo and Rio de Janeiro, the two most economically developed and active states in Brazil, issued administrative decrees regulating the use of Arbitration by those States and their entities (Decrees n. 46.245/RJ of 2018 and 64.356/SP of 2019).

(iv) How long do arbitral proceedings usually last in your country?

As a rule, the parties are free to agree on the duration of the arbitration, failing which the award must be rendered within a period of 6 months from the beginning of the arbitration, such period being renewable upon agreement of the parties and the arbitral tribunal.

In practice, the duration of an arbitral proceeding varies according to its complexity and the availability of the parties, their counsel and the arbitral tribunal to reach an agreement on hearing dates.

According to a research on the Brazilian arbitration market released in 2018, which collected information from the main arbitral institutions in Brazil, the average duration of arbitral proceedings is 19.6 months, from the signature of the terms of reference to the rendering of the arbitral award⁴. However, experience shows that, if the dispute involves the production of expert reports, proceedings are most likely to last over 36 months.

⁴ <<http://selmalemes.adv.br/artigos/An%C3%A1lise-%20Pesquisa%20Arbitragens%20Ns.%20e%20Valores-%202010%20a%202017%20-final.pdf>>. Access on March 02, 2020.

- (v) **Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?**

The BAA does not require that a party be represented by counsel in arbitration proceedings.

In practice, however, parties in domestic arbitrations are virtually always represented by Brazilian counsel, duly qualified before the Brazilian Bar Association. In international cases, it is not uncommon for Brazilian counsel to work alongside foreign law firms.

Moreover, in a context of expansion of the Brazilian arbitration market, we have also seen appointments of foreign practitioners (i.e. professors, lawyers) to act not only in international, but also in domestic arbitrations. Surely, these nominations are facilitated when the prospective candidate has, for example, prior experience in Brazilian law/civil law cases, or is also qualified to practice law in Brazil.

II. Arbitration Laws

- (i) **What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

Arbitration proceedings having their seat in Brazil are governed by the BAA. The Act does not differentiate between domestic and international arbitrations, even if there are foreign parties involved or if the governing law is not Brazilian law.

However, Article 34 of the BAA provides that an arbitral award will be deemed foreign if rendered outside Brazil, and in such case it will be subject to the regime of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Brazil therefore adopts a geographic criterion to differentiate between domestic and foreign awards. In order to be enforced in Brazil, a foreign arbitral award must be previously recognized by the Superior Court of Justice.

Although the influence of the UNCITRAL Model Law over the BAA is not easily perceived from the text, its main principles, such as the competence-competence principle and the separability of the arbitration agreement principle, can be found in the BAA.

- (ii) **Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

There is no definition in the BAA of what constitutes a domestic or an international arbitration. However, the BAA differentiates between national

awards and foreign awards based on a geographic criterion. Arbitral awards rendered within the Brazilian territory are deemed to be national awards and produce the same legal effects as a judgment rendered by the Brazilian Judiciary. They can be directly enforced without any previous court confirmation. On the other hand, arbitral awards rendered outside Brazil are deemed to be foreign arbitral awards, and in order to become effective in Brazil they must be previously recognized by the Brazilian Superior Court of Justice. Although highly criticized because of the multiple issues it raises (such as not being clear about the meaning of the expression “outside of the national territory” - whether it refers to the seat of the arbitration, the place where deliberations took place, or where the award was signed), this is the criterion adopted by the BAA and has been fully embraced by the Brazilian Judiciary⁵.

(iii) What international treaties relating to arbitration have been adopted (e.g., New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Brazil has adopted the following international treaties related to arbitration: (i) the 1958 New York Convention; (ii) the 1975 Panama Convention on International Commercial Arbitration; (iii) the 1979 Montevideo Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards; (iv) the 1991 Protocol of Brasília - Mercosur; (v) the 1992 Protocol of Las Leñas - Mercosur; (vi) the 1994 Protocol of Ouro Preto - Mercosur; (vii) the 1998 Buenos Aires Agreement on International Commercial Arbitration - Mercosur; and (viii) the 2002 Protocol of Olivos - Mercosur.

Brazil has not signed the 1965 Washington Convention (“ICSID”), nor has the country ratified any bilateral investment agreement that affords a private investor the opportunity to arbitrate investment-related claims against Brazil.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

According to Article 2 of the BAA, the parties are free to choose the rules of law that are applicable to the merits of the dispute, as long as their choice does not violate public policy. If the parties do not decide which rules will apply to the validity of the arbitration clause, the BAA adopts a supplementary criterion, stating, in Article 38, II – which is a similar provision to Article V(1)(a) of the New York Convention – that, if the parties are silent, the law of the country where

⁵ “Chapter 1: General Aspects of Recognition of Foreign Arbitral Awards in Brazil,” in Leonardo de Campos Melo, *Recognition and Enforcement of Foreign Arbitral Awards in Brazil: A Practitioner's Guide* (Kluwer Law International 2015 - pp. 5 – 22).

the award was rendered – normally the place of the arbitration – will apply to decide on the validity of the arbitration agreement.

The BAA also states that the parties may agree that the arbitration must be conducted under general principles of law, customs, usages and the rules of international trade. Specifically in relation to arbitration involving the public administration, the legislation provides that it must always be at law, with the seat in Brazil, in Portuguese, and subject to the principle of publicity.

III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

The BAA provides that an arbitration agreement must be in writing. It can be inserted into a contract or into a separate document which refers to the contract. Those are the usual formal requirements to the arbitration agreement.

