

**ARBITRATION TO RESOLVE INTERNATIONAL COMMERCIAL
DISPUTES UNDER THE BRAZILIAN ARBITRATION ACT: IS
BRAZIL A GOOD SITE FOR ARBITRATION?**

by

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LL.B. The Federal University of Espirito Santo (Brazil), 2000

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(Faculty of Law)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

July, 2004

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Title of Thesis:— "ARBITRATION TO RESOLVE INTERNATIONAL
COMMERCIAL DISPUTES UNDER THE BRAZILIAN ARBITRATION
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Degree: MASTER OF LAWS Year: 2004

Department of FACULTY OF LAW

The University of British Columbia

Vancouver, BC Canada

ABSTRACT

For a long time, Brazil remained faithful to its historic attitude of hostility towards arbitration. This placed Brazil in a state of dangerous isolation in times of fast technological changes, privatization, foreign investment and globalization affecting Latin America. The boom period of the mid 1990's was a time when large deals and contracts were signed and the seeds of modern international commercial arbitration were sown once again in the region. International investors and businesses setting up operations in Latin America demanded dispute resolution mechanisms that provided confidence and certainty that any disputes arising under contractual agreements were going to be resolved expeditiously, impartially and by knowledgeable experts. In this environment when privatization of telecommunications and hydroelectric power stations was occurring, the 1990's marked the renaissance of arbitration in Brazil with the enactment of new legislation on arbitration, the *Brazilian Arbitration Act* of 1996 (Law 9.307/96) ("the *Act*"). Since the enactment of the *Act*, arbitration has been the subject of study by scholars and strong efforts have been made to promote the use of arbitration in the country. This thesis focuses on the recent development of arbitration after the enactment of the *Brazilian Arbitration Act*, with an emphasis on the *Act's* regulations. The thesis recommends improvements which may be made in order to attract more foreign investors who seek the certainty that Brazil is a good venue for arbitration.

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ACKNOWLEDGEMENT

I have received help and tremendous support from various people to whom I am sincerely indebted. This thesis could not have been possible without some institutional support and personal sacrifices. To this end, I would first like to thank my supervisors Dr. Ljiljana Biukovic and Prof. Ian Townsend-Gault for their informed comments and guidance for the completion of this work. I would also like to thank Prof. Wes Pue for supporting the graduate students and the graduate program of the Faculty of Law. I thank the faculty and staff, including librarians of the law school for their assistance. To my fellow lawyers from Brazil, I owe eternal gratitude for the information and jurisprudence provided whenever was necessary.

I cannot forget to mention my graduate fellows who made this journey more enjoyable and interesting. To my other friends, I have to thank for the pleasant moments together, for being my family in Canada and for never letting me forget the happy Brazilian spirit. Special thanks to Jeff Kormos who always has been there for me, even in very moody times! Thank you for your friendship and understanding.

Last, but certainly not least, I am especially grateful to my mother, father and brothers Julio and Laura, whose love, encouragement (and money!!!) always taught me that just about anything is possible with courage and a lot of persistence. I am what I am because of my family. I love you.

To my parents

CHAPTER I: General Introduction

1.1. Introduction to the Thesis Topic

Arbitration is currently a “hot” topic in Brazilian jurisprudence. Until very recently, the litigation process, regardless of the nature or monetary implications of the disputes, settled the majority of disputes. As a result, legal resources have been squandered and the legal system is experiencing a serious backlog of court cases. For many litigants, securing justice is a distant or even unattainable goal because the access to various appeals means dispute resolution through the courts can take between 10 and 20 years. According to the Federal Justice Association of Brazil (Associação dos Juízes Federais do Brasil), from 1989 to 1999 the number of cases increased by 159.2%, the number of judges increased by 36.5%¹. Clearly, the judicial system requires overhauling to increase its efficiency.

The Brazilian government has identified two approaches toward improving judicial efficiency: The first approach would shorten the litigation process by simplifying the proceedings. The second approach circumvents the litigation process altogether through recourse to alternative dispute resolution mechanisms, including arbitration. In this thesis, I focus on the second approach, particularly on arbitration. The first approach, simplifying the litigation process, is of interest only for placing arbitration in a historical context.

