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IBA ARBITRATION COMMITTEE

Arbitration Guide

BRAZIL

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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 increased rapidly and steadily since the enactment of the 1996 Brazilian Arbitration Act (Federal Law n. 9307/1996, the BAA), especially after 2012, when the Brazilian Supreme Court confirmed its constitutionality and the Brazilian government ratified the 1958 New York Convention.[1] In this context, Brazilian courts have played 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 parties have opted for arbitration as their dispute resolution mechanism.

As a result of this movement, a vast number of sophisticated parties have opted to use arbitration as the dispute resolution mechanism in their most complex contracts, especially when involving M&A, energy, oil and gas, construction and infrastructure 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 judges who specialize in complex corporate and infrastructure disputes, the main advantages of arbitration in Brazil are still the speed of the proceedings and the qualification of the arbitrators. 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 them.

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 small pool of arbitrators, usually selected for a vast number of relevant cases. In response to such difficulty, the users are starting to appoint younger lawyers to act as arbitrators, with a solid background 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 are an uncommon occurrence in Brazil. Most arbitration proceedings, whether domestic or international, follow institutional rules.

Moreover, as of today, domestic arbitrations vastly outnumber international cases.[2] 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 section II.ii below).

The Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) 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 the Market Arbitration Chamber – the arbitration institution administered by the São Paulo stock exchange B3 (CAM), the Chamber of Corporate Mediation and Arbitration (CAMARB), in Minas Gerais, the Brazilian Center of Mediation and Arbitration (CBMA), in Rio de Janeiro, and the Mediation and Arbitration Chamber of Fundação Getúlio Vargas (FGV), also in Rio de Janeiro, have also been playing

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 115 in 2022. Source: https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/wp-content/uploads/sites/10/2023/06/CAM-CCBC-Facts-and-Figures-Anual-Report-2022-pt.pdf. Accessed on 25 October 2023.

2 Professor Selma Lemes, one of the co-authors of the bill which eventually became the BAA, conducts periodic research on arbitration-related matters in Brazil. According to Professor Lemes' 2023 research, there were 41 arbitrations related to international commercial agreements in Brazil in 2022. The ICC, the CAM-CCBC and the Chamber of Arbitration of the American Chamber of Commerce ('AMCHAM') concentrate circa 37 of these cases. Source: https://canalarbitragem.com.br/wp-content/uploads/2022/08/Pequisa-Selma-Lemes-e-Canal-Arbitragem-21-22-1.pdf. Accessed on 25 October 2023.

an important role, not to mention the ICC office in São Paulo, which is responsible for cases involving two Brazilian parties under the auspices of the ICC.

(iii) What types of disputes are typically arbitrated?

Article 1 of the BAA has adopted a broad approach to objective arbitrability, allowing all disputes regarding transferable property rights to be arbitrated. Therefore, disputes arising from general contract and corporate matters, particularly in specialized sectors (such as M&A, energy and oil and gas, infrastructure) are very often referred to arbitration.

Disputes involving companies and their shareholders are also frequently referred to arbitration. Article 109 of the Brazilian Corporations Act specifically provides that corporations can include arbitration agreements in their by-laws. Besides, in 2001 the São Paulo stock exchange B3 introduced its own arbitral institution, CAM, geared at administering disputes involving listed companies. Since 2010, any dispute between a company listed among the B3's top two levels, its shareholders and managers, are to be resolved by CAM.

Further, arbitration agreements are usually included in several government contracts. This is permitted by Federal Statute, such as the Concessions Act and the Public Private Partnership (PPP) Act, as well as State and Municipal Law. In 2011, the State of Minas Gerais was a pioneer, enacting Law n. 19477/2011, which allows the use of arbitration to solve disputes involving the State.

Confirming this trend, the 2015 Amendment to the BAA included a general provision allowing governmental entities to opt for the use arbitration to resolve some of its disputes. As a result, the number of arbitration proceedings involving State entities have increased over the last years.

Governmental entities have reacted favourably to the use of arbitration. São Paulo and Rio de Janeiro, the two most economically developed and active States in Brazil, issued administrative decrees regulating the use of arbitration (Decrees n. 46.245/RJ of 2018 and 64.356/SP of 2019). Moreover, several Federal Government entities, such as the National Agency for Oil, Gas and Biofuels (ANP), the National Telecommunication Agency (ANATEL) and the National Electric Energy Agency (ANEEL), frequently refer disputes related to concession agreements entered into with private entities to arbitration.