As to its content, there are no specific requirements. An arbitration clause stating that the parties undertake to submit to arbitration any dispute related to the agreement in which such clause is inserted must be considered valid. However, it is advisable to refer to the rules of the institution chosen by the parties.

If the parties (i) still do not agree on the steps or (ii) simply resist to start the arbitral proceedings, the party interested in starting the arbitration must resort to the national courts for a proceeding to complete the arbitration agreement and force the resisting party to participate, as provided for in Articles 6 and 7 of the BAA.

Finally, according to Article 4, Paragraph 2, of the BAA, arbitration agreements inserted in adhesion contracts are only valid if the adhering party starts the arbitration, if the arbitration agreement is included in an attached document and is separately signed, or if the arbitration clause is highlighted in the contract and the adhering party signs it separately.

According to Article 9, Paragraph 1, of the BAA, if the parties choose to refer to arbitration an already existing but still not yet judicialized dispute, they must enter into a submission agreement, which must be written and countersigned by two witnesses or by a public notary and contain certain information about the parties, the dispute and the arbitrators, as provided for in details in Articles 9 and 10 of the BAA.

In any case, when choosing to have an arbitration clause in their agreement, the parties should consider including certain provisions such as the rules of an arbitration institution chosen by the parties to administer the proceedings, seat, applicable law and number of arbitrators (the rules of Brazilian arbitration institutions usually have provisions in this regard). Parties also usually agree on a choice of forum clause for arbitration-related judicial support in order to ensure recourse to a more sophisticated, arbitration-friendly jurisdiction within Brazil.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Brazilian courts respect arbitration clauses and decline to exercise jurisdiction when a dispute related to an arbitration clause is presented to them, except in the case urgent relief is needed prior to the commencement of the arbitration proceedings. Under the BAA, the arbitration clause is deemed to be separable from the contract in which it is contained (Article 8 of the BAA). Hence, the nullity or discussion over the enforceability of the contract does not necessarily affect the arbitration clause.

Brazilian courts traditionally respect the competence-competence principle and recognize the authority of the arbitral tribunal to assert their own jurisdiction, including to decide on the validity of the arbitration agreement.

Article 7 of the BAA provides that, if the parties have signed an arbitration agreement and one of them objects to the commencement of the arbitration proceeding, the other party may request that it be served to appear in court so that the submission agreement is drawn up and arbitration is initiated. Such proceedings are only used in exceptional circumstances (e.g., if the parties refer to non-existing arbitral institutions or include no other reference apart from their choice to arbitrate).

However, if an arbitration agreement is deemed to be *prima facie* null and void by the court, the judge can immediately annul the agreement. This situation of *prima facie* annulment of arbitration awards occurs, for instance, when parties fail to comply with the formal requirements of arbitration agreements in adhesion contracts.

- (iii) **Are multi-tier clauses (e.g., arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

The use of multi-tier dispute resolution clauses is growing in Brazil, especially the ones providing for a negotiation/mediation (or dispute board, in case of construction disputes) phase prior to arbitration.

There are no relevant cases in Brazil related to the enforceability of such clauses. However, it should be mentioned that the Brazilian Mediation Act (2016) provide that arbitrators must suspend the course of an arbitration in case of violation of an agreement in which the parties undertake not to start arbitration proceedings prior to their engagement in mediation proceedings.

- (iv) **What are the requirements for a valid multi-party arbitration agreement?**

A valid multi-party arbitration agreement must meet the same requirements as those described in Section III.i above. Nevertheless, following the trend of international arbitration practices, multi-party agreements should provide for mechanisms regarding the choice of the arbitrators, as well as the consequences from multiple claimants or respondents not reaching an agreement when choosing an arbitrator. In *Paranapanema v Santander et al.*, the São Paulo Court of Appeal set aside an arbitral award, *inter alia*, due to the lack of equal opportunity granted to all parties to appoint their arbitrators. This judgement was later upheld by the Superior Court of Justice -- and is considered the Brazilian version of the French *Siemens v Dutco* case.

Certain rules of the Brazilian arbitral institutions already include specific rules to deal with multi-party arbitration agreement.

- (v) **Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

There are no conclusive judicial decisions nor academic literature concerning this issue.

Specifically in adhesion contracts, an arbitration clause will only be valid if the party adhering to the agreement takes the initiative to commence the arbitration proceedings or expressly consents to it (pursuant to Article 4, Paragraph 2, of the BAA).

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

An agreement to arbitrate can be extended to bind non-signatories only in specific cases. Although the arbitration agreement must be in writing, consent of the parties to an arbitration agreement can be expressed otherwise.

In the leading case *Trelleborg et al. v. Aneel* (2006), the Court of Appeal of the State of São Paulo extended the effects of an agreement to arbitrate to a non-signatory which was part of the same corporate group and had participated in the negotiations that led to the signing of the agreement.

In the more recent (and above mentioned) case of *Paranapanema v. Santander et al.* (2019), the Superior Court of Justice rendered a decision extending the effects of the arbitration agreement contained in the main contract to the related ancillary contracts. The court took the view that the parties had agreed that arbitration was going to be the dispute resolution mechanism for the whole group of contracts.