In 1996, the Brazilian Congress passed the *Brazilian Arbitration Act*², an instrument designed to resolve disputes between both domestic and international parties. The scope of application of the *Act* is not restricted to commercial matters, instead, the *Act* is applicable to

¹ Dalmo de Abreu Dallari, “A Tradição da Arbitragem e sua Valoração Contemporânea”, in Adriana Noemi Pucci, coord., *Aspectos Atuais da Arbitragem*, (Rio de Janeiro: Forense, 2001) 99 at 100.

² Lei 9.307 de 23 September 1996, *Diário Oficial da União* (D.O.U.), 24 September 1996, 18.897.

all transferable property rights. Hence, the use of arbitration will apply to matters of a contractual nature that can receive a monetary evaluation. Disputes related to family law, bankruptcy, anti-dumping, just to name some, cannot be settled using arbitration because they fall under the domain of national public policy.

The *Brazilian Arbitration Act* is composed of seven chapters (general provisions, the arbitration agreement and its effects, the arbitrators, the arbitral proceedings, the award, the recognition and enforcement of foreign arbitral awards, and final provisions) and in total contains 44 articles. This thesis focuses on an analysis of the *Brazilian Arbitration Act* by identifying the *Act's* omissions and defects and discussing the implications of using the *Act* to resolve international commercial disputes in Brazil.

In Chapter I, the subject matter of the thesis is introduced, along with its goals and methodology of research. Chapter II examines the social and economic framework associated with the development of arbitration in the world, along with Brazil's general reluctance to employ arbitration. This inquiry begins with a brief historical overview of the Brazilian legal regime, analyzing the progression of three major areas applicable to arbitration: national laws, international treaties and regional conventions. The study of national laws illustrates the internal laws providing for the use of arbitration for particular matters and circumstances. An investigation of international treaties, on the other hand, determines the international conventions regarding arbitration that have been ratified by the Brazilian government. Finally, an examination of regional conventions outlines the existing bilateral and multilateral treaties regarding arbitration among Latin American countries that are in force in Brazil.

Chapter III examines the question of the constitutionality of the *Brazilian Arbitration Act* addressed by the Federal Supreme Court in 2000. The Court was requested to recognize and enforce an arbitral award rendered by an arbitral institution in Switzerland against a Brazilian company. Prior to recognition, the Court decided to open incidental proceedings to discuss the potential unconstitutionality of the *Act* and to hear the Attorney General's opinion. The problem was associated with Articles 6 and 7 of the *Brazilian Arbitration Act*, with regards to the so-called "blank" arbitral clause, which does not provide for the rules of proceedings to start the arbitration. All members of the Supreme Court had to judge whether or not these Articles were conflicting with Article 5, paragraph XXXV of the Constitution. Four years after the enactment of the *Brazilian Arbitration Act*, the Supreme Court decided an individual is free to choose whether he wants to plead in court or opt for an alternative dispute resolution process such as arbitration.

Chapter IV is divided in two major sections. The first section (item 4.1), outlining the application of the *Act*, is subdivided into six subsections: The arbitration rules of Brazil based on the structure of the *Brazilian Arbitration Act* are discussed, along with the general provisions of the law; second, the arbitration agreement is described; third and fourth, the arbitrator's role and duties are defined, and the protocols governing arbitral proceedings are discussed; fifth, the conditions of validity for arbitral awards are presented; and finally, the criteria for recognizing and enforcing foreign arbitral awards are reviewed. Included in this analysis is a comparison of the *Brazilian Arbitration Act* with the *Model Law of the United Nations Commission on International Trade Law (UNCITRAL)*³, the *Convention on the*

³ *United Nations Commission on International Trade Law*, 21 June 1985, UN Doc. A/40/17, Annex I; hereinafter, *UNCITRAL Model Law*.

Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 1958⁴ and the *Inter-American Convention on International Commercial Arbitration (Panama Convention)* of 1975⁵, since it was inspired by these rules. The second section (item 4.2) of Chapter IV is also subdivided into six subsections, featuring a critique of the *Brazilian Arbitration Act* and identifying the defects and omissions that require remedy. This section emphasizes the polemic aspects of the *Brazilian Arbitration Act*: the choice of law rules, interim measures, possibility of recourse and enforcement of foreign arbitral awards.

Chapter V examines the dispute settlement mechanism of the Mercado Comum do Sul (MERCOSUL)⁶. The chapter begins by introducing the transitory system provided in the *Protocol of Brasilia*⁷, which highly emphasized negotiation and diplomacy among the contracting states. However, as a transitory mechanism, *Protocol of Brasilia* was improved with the ratification of the *Protocol of Las Leñas*⁸ and the *Protocol of Olivos*⁹. The latter expressly revoked the *Protocol of Brasilia*. Despite notable improvements concerning proceedings in the *Protocol of Olivos*, the system provided therein is still provisory and must be changed when the Common External Tariff (TEC-Tarifa Externa Comum) convergence process takes place. Furthermore, the *Protocol of Olivos* provides private parties limited opportunities to use this dispute settlement mechanism, offering the impression that the

⁴ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 3, hereinafter, *New York Convention*. In Brazil, *Decreto-lei 4.311 de 23 de Julho de 2002*, D.O.U., 24 July 2002, p. 03.

⁵ *Inter-American Convention on International Commercial Arbitration*, 30 January 1975, 14 I.L.M. p 336, entered into force on June 16, 1976. In Brazil, *Decreto Legislativo n. 90*, D.O.U., 6 June 1995; hereinafter, the *Panama Convention*.

⁶ Mercado Comum do Sul Between the Government of Uruguay, the Government of Paraguay, the Government of Argentina and the Government of Brazil, 26 March 1991, *Treaty of Asuncion* 1991 (entered into force on 26 September 1991) [MERCOSUL]. The MERCOSUL is a common market area among the contracting states, in order to integrate their economies to increase economic development.

⁷ *Dec. n. 922 de 10 de Novembro de 1993*, D.O.U., 13 November 1993, 13552.

⁸ The *Protocol of Las Leñas* was enacted on June 27, 1992.

⁹ The *Protocol of Olivos* was enacted on February 18, 2002. *Decreto Legislativo n° 712 de 14 de Outubro de 2003*, D.O.U., 15 October 2003, 2.

Protocol was drafted for disputes among the contracting states. Therefore, the *MERCOSUL Agreement on International Commercial Arbitration (Buenos Aires Agreement)*¹⁰ was ratified in Buenos Aires to provide access to arbitration for private investors willing to solve their disputes under the scope of the MERCOSUL with standardized rules, without having to resort to the complex mechanism of the *Protocol of Olivos*, and at the same time, avoiding litigation under national laws.

Finally, after analyzing the key problems associated with the *Brazilian Arbitration Act* and comparing it to other options, suggestions for improvement of the *Act* are recommended. Ultimately, this thesis hopes to answer the question: "Is Brazil a Good Site for Arbitration?"

In order to respond to this key question, several important conditions must be addressed. Depending upon where arbitrations takes place, great variations exist with respect to what matters are arbitrable, what form must be given to an arbitration agreement, the degree of judicial intervention in the arbitration process, the means of challenging an arbitrator, the freedom of choice of the law applicable to the merits, etc.¹¹. Thus, a recommended site for arbitration is the place whose laws and regulations provide confidence to the parties involved, in which a final decision will be reached taking into consideration their will, as expressed in the contract. The intervention of the courts should be restricted to situations where the arbitral tribunal is incompetent to act (coercive measures, enforcement of the arbitration agreement and administration of the award) or to oversee the fair proceedings of the arbitral tribunal. Bearing in mind the remarks made above, one may have

¹⁰ *Decreto Legislativo 265 de 29 de Dezembro de 2000*, D.O.F.E. 30 December 2000, 2. The *Buenos Aires Agreement* came into life after the meetings of the Common Market Counsel, which led to the CMC/Dec n. 3/98 of 23 July 1998.