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

Under the BAA, the parties are free to agree on the duration of the arbitration, failing which the award must be rendered within a period of six months from the beginning of the arbitration, such period being renewable upon agreement of the parties and the arbitral tribunal. In practice, however, 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 Professor Lemes's 2023 research, the average duration of arbitral proceedings is 18.41 months from the signature of the terms of reference to the rendering of the arbitral award. This represents a 4 per cent reduction in time when compared to the 2022 research. However, experience shows that, if the dispute involves the production of expert reports, proceedings are most likely to last between 24-36 months.

(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. However, Provision No. 196/2020 of the Federal Brazilian Bar Association states that representing parties in arbitral proceedings is to be considered a lawyering activity for the purposes of Brazilian law.

In practice, parties to arbitrations governed by Brazilian law 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 whenever there is an issue related to Brazilian law.

Moreover, in a context of expansion of the Brazilian arbitration market, we have also seen appointments of foreign practitioners (ie, professors, lawyers) to act as arbitrators both in international and domestic cases. Conversely, Brazilian

practitioners have also been nominated to act as arbitrators in cases seated elsewhere. These nominations are facilitated when the prospective foreign candidate has a working knowledge of Portuguese and experience in dealing in the Brazilian dispute culture, and when the Brazilian practitioner has working knowledge of English and/or other foreign languages and some cultural familiarity with the jurisdiction whose law governs the arbitration.

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?

As a general rule, arbitration proceedings whose award are to be issued in Brazil are governed by the BAA. Article 2(1) of the BAA allows parties to choose the law applicable not only to the merits of the case, but also to the arbitration proceedings provided that they do not violate public policy.

The BAA does not differentiate between domestic and international arbitrations, even if there are foreign parties involved or if the governing law is not Brazilian law. Hence, any arbitration whose award is to be issued in Brazil, even if it involves parties located in different jurisdictions or a different applicable law, is governed, as a general rule, by the BAA.

Although the influence of the UNCITRAL Model Law over the BAA is not easily perceived from its text, there is no doubt that 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 domestic and foreign awards based on the geographic criterion.

Arbitral awards rendered within the Brazilian territory are deemed to be domestic awards and produce the same legal effects as a judgment rendered by a Brazilian court. They can be directly enforced without any previous court confirmation, and the procedure for its enforcement mimics the procedure to enforce a regular court judgment.

Article 34 of the BAA provides that an arbitral award will be deemed foreign if rendered outside Brazil. 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), and its recognition will depend upon an examination by the Superior Court of Justice – the second highest court in the land – before being enforced by Federal Courts.

(iii) What international treaties relating to arbitration have been adopted (eg 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 directly 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 does not provide a default conflict-of-law rule. The Introductory Act to the Brazilian Rules of Law provides certain conflict-of-laws rules depending on the nature of the dispute, but its application to arbitration proceedings is disputed among scholars.

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 transparency.

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.

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 at least provide rules concerning the mechanism to constitute the arbitral tribunal, so that the arbitration agreement is at least operable.

If the arbitration agreement is inoperable, the party interested in starting the arbitration must resort to the national courts for a proceeding to enforce the arbitration agreement as provided for in Articles 6 and 7 of the BAA.

Finally, according to Article 4(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. In *Jose Benito v MRV* (2016), the Superior Court of Justice stated that, even though the adhering party had concluded a contract with a valid arbitration clause, it would not prevent it from filing its claim in a State court.

According to Article 9(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. This agreement must be written and executed by two witnesses or by a public notary, and must contain certain information, such as contact information of the parties and the arbitrations, the nature of the dispute and the place where the award is to be issued, among other.

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 arbitration chosen by the parties to administer the proceedings, seat, applicable law and number of arbitrators. 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 court.

(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 agreements and generally decline to exercise jurisdiction when a dispute related to an arbitration clause is presented to them. Brazilian courts traditionally respect the principles of competence-competence and the separability of the arbitration agreement (both of which are expressly stated in the BAA), and generally recognize the authority of the arbitral tribunal to assert its own jurisdiction, including to decide on the validity of the arbitration agreement.