Even though, in this case, the arbitration agreement was extended to parties of the same group of companies and involved in a group of contracts, Brazilian case law has established the need to analyze the specificities of each case, deciding, for example, that the mere existence of a group of companies is not by itself enough to extend the arbitration agreement to a non-signatory party of the same group.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

Article 1 of the BAA provides that those who can enter contracts (including direct and indirect public administration entities, in accordance with Article 1, Paragraph 1, of the BAA) may use arbitration to resolve conflicts regarding freely disposable economic rights. Therefore, what is not captured by this broad definition cannot be arbitrated. For instance, criminal or family matters are not arbitrable, while disputes concerning corporate matters and shareholders', infrastructure and public concession agreements are deemed arbitrable. Article 8 of the BAA expressly recognizes the competence-competence principle, by establishing that arbitrators have jurisdiction to decide, on their own motion or at the parties' request, the issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as of the contract containing the arbitration clause.

There is no provision in the BAA nor case law discussing if the lack of arbitrability constitutes a matter of jurisdiction or admissibility. Even so, those matters are to be first decided by the arbitral tribunal, considering the competence-competence principle. However, the arbitrators' decision regarding arbitrability can be challenged in a judicial court after the end of the arbitration, by means of the set-aside proceedings provided for in Article 32, IV, of the BAA.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

Under Brazilian law, the court cannot decline on its own motion the exercise of jurisdiction based on the existence of an arbitration agreement. Therefore, if court proceedings are initiated despite the existence of an arbitration agreement between the parties, the respondent must inform the court about such agreement at the first opportunity, as a preliminary objection to the claim. If no challenge is presented by the respondent, the court must interpret such behavior as a waiver of said party's right to arbitrate.

Should the respondent raise the arbitration agreement as a defense, Brazilian courts must refer the dispute to arbitration.

- (iii) **Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

The principle of competence-competence is recognized under Article 8 of the BAA, which provides that the arbitral tribunal (and not a court) is competent to find on its own jurisdiction, as well as to decide, on its own motion or at the parties' request, about the issues concerning the existence, validity and effectiveness of the arbitration agreement.

As explained in item III.ii, Brazilian courts strongly abide by the competence-competence principle, recognizing the authority of the arbitral tribunal to decide upon its own jurisdiction, as well as on issues of validity of the arbitration agreement. Parties can only access courts after the arbitration proceedings are finished and if there are grounds to set aside the award.

Although the merits of the underlying arbitral award cannot be reviewed by the court, the arbitrators' decision regarding arbitrability can be challenged, as nullity of the arbitration agreement, lack of jurisdiction and lack of arbitrability are enough grounds to set aside an award on the grounds set forth in Article 32 of the BAA (as explained in item XII below). In such scenarios, the court must proceed

with a *de novo* review in order to reach its own conclusion on the issues discussed.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

The BAA grants the parties ample leeway to appoint any trusted individuals with legal capacity as arbitrators. In general, the arbitrators are appointed in accordance with the provisions of the arbitration agreement, failing which the appointment must follow the arbitral institution's rules. Besides the classic method of appointment, by which each party chooses one arbitrator and the two party-appointed arbitrators choose the presiding arbitrator, there has been a trend towards a more significant participation of the parties in the selection of the chairman. In this context, it is common for the two party-appointed arbitrators to present to the parties a list of possible candidates. From such list, the parties can exclude one or more names (depending on the size of the list) of possible presiding arbitrators, so that the parties can also have a voice over who will preside the arbitral proceedings.

If the arbitration agreement does not provide all the necessary elements for a party to directly initiate arbitration, the BAA sets forth that the party seeking to initiate arbitration must inform the other party of its intention to start the proceedings (Article 6 of the BAA). Only if the other party objects to the commencement of the proceedings and no agreement is reached may the interested party request the judicial authority to summon the resisting party to appear in court. Then, if the parties do not reach an agreement and the arbitration agreement is silent about the appointment proceeding, the judge may appoint a sole arbitrator, under Article 7, Paragraphs 4 to 7, of the BAA. Although the law specifically provides so, it is very rare to see court-appointed arbitrators in Brazil.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

According to Article 14, Paragraph 1, of the BAA, the appointed arbitrators must consider the list of circumstances established in the Brazilian Code of Civil Procedure that characterize impediment or bias of judges and disclose any circumstances potentially giving rise to justifiable doubts as to their impartiality or independence prior to accepting to serve as arbitrators.

Also, the rules of most arbitration institutions in Brazil require the appointed arbitrators to submit a statement of independence and impartiality and to reveal any facts that, in the parties' view, might raise an objection to the arbitrators' independence or impartiality.

According to Article 15, a party who intends to challenge an appointed arbitrator must present its motion directly to the arbitral tribunal, setting forth its reasons with the pertinent evidence, at the first opportunity in the arbitration. If the motion is granted, the appointed arbitrator will be removed and replaced, pursuant to Article 16, which provides that, if no substitute arbitrator is appointed and the parties do not reach an agreement, the judge will appoint an arbitrator under the procedure established in the BAA.

Courts rarely appoint arbitrators, as most Brazilian arbitral institutions have their own rules regarding the substitution of arbitrators, conferring the party that has appointed the removed arbitrator the right to appoint a new one.

After the award has been rendered, the court might also play a role in challenges if a party files set-aside proceedings claiming that the award was rendered by someone who could not have acted as arbitrator (Article 32, II, of the BAA). It is worth noting that the Brazilian Judiciary rarely sets aside arbitration awards.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

In accordance with Article 13 of the BAA, any individual with legal capacity who is trusted by the parties may serve as an arbitrator. In addition, arbitrators must proceed with impartiality, independence, competence, diligence and discretion. It is important to note that there is no written code of arbitrators' ethics, hence the primary source of information in such matters remains cases interpreting the Brazilian Code of Civil Procedure in connection with challenges of judges.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

There are no specific rules or codes of conduct concerning conflicts of interest for arbitrators in Brazil. When necessary, the provisions of the Brazilian Code of Civil Procedure apply.