¹¹ Sigvard Jarvin, "Choosing the Place of Arbitration: Where do we stand?" (1988) 16 *International Business Lawyer* 417.

to answer the following questions: Is the *Brazilian Arbitration Act* appropriate to bring certainty and trust to foreign investors aiming to solve their disputes in Brazil? Have the enactment of the *Brazilian Arbitration Act* and the ratification of the main international conventions been effective in improving arbitration in Brazil? Are foreign investors confident enough to insert arbitration agreements in a contract with a Brazilian party?¹²

1.2. Goals and Methodology

The brief introduction is intended to explain why arbitration is growing, the importance of arbitration in Brazilian legislation and the potential future use of arbitration in international trade. Problems might surface in applying the *Brazilian Arbitration Act* to international commercial arbitration, because the *Act* currently does not make distinctions between domestic and international arbitration. Perhaps the legislator of the *Act* overlooked the distinctions in order to facilitate the acceptance and practice of arbitration in the Brazilian context, by introducing one law with complete rules of proceedings. Given the absence of arbitration practice in Brazilian legal tradition, the enactment of one law seems logical: it facilitates understanding and harmonizes legal proceedings. By contrast, two laws—one to deal with domestic and another to deal with international disputes—could create doubts, and fuel debate and skepticism among arbitration practitioners. Nevertheless, the adoption of one unique law for both kinds of disputes does not comply with the peculiarities of international trade.

¹² Mauricio Gomm Ferreira dos Santos, "Arbitration in Brazil" Paper presented to the International Centre for Dispute Resolution in New York City, The Practitioner's Conference on the Investment Climate and Increasing Use of International Commercial Arbitration in Latin America, March 12, 2004 [unpublished].

Faced with increasingly complex international transactions, institutions require consistent rules to deal with problems originating from those transactions. All over the world, numerous conventions and arbitration centres are emerging to address the genuine problems of international trade quickly and effectively. The conflicts commonly addressed by arbitration include: the traditional sale of goods, transportation agreements, distributorship and agency agreements, long-term construction contracts, joint ventures, licensing, patents and transfers of technology¹³. The very nature of these transactions—involving parties from different states, or objects of contracts being executed in a third state, or governments attracting foreign investors to provide public services—give rise to complex issues. These issues require the expertise and understanding provided by arbitration.

The increase of arbitral centres is happening at the domestic level as well. Indeed, Brazil now provides close to 70 arbitral institutions in its different states to settle domestic conflicts of interest to Brazilians¹⁴. For example, the Commercial Association of the State of Paraná founded the Chamber of Mediation and Arbitration in 1996¹⁵ (ARBITAC), and has held 27 arbitrations since 1999. In São Paulo, the Chamber of Mediation and Arbitration¹⁶ administered by the Federation of Industries has held 27 arbitrations in total. In the state of Minas Gerais, the Chamber of Mediation and Arbitration (CAMARB) has held 15

¹³ Dr. Ljiljana Biukovic, "International Commercial Arbitration in Cyberspace: Recent Developments" (2002) 22 *Northwestern Journal of International Law & Business* 319.

¹⁴ Brazil is a republic and a federation composed of 26 states, municipalities and the federal district. Compete exclusively to the Brazilian state to legislate on: civil law, procedural, commercial, criminal law, electoral law, maritime law, aeronautic law, aerospace law, and labour law.

¹⁵ Câmara de Mediação e Arbitragem da Associação Comercial do Paraná (ARBITAC). The ARBITAC kindly sent the information through email [translated by author].

¹⁶ Câmara de Mediação e Arbitragem de São Paulo da Federação das Indústrias e Comércio do Estado de São Paulo. This centre held five arbitrations in 2000, five again in 2001, nine cases in 2002, seven in 2003 and so far, one international arbitration in January 2004. Mrs. Denise G. Carregosa, the director of the Chamber provided the information [translated by author].

arbitrations, and they have had one to look after an international dispute¹⁷. In general, these arbitration centres are considered important in Brazil, with each one conducting the arbitration according to its own regulations.