However, if an arbitration agreement is deemed to be prima facie null and void by the court, a judge can set aside the clause. This situation of prima facie annulment of arbitration clauses are extremely rare, and are usually related to cases in which parties fail to comply with the formal requirements of arbitration agreements in adhesion contracts, or when the arbitration agreement was fraudulent.

(iii) Are multi-tier clauses (eg 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. These agreements are enforceable as per the 2016 Brazilian Mediation Act, which states that arbitrators must suspend the proceedings in case of violation of an agreement in which the parties undertake not to initiate the arbitration prior to the conclusion of the mediation.

(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 defendants not reaching an agreement when choosing an arbitrator. Certain rules of the Brazilian arbitral institutions already include specific rules to deal with multi-party arbitration agreements. This movement stemmed from *Paranapanema v Santander et al.,* a case where 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.

(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. With regards to 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 of *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. This is considered the Brazilian version of the *Dow Chemical* case.

In *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 analyse 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.

(vii) How do the courts in the jurisdiction determine the law governing the arbitration agreement?

There is no case law in relation to the choice of law governing the arbitration agreement ruled by Brazilian courts. Article 2(1) of the BAA allows parties to choose the law applicable not only to the merits of the case, but also to the arbitration proceedings and to the arbitration agreement, provided that they do not violate public policy.

If the parties fail to do so, the BAA does not expressly provide a default rule. However, both Article V(1)(a) of the New York Convention and Article 38(2) of the BAA state that the law of the place of issuance of the arbitral award governs the validity of the arbitration agreement.

(viii) Do courts in your jurisdiction distinguish between the seat (or legal place) of the arbitration and the venue of meetings/hearings?

The BAA does not contain any provision on the determination of the seat of arbitration. As stated above, the BAA adopts geographic criteria related to the place of issuance of the arbitration award only for the purposes of the differentiating the rules on enforcement of domestic and foreign arbitral awards.

When determining the contents of the submission agreement, Articles 10 and 11 of the BAA do differentiate, however, between the place where the award is issued and the place where the meetings/hearings will take place. Those provisions allow parties to agree on different places for each aspect of the arbitration.

(ix) Are blockchain- and NFT-related disputes arbitrable in your jurisdiction?

Article 1 of the BAA establishes a wide scope for objective arbitrability. According to this provision, all disputes related to transferable property rights may be subject to arbitration. In theory, disputes related to NFT are, thus, arbitrable. However, the debate on the arbitrability of disputes involving blockchain and NFT is still in its infancy.

(x) Are there circumstances in which courts find that a valid arbitration agreement has become inoperable?

Inoperable arbitration agreements are those with provisions that do not allow the parties to constitute the arbitral tribunal. Article 20 of the BAA provides that the defendant must argue the inoperability of an arbitration clause in the first opportunity.

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 are capable of entering into contracts may use arbitration to resolve disputes regarding transferable property rights. Criminal or family matters, for instance, are considered non-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. The Superior Court of Justice, in *Petrobras v ANP* (2017), decided that it is for the arbitral tribunal to decide whether a dispute is arbitrable or not.

There is no provision in the BAA nor case law discussing specifically whether the lack of arbitrability constitutes a matter of jurisdiction or admissibility. Those matters are to be first decided by the arbitral tribunal; hence, arbitrators have jurisdiction over the case and whether to decide on its arbitrability. 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 sua sponte 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, the defendant must inform the court about such agreement at the first opportunity, as a preliminary objection to the claim. If no challenge is presented, the court will interpret such behaviour as a waiver of said party's right to arbitrate. Should the defendant raise the arbitration agreement as a defence, 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 any issues concerning the existence, validity and effectiveness of the arbitration agreement.

As explained in section 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 concluded and if there are grounds to set aside the award.

In any event, courts are not allowed to review the awards on its merits. As a general rule, Brazilian courts offer a very deferential treatment to arbitral awards. Actions to set-aside arbitration awards are rarely successful; empirical research conducted by the Brazilian Arbitration Committee in 2007 and 2016 demonstrate that there are few cases where actions to set side arbitration awards were fully granted.[3]

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 choses one arbitrator and the two party-appointed arbitrators chose 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 the parties to constitute the arbitration agreement, the BAA sets forth that the party seeking to initiate arbitration may notify the other party of its intention to start the arbitration proceedings (Article 6 of the BAA). If the parties do not reach an agreement as to the commencement of arbitral proceedings and the arbitration agreement is silent about the procedure for appointment of arbitrators, parties may seek court assistance to start the arbitration, under Article 7 of the BAA.