Article 14 of the BAA provides that the appointment of an arbitrator may be challenged if the appointed arbitrator is somehow linked to the parties or to the dispute, by any of the relationships that characterize impediment or bias of judges set forth in the Brazilian Code of Civil Procedure.

Even though the IBA Guidelines on Conflicts of Interests in International Arbitration are not binding in Brazil, the grounds of the Brazilian Code of Civil Procedure are similar to those of the red and orange lists of such guide. In addition, it is common for the parties challenging arbitrators, as well as for the arbitral institutions or the tribunal when deciding over challenges, to refer to the IBA Guidelines as relevant authority.

VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Under the BAA, Brazilian courts are authorized to grant provisional relief prior to the constitution of the arbitral tribunal if there is urgency and enough and probable legal cause for granting the relief sought. Once the arbitral tribunal is constituted, it will decide whether to uphold the court's decision or not. If, however, the arbitration proceedings have already begun, the request for interim measures will be addressed directly to the arbitrators.

Arbitral tribunals may grant all kinds of interim measures at any time during the proceedings (of course, respecting the natural limits of the arbitrators' lack of *ius imperium*), be it by means of an order or an award, both enforceable in court. There are scholars who take the view that, in order to be enforced, orders issued by arbitrators must be sent to a court of law by means of an arbitral letter, which is a formal method of communication between arbitral tribunals and the Judiciary. The BAA, however, has clear language that awards must be enforced in accordance with the same provisions applicable to court judgments.

In order to be legally binding in Brazil, interim measures granted by arbitral tribunals seated outside of the country must be previously recognized/granted exequatur by the Superior Court of Justice. Until very recently, there was no case law on whether the procedure to be followed was that of recognition of foreign arbitral awards or of granting of exequatur to letters rogatory. In the end of 2019, however, the Superior Court of Justice shed light on the matter, in a precedent in which the Chief Justice expressly followed recognition proceedings and granted the urgent relief issued by an arbitral tribunal seated outside of Brazil.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?**

Brazilian courts can and often grant provisional relief prior to the constitution of the arbitral tribunal in support of arbitration if there is urgency (*periculum in mora*) and enough and probable legal cause (*fumus boni iuris*) for the relief sought. Once the arbitral tribunal is constituted, it will decide whether to uphold the court's decision or not (Article 22-B of the BAA). If the arbitration proceedings have begun, the request for provisional relief will be addressed directly to the arbitrators, with the possibility of the courts being asked to enforce

the arbitral tribunal's order, given that arbitrators lack *imperium*. The court may grant the provisional relief.

- (iii) **To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

Courts may grant evidentiary assistance/provisional relief only prior to the constitution of the arbitral tribunal, if such request is deemed necessary to (a) protect a party's right or (b) produce perishable evidence. After the arbitral tribunal is constituted, all requests must be directed to the arbitrators. If the arbitrators deem the evidentiary assistance to be necessary, they must communicate the need for such assistance to the court through an arbitral letter (Article 22-C of the BAA). Courts must comply with said request and cannot review its merits.

VII. Disclosure/Discovery

- (i) **What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

There is no US-style discovery in Brazil. The basic rule of Brazilian civil procedural law, also adopted by arbitrators, is that the party must present the evidence on which it seeks to rely. In accordance with Article 22 of the BAA, the arbitral tribunal, either on its own motion or at the parties' request, may hear parties' and witnesses' testimony and rule on the production of expert evidence and any other evidence deemed necessary. Arbitral tribunals can grant specific requests for the production of evidence a party does not have – either during or before the arbitration proceedings start – if said party can indicate the relevance of said evidence to the outcome of the dispute. In this sense, parties and arbitrators have time and time again relied on internationally used guidelines and mechanisms to request evidence, such as the IBA Rules on the Taking of Evidence in International Arbitration and the Redfern Schedule.

- (ii) **What, if any, limits are there on the permissible scope of disclosure or discovery?**

There is no discovery or disclosure under Brazilian procedural or arbitral law.

- (iii) **Are there special rules for handling electronically stored information?**

There are no special rules for handling electronically stored information in Brazil.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

The BAA does not set out any rule regarding the confidentiality of arbitral proceedings. Therefore, the parties are free to choose, when drafting the arbitration agreement, whether the proceedings will be confidential or not. However, the rules of most arbitral institutions provide for confidentiality, similarly to the standard practice in the main international arbitration institutions.

It is worth noting that, under Article 1, Paragraph 3, of the BAA, arbitrations involving the public administration are subject to the principle of publicity.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no provisions in the BAA in relation to such matters.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

There are no provisions in the BAA as to rules of privilege.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

The adoption of the IBA Rules on the Taking of Evidence in International Arbitration in international proceedings has increased over the last years. Such rules are, however, rarely invoked by arbitrators in domestic cases.

Although the arbitral tribunal has the power to decide on the aspects related to the taking of evidence, as per Article 21 of the BAA, if the IBA Rules are adopted upon the parties' agreement as established in the arbitration agreement, arbitrators may only depart from them if the parties grant the tribunal discretion to do so.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

There are no limits to the arbitral tribunal's discretion to govern the hearings, unless the parties agree to provide otherwise - which is not a common practice in Brazil.

