

# Key Things to Know about Arbitration and Brazil

**Gustavo Fernandes de Andrade**

+55 21 2127 4271

[gfernandes@mayerbrown.com](mailto:gfernandes@mayerbrown.com)

**Allison M. Stowell**

+ 1 212 506 2469

[astowell@mayerbrown.com](mailto:astowell@mayerbrown.com)

August 11, 2016

# Today's Speakers



Gustavo Fernandes de Andrade  
Rio de Janeiro



Allison M. Stowell  
New York

# Key Things to Know about Arbitration and Brazil

- The Explosion of Arbitration
- Domestic Arbitrations
- Arbitrations with Public Administrations
- Foreign Arbitrations

# EXPLOSION OF ARBITRATION

# A Brief History of Arbitration in Brazil

- 1996: Brazil Arbitration Law, based on the UNCITRAL Model Law, is adopted
- 2001: Brazil's Supreme Court declares the Arbitration Law constitutional
- 2002: Brazil becomes party to the New York Convention
- 2015: 1996 Arbitration Law is modernized by an amendment

# “Explosion” of Arbitration in Brazil

- Since the 2001 Supreme Court’s decision finding the Arbitration Law constitutional, the number of arbitrations has exploded
  - Between 2008 and 2014, the number of ICC arbitrations involving Brazilian parties tripled
  - In 2014, only France and the United States had more nationals involved in ICC Arbitrations
  - Between 2010 and 2015, the number of arbitrations filed in the six largest Brazilian arbitration institutions increased 58%, to 222 new arbitrations filed in 2015
    - The average amount in dispute has increased from R\$11 million in 2005 to R\$48 million in 2015

# “Explosion” of Arbitration Unlikely to Reverse in the Foreseeable Future

- Overburdened courts are driving the government’s support of arbitration
- Investment by foreign investors continues, despite the recession
  - Significant opportunities for foreign investors in coming years, including Petrobras’s anticipated divestments of over \$15 billion in assets
- 2015 Amendments authorize direct or indirect public administration entities to arbitrate disposable disputes
- “Cooperation and Facilitation Investment Agreements” with Angola, Malawi, Mexico and Mozambique and Colombia permit inter-state arbitration

# Overarching Principle of Due Process

All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

LIV – no one shall be deprived of freedom or of his assets without the due process of law;

*Constitution of the Federative Republic of Brazil, Title II, Chapter I, Article 5*

The arbitral procedure shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitral institution or specialized entity, it being possible for the parties to empower the sole arbitrator or the arbitral tribunal to regulate the procedure. ...

2° Paragraph: The principles of adversary proceeding, equal treatment of the parties, impartiality of the arbitrator and freedom of decision, shall always be respected.

*Brazilian Arbitration Law, Article 21*

MAYER • BROWN



# Overarching Principle of Due Process

At the parties' discretion, arbitration may be conducted under the rules of law or in equity.

1° Paragraph: The parties may freely choose the rules of law applicable in the arbitration provided that their choice does not violate good morals and public policy.

2° Paragraph: The parties may also agree that the arbitration shall be conducted under the general principles of law, customs, usages and international rules of trade.

*Brazilian Arbitration Law, Article 2*

# DOMESTIC ARBITRATIONS

# The Arbitral Tribunal

- No requirement for counsel or arbitrators to be Brazilian
- Some Brazilian arbitral institutions restrict the selection of arbitrators to a roster
- Under the 2015 Amendments, parties may agree that this restriction is not binding on them
- After evaluating the institution's rules and its roster, consider including a provision that the limitation imposed by arbitral rules on the selection of arbitrators from the institution's roster does not apply

# Statute of Limitations

- The statute of limitations stops running when the arbitration is initiated
  - It is tolled if the tribunal eventually finds that it lacks jurisdiction
- However, an arbitration is “initiated” when the tribunal is constituted—not when the request for arbitration is filed
- Once the tribunal is constituted, the date of the request for arbitration, not the date of tribunal’s constitution, is used for purposes of the statute of limitation

# Interim Measures

- Parties may request interim measures from a court, but only before the tribunal is constituted
- A party must file a request for arbitration within 30 days of the order granting interim measures
  - If not, the interim measures become ineffective
- Once a tribunal is constituted, the tribunal may uphold, amend or revoke the interim measures, and recourse to a court may no longer be had

# Multi-Party Arbitration

- Arbitration Law does not provide for multi-party arbitration, including means of joinder or consolidation
- Consider including provisions providing for consolidation or joinder in the arbitration agreement
  - Provide for all parties' ability, including joined parties, to participate in appointment of arbitrator so as to avoid Constitutional due process concerns

# Disclosure

- Courts may enforce tribunals' discovery orders under the Arbitration Law
- However, disclosure is traditionally limited in Brazil
- Courts require that the requests must clearly specify the documents sought
  - It is unclear whether courts would enforce a broad request for documents
- Consider instead requesting that the tribunal draw an adverse inference based on the failure to produce evidence, which is likely permitted under the Constitution's due process requirements

# Attorneys' Fees and Interest

- Express agreement is required for a tribunal to allocate attorneys' fees and costs
- Absent agreement on the applicable interest rate, the National Treasury rate ("SELIC"), currently 14.25%, is frequently applied
- Consider including provisions for allocation of attorneys' fees and costs and the applicable interest rate



# The Award

- A party must request that the tribunal correct or clarify an award within five days of receipt or personal delivery, unless another deadline is agreed by the parties
- Motion to vacate must be filed within 90 days of the award, even if it is a partial award

# ARBITRATION WITH PUBLIC ADMINISTRATIONS

# Arbitrations with Public Administrations

- Brazil is not an ICSID member
  - Brazil has entered into Cooperation and Facilitation Investment Agreements with Mexico, Angola and Mozambique, countries in which Brazilian investors have interests
  - These do not have investor-state dispute settlement provisions
- The 2015 Amendment to the Arbitration Law clarified that Public Administration (both Direct and Indirect) may arbitrate disputes related to “disposable economic rights”
- The arbitrations must be decided based on law (not equity) and be public

# Public Administration Arbitrations

- In 2015, 20 arbitrations involving public administrations were filed with Brazil's six largest arbitral institutions
- Further developments will be watched with interest

# FOREIGN-SEATED ARBITRATIONS

# Data Protection Laws

- There is no express restriction on the cross-border transfer of electronically stored information
- A number of specific laws impose privacy of personal information and data protection based on particular types of relationships, industries and professional activities
  - “Personal information” includes information regarding legal entities
- A comprehensive data protection law may be adopted in the near-future: a bill for the Protection of Personal Data has been under consideration since 2015
- Consult with local counsel for most up-to-date requirements, such as consent, for the collection and production of data for use in an arbitration

# Enforcement of Awards

- Interim and Partial Awards are enforceable
  - The award must be final
- Awards must be recognized by the Brazilian Superior Court of Justice (“STJ”) to be enforced
  - The court is specialized and has a pro-enforcement stance
- The motion must contain:
  - a duly certified copy of the arbitration award, authenticated by a Brazilian Consulate;
  - a duly certified copy of the arbitration agreement; and
  - sworn translations of the arbitration award and agreement
- Grounds for refusing to vacate are those of New York Convention

# Thank You

For questions, please reach out to:

- **Gustavo Fernandes de Andrade**  
+55 21 2127 4271  
[gfernandes@mayerbrown.com](mailto:gfernandes@mayerbrown.com)
- **Allison M. Stowell**  
+1 212 506 2469  
[astowell@mayerbrown.com](mailto:astowell@mayerbrown.com)