3 Available at www.cbar.org.br. Accessed on 25 October 2023.

Moreover, parties may also seek court assistance to the appointment of arbitrators in case the arbitration agreement provide for an even number of arbitrators (Article 13(2) of the BAA) or in case an arbitrator refuses the appointment or dies, and the arbitration agreement or the rules of arbitration do not provide for a way to substitute the arbitrator (Article 16(2) of the BAA). However, 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(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. In practice, however, arbitrators tend to rely on international standards (such as the IBA Guidelines on Conflict of Interests in International Arbitration) to determine which facts to disclose.

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 of the BAA, 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. Most arbitration rules, however, refer any challenge to either a permanent body within the institution or an ad hoc committee appointed for the sole purpose of examining the challenge.

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 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 on such grounds.

Also, issues related to conflict of interest may also play a role in the recognition and enforcement of foreign arbitral award. In *Abengoa v Ometto* (2017), the Superior Court of Justice refused recognition of a foreign arbitral award in a case where the arbitrator allegedly failed to disclose conflicts issues.

(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. They do not need to be lawyers – in fact, it is not uncommon for other professionals to serve as arbitrators in specialized cases (such as construction, for instance). In addition, arbitrators must proceed with impartiality, independence, competence, diligence and discretion. There is no written code of arbitrators' ethics, however, arbitrators are bound by any applicable ethical professional rules.

(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. Even though the IBA Guidelines on Conflicts of Interests in International Arbitration are not binding, it is common for the parties challenging arbitrators, as well as for the arbitral institutions or the tribunal, to refer to the IBA Guidelines as relevant authority.

VI. Interim Measures and Emergency Arbitration

(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 only authorized to grant interim measures prior to the constitution of the arbitral tribunal, and only if the interested party can prove probability of success of the claim and risk of irreparable harm. Once the tribunal is constituted, the sole jurisdiction to issue interim measures belongs to the tribunal which may also uphold, reverse or modify a previous court injunction.

Arbitral tribunals may grant all kinds of interim measures at any time during the proceedings, be it by means of an order or an award, both enforceable in court. Interim measures issued by arbitrators must be enforced by a court of law. To do so, arbitrators may use arbitral letters – a formal mechanism for communication between arbitral tribunals and the judiciary provided for in the BAA.

Traditionally, interim measures granted by arbitral tribunals seated outside of the country must be previously recognized by the Superior Court of Justice. In the end of 2019, however, the Superior Court of Justice followed recognition proceedings and granted the urgent relief issued by an arbitral tribunal seated outside of Brazil. However, there are scholars that defend the notion that foreign arbitral tribunals may also utilize arbitral letters to seek enforcement of interim measures in 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 if the interested party can prove probability of success of the claim and risk of irreparable harm. Once the arbitral tribunal is constituted, it will decide whether to reverse or modify the court's decision (Article 22-B of the BAA). If the arbitration proceedings have begun, any request for provisional relief will be addressed directly to the arbitral tribunal, with the possibility of the courts being asked to enforce the arbitral tribunal's order.

(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 (a) is deemed necessary to produce perishable evidence; (b) relate to evidence that may facilitate a settlement; or (c) the evidence may justify or avoid the arbitration. After the arbitral tribunal is constituted, all requests must be directed to the arbitrators. If the arbitrators deem that court assistance is necessary to produce any evidence during the proceedings, 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.

(iv) Are decisions by emergency arbitrators enforceable in your country?

Yes. Decisions rendered by emergency arbitrators may be enforced via arbitral letters, according to Article 237(4) of the Brazilian Code of Civil Procedure.

(v) What is the approach in your country to anti-suit injunctions or injunctions by arbitrators preventing parties from initiating litigation proceedings?