- (iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?**

Witness testimony is usually presented by means of direct oral examination and cross-examination during the evidentiary hearings. The use of witness statements and cross-examination has increased, although it is still not considered standard practice in the country. Arbitrators may, and usually do, question witnesses at their discretion.

- (iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?**

Arbitrators have full discretion to call witnesses, except for those individuals who are bound by a duty of confidentiality. Although the BAA does not provide for any rule on oath or affirmation, it is common for the arbitral tribunal to warn the witnesses that they might be subject to civil and criminal prosecution in case they do not tell the truth.

- (v) Are there any differences between the testimony of a witness specially connected with one of the parties (e.g., legal representative) and the testimony of unrelated witnesses?**

Considering Brazil's civil law tradition, when it comes to witnesses, Brazilian arbitrators tend to rely on documentary evidence much more than on witness testimonies.

The Brazilian Code of Civil Procedure differentiates unrelated witnesses from people who may have an interest in the dispute. Technically, the word "witness" can only be used when referring to a neutral person sharing factual knowledge with the adjudicator. The legal representative of a party and other people who may have any interest on the outcome of the dispute are considered "informants." However, arbitrators usually do not differentiate witnesses from informants, rather paying close attention to try to determine how credible they were during the hearing, regardless of their previous connections with the parties. Their testimonies are normally given less weight than written evidence.

- (vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

Expert testimonies are generally presented to the Tribunal and opposing party prior to the evidentiary hearing, with enough time in advance so that the opposing party's expert witness may prepare a technical response. At the hearing, the parties' expert witnesses are virtually always questioned by counsel for opposing party. The tribunal also pose questions to expert witnesses. There are no formal

requirements regarding independence and/or impartiality applied to expert witnesses, but, when it comes to the party-appointed experts, the arbitrators are free to give weight to such evidence as they deem appropriate.

- (vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

Domestic arbitral tribunals frequently appoint experts besides those appointed by the parties, and the evidence provided by tribunal-appointed experts are given more relevance by the arbitrators than the evidence provided by the party-appointed experts. Under Brazilian law, there are no requirements that experts be selected from a particular list.

- (viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

Yes. Witness conferencing is generally used when the arbitral tribunal perceives inconsistencies between testimonies or expert reports. In this case, party-appointed witnesses, sometimes in the presence of the tribunal-appointed witness, are heard together so that the controversial issues are cleared by the fact finders.

- (ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

There are no formal rules or requirements as to the use of arbitral secretaries under the BAA. However, arbitral secretaries are expected to adopt the same standards regarding independence and impartiality as arbitrators. The use of secretaries has become more common over the years in Brazil, especially among some arbitrators who receive frequent appointments, cumulating a large number of cases.

X. Awards

- (i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

Under the BAA, the award must be rendered in writing (Article 24) and must include: (i) a report containing the names of the parties and a summary of the dispute; (ii) the grounds for the decision, where it must be expressly mentioned whether the arbitrators decided *ex aequo et bono*; (iii) the date and place of the award; and (iv) the signature of the arbitrators. There are no limitations on the types of relief admitted.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Considering that Brazilian law does not provide for punitive and exemplary damages, the awarding of such damages is controversial and not common in Brazil. Besides, it is not unusual to see arbitration agreements which expressly state that arbitrators cannot award punitive damages.

Arbitrators can award interest and compound interest, within the strict parameters set forth under Brazilian civil law, provided that Brazilian law governs the merits of the dispute.

(iii) Are interim or partial awards enforceable?

Yes, partial awards are expressly referred to in the BAA (Article 23, Paragraph 1) are fully enforceable, as long as they comply with the requirements set forth in the statute and in the Brazilian Code of Civil Procedure. There is case law from the Superior Court of Justice according to which the statute of limitations to file set-aside proceedings against a partial award starts running from the date in which said decision becomes final (*res judicata*).

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Yes. Article 24, Paragraph 2, of the BAA provides that dissenting arbitrators can render separate opinions if they wish to do so. If there is no majority agreement among the arbitrators, the decision of the chairman will be final and binding. There are no specific requirements as to the form and content of dissenting opinions, although it stems from the BAA that the dissenting arbitrator must be identified and state the reasons for doing so in the award.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Under Article 28 of the BAA, arbitral proceedings may be terminated by an agreement between the parties.

At any time during the proceedings, the parties may request that the arbitral tribunal render an award declaring the termination of the dispute. Awards by consent must be in writing and fulfill the same requirements of any arbitration award to be considered valid.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

According to Article 30 of the BAA, the parties have five days after being notified of the award to request that the arbitrators correct or interpret it to (i) correct any material error, (ii) clarify any obscurity, doubt or contradiction, or (iii) make reference to any issue that the decision should have mentioned but failed to do so.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

There are no specific rules as to which party is responsible for the costs of arbitration. Under Article 27 of the BAA, arbitrators are free to decide the issue of liability for costs, provided that they observe any applicable provisions of the arbitration agreement and institutional rules. In practice, arbitrators usually establish liability for costs proportionally to the success of each party's claims. Besides, it has become common for arbitral tribunals to take the parties' conduct during the proceedings into account when ruling on costs.

Parties are free to determine the rules about the liability for costs of the arbitration prior to the beginning of the arbitral proceedings or even in the arbitration clause.