Since the main characteristic of arbitration is flexibility, it is inconceivable to design a uniform arbitral procedure to resolve all disputes efficiently. As the goal of international commercial arbitration is to offer a binding but flexible means of resolving disputes, in the introductory chapter of *Law and Practice of International Commercial Arbitration*, Redfern and Hunter state:

Whilst general guidance can be offered as to ways of arbitrating international commercial disputes speedily and effectively, the need for initiative and imagination in adopting, adapting and developing the appropriate procedure to deal with the particular dispute must not be under-stated. This is part of the challenge of the practice of international commercial arbitration.¹⁸

The purpose of this thesis is to disclose the potential for arbitration to be used as an alternative method of dispute resolution in Brazil, while revealing the challenges that the *Act* poses to international commercial arbitration.

The method of research will be a mix of conventional legal research and comparative study. The comparison will illustrate the differences and similarities between the *Brazilian Arbitration Act* and the *UNCITRAL Model Law*¹⁹, the *New York Convention*²⁰ and *Panama Convention*²¹. Using the comparative method will reveal weaknesses in the *Act* and unearth

¹⁷ Câmara de Arbitragem Empresarial – Brasil (CAMARB). The centre held two arbitrations in 1999, two in 2000, three in 2001, three in 2002, four in 2003 and so far, one case in 2004. Mrs. Flávia Bittar, the secretary of the Chamber, provided the information.

¹⁸ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (Sweet & Maxwell: London, 1986), p. 51 [Redfern and Hunter].

¹⁹ *UNCITRAL Model Law*, *supra* note 3.

²⁰ *New York Convention*, *supra* note 4.

²¹ *Panama Convention*, *supra* note 5.

changes made by the legislator to make the *Act* conform to the Brazilian reality. Doctrinal books are used as a primary source to shed light on the basic arbitration process. Journal articles covering the topic offer a fresh, up-to-date look at more controversial issues, such as recognition and enforcement of international arbitral awards, coercive measures and the choice of law applied during arbitral proceedings. This approach will enable me to conclude with suggested amendments to the *Brazilian Arbitration Act* that would correct the ambiguities of the law.

In addition, pointing out the shortcomings of the *Act* will be an important step toward predicting future problems associated with applying the *Act*, which the Brazilian courts might address in case law. In order to make such predictions, it will be necessary to research and analyze the latest court decisions in Brazil.

An historical overview will be used to explain the hostile attitude among lawyers toward arbitration and why the application of arbitration was delayed for years.

The conclusion will emphasize the importance of arbitration as an alternative method of dispute resolution. A clearer understanding of this institute, combined with a report on the Brazilian Supreme Court's positive use of arbitration, will be crucial to the successful development and acceptance of arbitration in Brazilian society and culture.

CHAPTER II – The Social and Economic Context for the Development of Arbitration

As previously mentioned, the pressing need to reduce both time and resources devoted to litigation brought about two responses in Brazil: the first was to devise ways to simplify litigation, and the second was to create alternative mechanisms for resolving disputes. The first initiative to simplify legal proceedings was launched in 1973, when the *Brazilian Code of Civil Procedure (C.C.P.)*²² was published, introducing the **summary proceeding**²³. Heretofore, all cases in Brazil have been conducted according to the **ordinary proceeding**, which entails a set of formal rules. However, Brazil's large caseload has posed an obstacle toward greater efficiency. Through the use of the summary proceeding, the number of cases was substantially reduced, resulting in a shorter overall process. However, the summary proceeding has not yet been universally applied, and is usually reserved for minor cases, such as cases concerning unpaid condominium fees²⁴ or cases involving low monetary awards (v.g., up to 20 times the monthly wage stipulated by the Brazilian government)²⁵.