Brazilian courts have granted anti-arbitration injunctions in very few cases. There are two decisions that became notorious among international arbitration practitioners. First, in *Copel v UEG* Araucaria (2003), a Trial Court in Curitiba held that the

arbitration agreement inserted in the contract between the parties was invalid and determined that UEG Araucaria should abstain from practicing acts that would result in the continuation of arbitration filed before the International Chamber of Commerce in Paris. Second, in the *Jirau case* (2012), the São Paulo Court of Appeals ordered the insurers to withdraw an arbitration initiated in London, while English courts ordered the Brazilian builders to withdraw the court proceedings started in Brazil.

Until recently, it was well established in Brazil that these decisions represented exceptions, since the lower and superior courts in Brazil used to favour the competence-competence principle. However, in *Petrobras' Shareholders v The Federal Government* (2019), the Superior Court of Justice ordered an arbitration be stayed on the grounds that the arbitration agreement did not bind the Federal Government. Other similar anti-suit injunctions have been filed in other proceedings involving Petrobras minority shareholders seeking redress from the Federal Government as controller of Petrobras.

There are no reported cases on the enforceability of anti-suit injunctions ordered by arbitrators. However, the Federal Constitution states that no dispute shall be barred from being brought to courts, except in very limited circumstances (such as arbitration itself). Therefore, there is a strong chance that a court would not enforce such anti-suit injunction.

(vi) Do courts provide assistance in aid of foreign-seated arbitrations, including for disclosure of documents?

As stated above, Brazil has adopted a model of cooperation between the judiciary and arbitral tribunals for carrying out procedural acts by means of an instrument known as an arbitral letter, provided for in Article 22-C of the BAA. There is controversy, however, as to whether the same procedure applies to foreign-seated arbitrations – some scholars are of the view that any order by a foreign tribunal must be subject to recognition proceedings.

The Brazilian Code of Civil Procedure does provide for a lawsuit for the early production of evidence in cases where (a) the evidence may perish; (b) the evidence that may facilitate a settlement; or (c) the evidence may justify or avoid the arbitration. Albeit different from other rules found in comparative law (particular §1782 of Title 28 of the United States Code), this action may be used in aid of arbitration.

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, generally 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 – either during or before the arbitration proceedings start – if the requesting party can precisely indicate which evidence it needs and its relevance 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. The BAA does state, however, that arbitrators must proceed with discretion. Additionally, the rules of most arbitral institutions provide for confidentiality, similar 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 transparency.

(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 specific provisions in the BAA in relation to such matters. However, The BAA does state that arbitrators must proceed with discretion.

(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. Those rules are generally found in the Brazilian Bar Act and the Code of Ethics and Discipline of the Brazilian Bar Association.

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, particularly in international cases. 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' agreement provides 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 privilege or by a duty of confidentiality. The BAA does not provide for any rule on oath or affirmation. However, providing false testimony is a crime under Brazilian law. Hence, it is common for the arbitral tribunal to warn witnesses that they might be subject criminal prosecution in case they do not tell the truth during their testimony.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative, director or employee) and the testimony of unrelated witnesses?

The Brazilian Code of Civil Procedure differentiates between witnesses with no connection to the dispute and those who may have an interest in the case. 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, companies' employees, and other people who may have any interest on the outcome of the dispute are considered 'informants'.

Although some arbitrators rely on the Civil Procedure standards, the modern trend among arbitrators is to 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. In any event, Brazilian arbitrators tend to rely more on documentary evidence and expert testimony than on witness testimonies, which is a mainstay in the civil law tradition.

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

Expert testimonies are generally given during the evidentiary hearing. Experts may provide a report in advance, so that the opposing party may examine and engage an expert to prepare a response.

At the hearing, the parties' expert witnesses are virtually always questioned by counsel for opposing party. The tribunal can also pose questions to expert witnesses at any time.

There are no formal requirements regarding independence and/or impartiality applied to expert witnesses. 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 increasingly being used in both domestic and international cases, particularly when the arbitral tribunal perceives a great discrepancy in the positions held by the party-appointed experts. 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?

The BAA allows tribunals to appoint a secretary (Article 13(5)). However, 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.

(x) Are there any ethical codes or other professional standards applicable to counsel and arbitrators conducting proceedings in your jurisdiction?

Yes. Lawyer ethics are regulated by the Brazilian Bar Act and the Code of Ethics and Discipline of the Brazilian Bar Association. These rules set forth the duties of counsel towards their community, their clients and their colleagues. Scholars advocate that both rules apply to Brazilian counsel irrespective of the place in which they are conducting the proceedings.