In arbitration involving states or state agencies, the applicable laws usually provide that the private party advance all arbitration-related costs, which will be reimbursed by the state in case it loses on the merits.

(ii) What are the elements of costs that are typically awarded?

Decisions on costs and expenses usually encompass: (i) the arbitral institution's administrative fees; (ii) the arbitrators' fees and expenses; (iii) reasonable attorneys' fees and justified expenses; (iv) experts' fees and expenses; as well as (v) reasonable expenses related to the hearings.

There is a discussion in Brazil about the possibility of arbitrators awarding fees to the winning party's lawyers ("*honorários de sucumbência*"). This fee arises from the Brazilian Code of Civil Procedure and the federal law regulating the Brazilian Bar Association and the rights and duties of lawyers in Brazil. According to these laws, courts must award a success fee based on a percentage (which can go as high as 20%) of the total amount in dispute, which must be paid directly by the losing party to the counterparty's lawyers.

In domestic arbitration, it is common for the parties to agree, either in the arbitration agreement or in the terms of reference, that these loss of suit fees can be awarded by the arbitral tribunal.

There is ongoing debate among Brazilian scholars and practitioners as to whether loss of suit fees are due in case the arbitration agreement is silent on the matter. The predominant view is that, lacking the parties' agreement, the arbitral tribunal cannot award said fees.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

In institutional arbitrations, the arbitral tribunal's fees are usually pre-established by the rules of the arbitral institution, while in *ad hoc* arbitrations the arbitrators and the parties will be free to discuss and fix the costs.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Yes, unless agreed otherwise by the parties. Usually, the apportionment of costs considers the parties' behavior during the arbitration (as provided for in Article 27 of the BAA), the relief sought by each party and what was respectively awarded to each of them.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

No. Decisions as to costs are part of the merits and, therefore, are not subject to any form of scrutiny by Brazilian courts, unless the issue has a close connection to any of the grounds for challenging the award (e.g., if the arbitral tribunal awards attorneys' fees based on a certain percentage of the case, despite the lack of agreement of the parties, or accrued of compound interest, at least such part of the award will be considered null and void).

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

In accordance with Article 32 of the BAA, awards can be challenged if: (i) the arbitration agreement is null and void, (ii) the award was rendered by someone who could not serve as an arbitrator, (iii) the award does not meet the

requirements set forth in Article 26 of the BAA, (iv) the award exceeded the scope of the arbitration agreement, (v) the award was rendered as a result of nonfeasance, extortion or passive corruption, (vi) the award was not rendered within the time frame established by the parties or within six months, if the parties did not establish any other term, or (vii) the due process was not observed.

Article 33 of the Act establishes a 90-day period for filing a motion to set aside an arbitral award, starting from the notice to the parties of the award or from the notice to the parties of a decision in response to a motion to clarify the award. These proceedings are subject to the ordinary track proceedings under the Brazilian Code of Civil Procedure and could last, on average, from three to six years.

The general rule is that set-aside proceedings do not stay enforcement proceedings. However, a party may request a provisional relief to stay the enforceability of the award based on the requirements of urgency (*periculum in mora*) and enough and probable legal support for the relief sought (*fumus boni iuris*), meaning that the requesting party must prove that the award will most likely be declared null and void. Said decision would be subject to appeal as every interlocutory decision granting/denying provisional relief in Brazil.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

Article 5, XXXV, of the Brazilian Federal Constitution provides that “*the law shall not exclude any injury or threat to a right from the consideration of the Judiciary*,” meaning that the parties cannot waive their right to challenge an arbitration award that has not yet been rendered. The law does not provide for any specific requirement for such an agreement.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

In Brazil, the rule is that awards may not be appealed. Exceptionally, the parties may agree to appeal against an arbitral award by setting forth the grounds of the appeal and most likely not involving the Judiciary. However, this is only in theory, since we are not familiar with any case in which an appeal has been agreed by the parties.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

In accordance with Article 33, Paragraph 2, of the BAA, the court can remand an award to the arbitral tribunal whenever the situations described in certain subparagraphs of Article 32 of the BAA occur, namely, subparagraphs (iii) (“the

award does not meet the mandatory requirements of the Act for an award”); or (iv) (“the award exceeded the scope of the arbitration agreement”). Under these conditions, courts may declare the award void and remand it to the tribunal, which will have the power to render a new award, remedying the defects that were the grounds for said remand (Article 33, Paragraph 2).

XIII. Recognition and Enforcement of Awards

- (i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

In order to enforce a foreign arbitral award in Brazil, i.e., an award rendered outside of the Brazilian territory, an application for recognition must be filed before the Superior Court of Justice, pursuant to Article 35 of the BAA and Article 104, I, “i” of the Federal Constitution. One can challenge recognition either based on the grounds set forth by the 1958 New York Convention, as Brazil is a signatory party to the Convention, or those established in Articles 38 and 39 of the BAA, which are virtually the same grounds of the New York Convention.

The draftsmen of the bill which eventually became the BAA decided to include in its text the main provisions of the 1958 New York Convention. By doing so, Brazil adopted the main framework of the New York Convention without formally becoming a Member State. Whilst this strategy was originally intended merely to circumvent the lack of political will to ratify and internalize the Convention, the practical, unintended effect was to hinder the application by the Brazilian Judiciary of the actual provisions of the New York Convention.