In addition to the reduced length and increased simplicity of the summary procedure, the summary procedure requires less time for the court and the parties to respond. In the ordinary procedure, if the initial petition is regular (with no impediments, suspicion, amendment to the initial petition or other factor to delay a case), the competent judge orders the realization of citation within 10 days. In practice, citation takes at least a year in Brazil

²² *C.C.P.* (1973) is still valid and applicable to litigation.

²³ Art. 275 *C.C.P.* (1973) establishes seven situations that are under the scope of the summary proceeding.

²⁴ Art. 275, II, "b", *C.C.P.* (1973).

²⁵ Art. 275, I, *C.C.P.* (1973).

whenever civil matters are at stake. After receiving the citation, the defendant has 15 days to present his defence. When the response is due, the judge has 10 days to order the preliminary measures. If any irregularity is detected, the judge will give a minimum of 30 days to allow the party to amend the petition. After the order of the preliminary measures has been accepted, the judge will render his decision according to the state of the process. If the matter of dispute regards only law or regards law and facts, there is no need for evidence. If facts are present and the matter of dispute considers transferable property rights, the judge will request evidence and will schedule hearings within 30 days. The defendant has five days to respond to the petitioner's evidence. During the hearing, if the parties conciliate, the judge will render a judgment recognizing the parties' agreement. On the other hand, if the parties do not conciliate during the first hearing, the judge will highlight the controversial points, determine the evidence to be made and designate another hearing to enable him to decide the case. This is a regular ordinary procedure.

The summary procedure is far less time-consuming. In the initial petition, the petitioner must include the witnesses and their experts, and he or she must formulate the questions right away. After receiving the initial petition, the court will schedule the hearing within 30 days, giving notification to the respondent at least 10 days prior the hearing. If the parties conciliate during the hearing, the judge will homologate their agreement. If they cannot conciliate, the respondent will provide his written defence, with all the documentation and witnesses necessary to prove his allegations during the hearing. Afterward, the judge will designate the trial date within 30 days maximum, where she or he can render the final decision or render the final decision 10 days following the trial date. In the summary

proceeding, by contrast, incidental proceedings are forbidden, as well as third party intervention.

In 1990, Brazil passed the *Consumer Protection Code*²⁶, creating an effective mechanism for solving disputes between customers and suppliers of goods and services. For the first time in the history of Brazilian law, special courts were created to adjudicate this kind of dispute. According to Article 51, VII, of the Code, all contractual agreements containing clauses establishing mandatory arbitration to solve matters related to consumption of goods and services are considered abusive clauses. In Brazil, for instance, an adhesion contract involves one of the parties acting as the proponent of a contractual agreement with its clauses pre-established by the proponent. No negotiation between parties is required to draft the terms of the contract. Hence, if the adhesion contract imposes the use of arbitration to resolve consumer disputes between contracting parties, it is considered abusive. As a result, debate remains heated about the use of arbitration to resolve such conflicts.

Depending upon the conditions under which the contract was made, arbitration can be used to settle consumer disputes. If the consumer accepts the arbitration clause by providing his or her initials on this specific clause, the consumer faces “no impediments” to resort to arbitration to resolve the dispute. The consumer’s intention becomes more evident if he or she gives initiation to the arbitral proceedings. Plínio José Lopes Shiguematsu²⁷ argues that arbitration is not admissible to solve this kind of dispute because of the unbalanced bargaining power between seller and buyer. In this case, the *Consumer Protection Code* provides for conciliation at the first hearing of the litigation process as a remedy to avoid

²⁶ Lei n° 8.078 de 11 Setembro de 1990, D.O.U., 12 September 1990, 1 [translated by author].

²⁷ Plínio José Lopes Shiguematsu, “A Problemática da Cláusula Compromissória nos Contratos de Adesão” in Paulo B. Casella, ed., *ARBITRAGEM: lei brasileira e praxe internacional*, 2 ed., (São Paulo: LTr, 1999); see also C.H. Carvalho Froés, “A Arbitragem no Brasil de Acordo com a Lei 9.307/96”, in José Maria R. Garcez, ed., *A Arbitragem na Era da Globalização*, (Rio de Janeiro: Forense, 1997).

litigation. However, if the parties do not reach an agreement, the court will render a final decision.