As for the arbitrators, the BAA establish some relevant rules regarding their conduct, including, inter alia, the arbitrator's duty to act with impartiality, independence, competence and discretion; and the arbitrators' obligation to reveal any fact that might give rise to justifiable doubts as to their impartiality and independence. Finally, some of Brazil's most prominent arbitral institutions such as CAM-CCBC and CIESP-FIESP also issued their own codes of ethics, which serve as a guide for both arbitrators, parties and representatives in each of the proceedings they administer.

(xi) Have arbitral institutions in your jurisdiction implemented rules empowering arbitral tribunals to exclude counsel based on conflicts of interest or other reasons?

Brazilian arbitral institutions do not provide for any rule empowering arbitral tribunals to take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation to date.

(xii) Has your jurisdiction adopted any rules with regard to remote hearings and have there been any court decisions on same?

The BAA does not contain a specific provision on the possibility of holding a remote hearing, but it does give arbitrators and parties broad autonomy to establish the arbitration procedure, provided that the principles of due process of law and the impartiality of the arbitrator are respected. Some institutions, such as the CAM-CCBC, do have specific rules regarding remote hearings.

Remote hearings are widely accepted in arbitration practice in Brazil and have become pretty popular after the Covid-19 pandemic. There are no reported cases addressing any allegations of violation of due process during remote hearings.

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 (Article 26). 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 civil law does not specifically 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 monetary adjustment 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(1)) and are fully enforceable, as long as they comply with the requirements set forth in the statute. There is case law from the Superior Court of Justice according to which the 90-day deadline to file set-aside proceedings against an award, as provided under Article 33 of the BAA, is applicable to partial awards as well, and starts running from the date in which said decision becomes final (res judicata). Partial awards (as well as final awards) become final and binding after its issuance or in case a decision on a request for clarification is issued.

(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(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 by consent. Awards by consent must be in writing and fulfil 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. Institutional rules also provide for a similar right, albeit most of them grant a longer term to present a request for clarification (usually around 15 days).

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 to 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 Brazilian Bar Act. According to these statutes, courts must award a success fee based on a percentage of the total amount in dispute (established between 10 per cent and 20 per cent), and which must be paid directly by the losing party to the counterparty's lawyers. Scholars disagree as to whether those fees can (or should) be granted by arbitrators.

(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. In ad hoc arbitrations, the arbitrators and the parties will be free to discuss and fix the costs. If the parties and the arbitrators fail to reach an agreement, the arbitrator may seek court assistance in fixing its fees (Article 11, sole paragraph, of the BAA).

(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, for the apportionment of costs, the tribunals consider the parties' behaviour 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 (eg, 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) due process was not observed.

Article 33 of the Act establishes a 90-day term 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 request for clarification of the award. These proceedings are subject to the ordinary procedure 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. However, a party may request a provisional relief to stay the enforceability of the award if the interested party can prove probability of success on the action and risk of irreparable harm. 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, as a general rule, the parties cannot waive their right to challenge an arbitration award in court. However, the Brazilian Code of Civil Procedure allows parties to agree on changes to the procedure, provided that the dispute is related to freely transferable property rights and that the provision is not inserted in adhesion contracts or against parties with clear vulnerabilities. One could argue that this may include the possibility to waive such right. However, there is no case law on the issue.

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

Awards are not appealed to courts in Brazil. Parties may agree on an appeal mechanism within a particular arbitral institution – this is common in sports arbitration cases. However, those appeals are generally seen as another phase in the arbitration.

(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(2) of the BAA, a court may remand an award to the arbitral tribunal whenever the situations described in certain subparagraphs of Article 32 of the BAA occur, namely, when '*the award does not meet the mandatory requirements of the Act for an award*' or '*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).

(v) Is there a specialist arbitration court in your jurisdiction?

Certain State courts have specialized courts for arbitration matters. In 2017, the São Paulo State Court of Appeals created two divisions specialized in arbitration related disputes. In 2023, another one was created in the city of Campinas. The National Justice Council – which supervises judicial activity in Brazil – provides a list of courts specialized in arbitration.[4]

4 https://www.cnj.jus.br/corregedoria-divulga-lista-de-varas-especializadas-em-arbitragem/. Accessed on 25 October 2023

(vi) To what extent do courts in your jurisdiction allow arbitrators to amend and/or replace wrongly invoked law or the law not invoked by the parties (iura novit arbiter)? Could this be a basis to set aside the award?