In fact, Brazil ratified the New York Convention on June 7, 2002 and finalized its internalization by means of Legislative Decree n. 4311, officially promulgated by the Executive branch on July 23, 2002. Because the BAA contains virtually all of the provisions of the New York Convention dealing with the recognition and enforcement of foreign arbitral awards, the Superior Court of Justice, when deciding such applications, until recently had almost exclusively referred to the provisions of the BAA, with only a few references to provisions of the New York Convention. Consequently, the Superior Court of Justice has in effect been denying itself the opportunity to draw on guidance from the body of court decisions, opinions and commentaries of highly qualified scholars and practitioners worldwide on the Convention, developed over many decades. However, the Superior Court of Justice now appears to be aware of this issue and has increasingly been making express reference to the Convention in its judgments.

Once a foreign arbitral award is recognized by the Superior Court of Justice, the competent federal court will have jurisdiction to enforce it.

Although Brazilian case law is usually supportive of arbitration, a recent decision by the Superior Court of Justice in *Abengoa v. Ometto* (2017) caused some concern in the Brazilian arbitration community. In this case, New York courts denied Ometto's request to vacate two twin ICC arbitration awards rendered in the United States, but, when Abengoa tried to enforce them in Brazil, the Superior Court of Justice allowed the same factual and legal issues to be re-argued and found that the awards could not be recognized based on the same grounds that were rejected by the New York courts, as they would, according to a majority decision by the court, violate Brazilian domestic public policy.

Arbitral awards rendered within the Brazilian territory are deemed to be an enforceable judicial instrument and do not need to be confirmed, nor recognized by the Judiciary. Therefore, the interested party must simply file an application for the enforcement of the award. The interested party can oppose the enforcement arguing, for example, setoff, novation, that the amounts enforced are excessive or that the statute of limitations has run. The challenging party may request that the court stay the enforcement, and the judge will grant it if the grounds for the request are relevant and if the continuation of the enforcement proceeding could cause irreparable damage to the debtor. In addition, the challenging party must post a bond to guarantee to the enforcement court that, should the challenge fail, the credit will be paid.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

In accordance with Article 109 of the Federal Constitution, once recognition of a foreign judgment (including a foreign arbitral award) is granted by the Superior Court of Justice, the competent federal court will have jurisdiction to enforce it.

The enforcement court will notify the defendant to pay the amount or perform the obligation, as provided for in the recognized foreign arbitral award. If payment or performance is not honored, the court will issue an order of attachment and appraisal. The debtor may oppose enforcement on very limited grounds (the defendant may not raise the merits defenses discussed in the arbitration, nor the defense grounds discussed in recognition proceedings), such as payment, novation, setoff or the running of the statute of limitations.

(iii) Are conservatory measures available pending enforcement of the award?

Yes, conservatory measures are available pending the enforcement of any award in Brazil, provided that the legal requirements have been met (basically, the aforesaid requirements of *fumus boni iuris* and *periculum in mora*).

- (iv) **What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?**

Courts have generally been very favorable to the recognition and enforcement of foreign awards. However, in *EDF v. Enesa* (2016), the Superior Court of Justice refused to recognize an award that had been set aside in Argentina on the grounds that an award set aside by the courts at the seat cannot be recognized and enforced in Brazil. Despite several discussions among Brazilian scholars, this decision is in line with Article V(e) of the New York Convention.

- (v) **How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?**

Enforcement of an award typically takes up to two years if there is opposition to such enforcement – which timeframe does not consider the amount of time of recognition proceedings before the Superior Court of Justice. The enforcement of an award must be sought within the same time frame of the statute of limitations applicable to the obligation created under the award (leading case n. 732.027 of the Federal Supreme Court), and the statute of limitations will not run while pending recognition proceedings before the Superior Court of Justice.

XIV. Sovereign Immunity

- (i) **Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

Foreign states and state entities enjoy full immunity from judicial proceedings, as well as enforcement immunity in Brazil. However, the Brazilian federal government, states, the Federal District, and municipalities, including all of their agencies, do not enjoy any kind of immunity.

- (ii) **Are there any special rules that apply to the enforcement of an award against a state or state entity?**

In accordance with Article 100 of the Federal Constitution, payments owed by the federal government, states, the Federal District, or municipalities by virtue of a court decision must be made exclusively in chronological order after being included in their respective annual budgets.

XV. Investment Treaty Arbitration

- (i) **Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

Brazil is not a party to the ICSID Convention and is historically resistant to investor-state arbitration. In 2017, Brazil signed the Protocol on Investment Cooperation and Facilitation (MERCOSUR Protocol). In 2019, the Mercosur and the European Union concluded a comprehensive free trade agreement (not yet signed). However, neither of those treaties affords a private investor the opportunity to arbitrate investment-related claims against Brazil.

- (ii) **Has your country entered into bilateral investment treaties with other countries?**

From 1994 to 2020, Brazil signed 27 BITs, which were never approved by Congress, therefore never entering into force internally, which is evidence of the country's long-lasting position against the BIT model. Recently, the country developed a particular model of bilateral treaty, the Agreement for Cooperation and Promotion of Investments ("ACFI," from the Portuguese *Acordos de Cooperação e Facilitação de Investimentos*). The ACFI is considered more balanced and seeks to prevent – instead of solving – disputes, adopting arbitration only between the signatory states. The ACFI also establishes an "Ombudsman," who is entitled to mediate conflicts between investors and the host state.

Brazil has signed ACFI's with Angola, Chile, Colombia, the United Arab Emirates, Ethiopia, Malawi, Morocco, Mexico, Mozambique, Peru, Suriname, Guiana, Ecuador and India⁶.