Continuing this trend in favour of new courts, the Brazilian Congress passed *Law 9.099* creating *Special Courts of Civil and Criminal Matters*²⁸. The legislation established two separate court systems, each with its own distinct summary proceeding: one to settle civil matters, and the other for criminal matters²⁹. These systems proved effective in resolving minor civil and criminal offences. *Law 9.099* has specific provisions regarding the use of conciliation and arbitration; however, the procedure starts as a regular litigation. During the first hearing, the competent judge informs the parties of the advantages of conciliation. If the parties conciliate, the judge will homologate their agreement; but if they do not, the parties can opt to go to arbitration according to the rules established in Articles 24, 25 and 26 of *Law 9.099*. If the parties cannot agree on nomination of the arbitrator, the judge will nominate one, immediately designating the trial date to enable the arbitrator to hear the parties and witnesses and analyze the evidence. After the trial date, the arbitrator grants an award within five days, which will be given to the original judge for homologation without possibility of appeal. If the parties do not agree on arbitrating their dispute, the litigation follows the procedure established by the law.

Recently, the government created the *Special Federal Courts of Criminal and Civil Matters* through enactment of *Law 10.259/2001*³⁰. These courts will deal exclusively with minor issues under the federal jurisdiction, with proceedings simplified in a similar manner to those tried under the *Special Court of Criminal and Civil Matters*.

²⁸ *Lei nº 9.099 de 26 de Setembro de 1995*, D.O.U., 27 de September 1995, 15033 [translated by author].

²⁹ Art. 3 and following regards the Special Civil Courts (Juizados Especiais Cíveis) and art. 60 to art. 92 regard Special Criminal Courts (Juizados Especiais Criminais) [translated by author].

³⁰ *Lei 10.259 de 12 de Setembro de 2001*, D.O.U., 13 September 2001, 01.

Brazil's growing demand for an alternative dispute settlement mechanism persuaded legislators to pass *Law 9.307* in 1996, introducing the *Brazilian Arbitration Act*. Arbitration, however, was not a novelty for Brazilian jurists. The concept had appeared in several previous statutes, including the *Civil Code (C.Civ.)* of 1916³¹, although arbitration was largely ignored in practice. Like the majority of their colleagues practicing civil law in Latin America, Brazilian jurists were highly skeptical of arbitration because of the state's longstanding monopoly over the justice system via regular litigation. The courts felt that private agreements authorizing the use of arbitration diminished their jurisdiction. Part of their reluctance was based on inconsistencies inherent in the arbitral proceedings, which allowed capacity and fairness of the proceedings to be continually questioned. In short, arbitration agreements raised the courts' suspicions, because they were often the product of unequal bargaining power between the parties.

By the 1990s, arbitration had undergone a maturing process. No longer did Brazilian citizens perceive the state as the sole source for justice. Consequently, legislators saw that justice might be obtained privately, involving a third person deciding a conflict: the arbitrator. The Brazilian government's first efforts toward change (*i.e.*, the *Consumer Protection Code*, the *Special Courts of Civil and Criminal Matters*, the *Brazilian Arbitration Act*, etc.) reflect the collective desire to create, alongside the state, a private mechanism for maintaining social peace and stability.

The practice of arbitration in Brazil is now a reality. As Prof. Irineu Strenger asserted,

...[T]o ignore arbitration means to put ourselves in an outdated and inferior level, juridical and culturally speaking. In recent years, more and more countries modified their legal system to comply with international

³¹ *C.Civ.* (1916-2002). Recently, the *Law 10.406/2002* enacted the New Civil Code on January 10th, 2002, revoking the oldest Civil Code. *Lei 10.406/2002 de 10 de Janeiro de 2002*, D.O.U., 11 January 2002, 01.

arbitration specificity. The enormous growth of arbitration centres all over the world brought, consequently, an increase of rules that are practiced in this activity [translated by author]³².