Iura novit arbiter is usually accepted by Brazilian courts, although it remains a controversial issue. There are precedents from the Superior Court of Justice and from the State Court in São Paulo according to which decisions that are based in different legal grounds than the ones brought up by the parties where declared valid.

Regarding the possibility of setting aside an arbitral award on these grounds, the BAA does not specifically deal with this issue. While it is possible that a party might seek to set aside an award based on the arbitrators' application of the iura novit arbiter principle, it would generally be a challenging argument to make unless it can be demonstrated that the arbitrators' actions amounted to a breach of due process.

XIII. Arbitrator Liability

(i) Does the arbitration law in your jurisdiction expressly provide for the immunity of arbitrators, experts, translators, interpreters and/or other participants in arbitration proceedings from civil liability in connection with their mandate? If so, are there exceptions to this immunity?

The BAA has no specific provision on the matter. There is consistent case law affirming that arbitrators have no standing to be sued in set aside proceedings. This position is also widely supported by scholars. There are no reported cases on whether arbitrators are liable for any damages caused by them during their mandate.

(ii) Does this immunity, if any, extend to criminal liability?

Article 17 of the BAA expressly establishes that arbitrators are subject to the same treatment conferred to judges, particularly for the purposes of criminal liability. Hence, arbitrators are subject to the same sanctions as judges in case of any crimes committed during their mandate.

XIV. 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?

On the one hand, arbitral awards rendered in Brazil are deemed to be an enforceable judicial title, and do not need to be confirmed nor recognized by a court. Therefore, the interested party must simply file an application for the enforcement of the award. The interested party can oppose the enforcement on limited grounds. The challenging party may request that the court stay the enforcement, and the judge will grant it if there is a probability of success in the claim and if there is a risk of irreparable harm.

On the other hand, enforcement of a foreign arbitral award in Brazil requires an application for recognition to 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 in 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 7 June 2002 and finalized its internalization by means of Legislative Decree n. 4311, officially promulgated by the executive branch on 23 July 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 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. This seems to be the most modern trend.

Only after a foreign arbitral award is recognized by the Superior Court of Justice, can it be enforced. Enforcement of a foreign arbitral award is under the jurisdiction of Federal Courts.

(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 arbitral award is granted by the Superior Court of Justice, the competent federal court will have jurisdiction to enforce it. Once recognized, the procedure to enforce a foreign arbitral award is the same as a domestic arbitral award: the court will notify the defendant to comply with the recognized foreign arbitral award. The defendant may oppose enforcement on very limited grounds (the defendant may not raise the merits defences discussed in the arbitration, nor the defence grounds discussed in recognition proceedings).

(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 requesting party proves that it has a probability of success in the claim and if there is a risk of irreparable harm.

(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 favourable 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.

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

Enforcement of an award may take between two to five years, depending on whether there is opposition to such enforcement and whether there are assets to satisfy the credit. 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, and the statute of limitations will not run while pending recognition proceedings before the Superior Court of Justice.

XV. Sovereign Immunity

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

Foreign States and State entities enjoy immunity from judicial proceedings, as well as enforcement immunity in Brazil, except in very limited circumstances (such as accepting jurisdiction in Brazil, and when enforcement is related to assets used for commercial/non-diplomatic purpose). However, the Brazilian Federal Government, the States, the Federal District, and Municipalities, including all of their agencies, do not enjoy any kind of immunity within Brazilian courts.

(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 (including arbitral awards) are paid via a form of government bond (*precatório*). Payment of the bonds is made in the chronological order of its issuance, and are subject to other specific rules provided in Brazilian law.

(iii) Are there any requirements for arbitrations involving sovereign entities?

The BAA does not specifically address arbitrations involving sovereign entities. Nevertheless, the BAA was amended in 2015 to clarify that public administration (ie, the Federal Government, States, the Federal District, and Municipalities, including all of their agencies) can be a party to arbitrations, and, like any other party, must voluntarily agree to submit to arbitration.

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 transparency.

XVI. 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 Washington 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 Bilateral Investment Treaties (BITs), which were never ratified by Congress. Therefore, these treaties never entered into force internally, which only serves as evidence of the country's long-lasting position against the traditional BIT model.