XVI. Resources

- (i) **What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?**

The main reference is the BAA, available in English at <<http://cbar.org.br/site/legislacao-nacional/lei-9-30796-em-ingles/>>. Also highly recommended are: (i) "Arbitragem e Processo," by Carlos Alberto Carmona; (ii) "Apontamentos sobre a Lei de Arbitragem," by Pedro A. Batista Martins; (iii) "A Reforma da Arbitragem," edited by Leonardo de Campos Melo and Renato Resende Beneduzi; (iv) "20 Anos da Lei de Arbitragem," edited by Carlos Alberto Carmona, Selma Ferreira Lemes and Pedro Batista Martins; (v) "Lei de

⁶ <<http://www.itamaraty.gov.br/pt-BR/politica-externa/diplomacia-economica-comercial-e-financeira/15554-acordo-de-cooperacao-e-facilitacao-de-investimentos>>. Access on March 02, 2020.

Arbitragem Anotada,” by André de A. C. Abbud, Daniel Levy and Rafael F. Alves; and (vi) International Arbitration – Law and Practice in Brazil, organized by Peter Sester.

“Revista de Arbitragem e Mediação” (“RAM”) and CBAr’ “Revista Brasileira de Arbitragem” are the most renowned arbitration journals in Brazil and also a relevant source for practitioners, containing studies on domestic and international arbitration and comments on recent caselaw (<<https://www.thomsonreuters.com.br/>> and <kluwerlaw.com>, respectively).

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

The major arbitration conferences in Brazil, held annually, are: (i) The ICC Brazilian Arbitration Day, which takes place in São Paulo in March; (ii) the Rio de Janeiro International Arbitration Conference, organized by the Rio de Janeiro State Public Attorneys’ Office, in May; (iii) the CBMA International Arbitration Congress, which takes place in Rio de Janeiro in August; (iv) the International Congress hosted by the Brazilian Arbitration Committee, in September; and (v) the São Paulo Arbitration Week organized by CAM-CCBC, in October.

The subjects, addressed by domestic and international practitioners and academics, are practical and always up to date, which has resulted in an increasing number of attendees from different jurisdictions.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Yes. Brazilian courts have been playing an important role over the last 20 years, turning the country into an arbitration-friendly jurisdiction, by applying the BAA and refraining from deciding on the merits of cases in which the parties have opted for arbitration as their dispute resolution mechanism.

As a result of this movement, a vast number of sophisticated contracts executed in the country have set forth arbitration as the chosen mechanism for dispute resolutions, especially those dealing with energy, oil & gas, infrastructure and M&A transactions. The rise of local arbitral institutions with very good reputation and experience in administering international cases, as well as the arrival of the ICC, which established an office in São Paulo in 2018, also indicate that arbitration has become a real alternative to court proceedings in Brazil.

It is worth mentioning the 2015 Amendment, which included a general provision in the BAA allowing the direct and indirect public administration to use

arbitration to resolve some of its conflicts and confirming that arbitrators have the power to grant interim measures, converting into law well-established precedents from Brazilian courts over the years, specially the Superior Court of Justice.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

The use of mediation in Brazil has been increasing for the past years. It is relevant to note that, besides the growth due to multi-tiered dispute resolution clauses inserted in sophisticated contracts, mediation is also growing in Brazil due to public policy initiatives, such as Resolution n. 125 of 2010, of the National Council of Justice, and its amendments and the Mediation Act (Federal Law n. 13140/2015).

In 2016, when the 2015 Brazilian Code of Civil Procedure came into force, court-assisted mediation became widely used, as the code establishes mandatory conciliation or mediation hearings before the respondent presents a defense.

Following the success of arbitration in Brazil, dispute boards are becoming more popular, especially considering that, prior to the 2014 World Cup and the 2016 Summer Olympics, many construction agreements were signed with reference to dispute boards as an initial means of settling disputes and some of these agreements are now under discussion. In this regard, São Paulo City Law n. 16873/2018 establishes that issues arising from contracts signed by the direct and indirect public administration of the City of São Paulo can be referred to dispute boards.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

The 2015 Amendment filled some gaps in that Act that are worth mentioning. The first is the inclusion of an express provision authorizing both the direct and indirect public administration to use arbitration to resolve their conflicts regarding disposable public property rights (Article 1, Paragraph 1, of the BAA).

It was also established that the commencement of arbitration stops the statute of limitations on the underlying claims, even if it is later decided that the arbitrators lack jurisdiction to decide upon said claims (Article 19, Paragraph 2, of the BAA).

Filling a significant gap that generated much controversy throughout the years in corporate law, the 2015 Amendment granted legal appraisal rights to minority shareholders who opposed to the inclusion of arbitration agreements in companies' bylaws (the 2015 Amendment added Article 136-A to Federal Law n. 6404/1976, which is the Brazilian Corporations Act).

Regarding the relationship between arbitral tribunals and judicial courts, the amendment created the "arbitral letter" and regulated the procedure regarding

interim measures in connection with arbitration, granting the arbitral tribunal powers to maintain, modify or revoke any provisional or urgent measure granted by the courts (Articles 22-C and 22-B of the BAA, respectively).

Finally, the law now guarantees parties' autonomy to appoint an arbitral tribunal of their own choice, as it provides that the parties may agree not to choose arbitrators from the arbitral institution's list, even if the rules of such arbitral institution establish the opposite (Article 13, Paragraph 4, of the BAA).