Recently, the country developed a particular model of bilateral investment treaty, the Agreement for Cooperation and Promotion of Investments (ACFI, from the Portuguese *Acordos de Cooperação e Facilitação de Investimentos*). The ACFI 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 India.[5] Some of these treaties are currently in force, while others await ratification.

(iii) Have there been any recent court decisions in your country in relation to intra-European investor-state arbitration?

No.

XVII. 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 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's '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.

XVIII. 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 subjected to arbitration.

As a result of this movement, a vast number of sophisticated contracts executed in the country have opted for arbitration as the chosen mechanism for dispute resolution. The rise of local arbitral institutions with very good reputation and

5 The treaties are available at https://concordia.itamaraty.gov.br/. Accessed on 25 October 2023.

experience in administering complex, 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 to the BAA converted into law well-established precedents from Brazilian courts over the years, specially the Superior Court of Justice. This Amendment was key to update the BAA and consolidate established case law into the Brazilian legal system.

(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, especially since the enactment of the Mediation Act in 2016. The use of ADR in Brazil has long been the focal point of public policy initiatives, such as Resolution No. 125/2010 of the National Council of Justice, which establishes policies and procedures for the use of ADR by courts, and the 2015 Brazilian Code of Civil Procedure, which placed a high emphasis on the use of court-assisted mediation in civil litigation cases.

Moreover, dispute boards are becoming increasingly popular, especially after the 2014 World Cup and the 2016 Summer Olympics. Many construction agreements executed for these events made reference to dispute boards, and the experience was positive. Even State entities have adopted dispute boards to public procurement and construction contracts: São Paulo City Law n. 16873/2018, for instance, establishes that issues arising from contracts executed by the City of São Paulo and its governmental entities can be referred to dispute boards.

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

The 2015 Amendment filled some gaps in the BAA 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' by-laws (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).

(iv) Are there any official plans to reform the arbitration laws and practice in your jurisdiction?

Since its enactment in 1996, the BAA has been modified only once. More recently, however, a bill aiming to alter some aspects regarding the appointment of arbitrators, arbitrators' duty to disclose, and confidentiality was proposed and still awaits vote in the Congress. Unlike the 2015 Amendment, which was predominantly praised by scholars and practitioners, the bill has been criticized by the arbitral community in Brazil for being too restrictive of party autonomy. So far, it has not moved forward in Congress.

(v) Are there any rules governing third-party funding in your jurisdiction? Is there an obligation to disclose the identity of any non-party who has an economic interest in the outcome of the proceedings, including any third party funder? Have there been any recent court decisions in your jurisdiction in relation to third-party funding?

Although third-party funding is a growing phenomenon in Brazil, the BAA is silent over the matter. In order to adapt to this new trend, some of the country's leading arbitral institutions (eg, CAM-CCBC, CAMARB and CIESP/FIESP) have issued resolutions providing for recommendations regarding third-party funding, particularly related to the duty to disclose the existence of a third-party funder.

Finally, despite there being no case law involving the participation of funders in arbitration proceedings in Brazil, it is certain that the validity of the practice has already been endorsed by Brazilian courts. In *José Aurelio Valporto v Odebrecht S.A* (2022)[6] the São Paulo State Court of Appeals ruled that there was no impediment for a plaintiff to seek financial assistance from third parties to finance the costs of a lawsuit.

(vi) Has your country implemented a sanctions regime? Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent court decisions in your country in relation to the impact of sanctions on international arbitration proceedings?

Federal Law No. 13,819/2019 *(the International Sanctions Law) governs the enforcement and monitoring of sanctions imposed by the United Nations Security Council (UNSC) on countries, entities or individuals.* As per the International Sanctions Law, UNSC sanctions and the designations of its sanctions committees are immediately valid and enforceable both for Brazilian citizens and throughout Brazil's territory.

There are currently 14 different international sanctions regimes in place under the UNSC. These sanctions are considered as a matter of public policy by Brazilian scholars. However, we are not aware of any court decisions addressing the impact of sanctions in arbitration proceedings.

6 *See* São Paulo Estate Court of Appeals, 2nd Business Chamber, No. 2153411-63.2022.8.26.0000, 20 September 2022.