The history of Brazilian arbitration reflects the current trend in integrated economies. The result of these economies has been a vast increase in international trade, and along with this development, a demand for specific rules governing foreign trade and investment. In response to new demands, the material and procedural rules of law for respective states must adjust to commercial practice. Two factors underlie this latest development: the primacy of international rules of law, and internal adjustments between domestic laws and international arbitral procedures.

However, in the past, arbitration was rarely used in Latin America owing to *double exequatur* i.e., arbitration decisions handed down in the country of origin having to be recognized by the relevant court in that jurisdiction, and later in the country where enforcement is being sought. In addition, arbitration clauses for many years were not considered valid: the clauses were held to be *pactum in contrahendo*, that is, considered only as a promise to arbitrate in the future. Thus, Latin American judges understood such clauses lacked the binding force of law. The enforcement of foreign awards was also a matter of national sovereignty. To recognize a "foreign jurisdiction" would represent the courts' attempt to override national sovereignty. Therefore, no legal provision provided legal effect to the foreign arbitral decision.

In addition, domestic arbitral awards required recognition by national courts. Thus decisions handed down by third parties were routinely referred to the state for final adjudication. In other words, while the backlog of court cases crippling the judiciary system

³² Irineu Strenger, *Arbitragem Comercial Internacional*, (São Paulo: LTr, 1996) at 23 [Strenger].

proved an important stimulus to overhauling arbitration laws and legislating new laws, economic factors also played a key role.

As recently as the 1980s, Brazil remained sheltered behind a wall of economic protectionism and—consistent with a nationalist and retrograde vision of the role of state—continued to monopolize public services and key industries. However, the world was changing, and a relatively new phenomenon was emerging: the formation of economic blocks. This phenomenon, which began with the creation of the European Economic Community³³ following the Cold War, received further impetus with the conclusion of the North American Free Trade Agreement (NAFTA)³⁴ and Mercado Comum do Sul (MERCOSUL)³⁵. The aim of these blocks was to facilitate the circulation of goods and services between core members by eliminating customs duties and tariffs restrictions. It should be noted that, despite common goals, each block created its own distinctive rules in order to establish itself as a concrete entity.

Cherie O'Neal Taylor³⁶ states that any free trade or common market agreement must feature political institutions and a dispute settlement mechanism. According to Taylor, political institutions are essential for reaching decisions on how to implement treaty obligations, as well as for overseeing their implementation. A dispute settlement mechanism is needed to resolve disputes that may arise over the meaning and application of the agreement's legal obligations and objectives. She notes:

³³ *Treaty of Rome*, 25 March 1957, 294 U.N.T.S. 17 (F).

³⁴ North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA].

³⁵ MERCOSUL, *supra* note 6.

³⁶ Cherie O'Neal Taylor, "Dispute resolution as a catalyst for economic integration and an agent for deepening integration: NAFTA and MERCOSUR?" (1996) 17 *Northwestern Journal of International Law & Business*, n 2-3, 850.

...A dispute settlement mechanism is crucial to the viability of an economic integration arrangement because the traditional method which states resolve their disputes is through negotiation. Since not all negotiations lead to politically acceptable solutions for disputing countries, some conflicts would never be resolved unless they turned to a form of third-party dispute resolution.³⁷

With the growth of international trade, the circulation of information, technology and capital also increased trade disputes. Differing interpretations of rules—such as the rules applicable for trade among countries in regional economic blocks—can trigger disputes among private parties that require resolution. It is safe to say a natural symbiosis exists between arbitration and the international trade community. The extraordinary expansion of economic relations between people governed by differing political and legal regimes has coincided with the growth in arbitration, particularly among businesses requiring additional legal expertise³⁸. In such a complex economic climate, the arbitration system offers a more flexible alternative for dealing with international commercial disputes.

Furthermore, because international business disputes usually involve parties of different states, most parties are inclined to insert their choice of law clause to address the terms of their own contracts. If the parties do not make such a distinction, the discussion of the conflict-of-law rules before national courts or arbitrators will automatically create two disadvantages for the parties involved: first, it means all contractual documentation will require translation to the language of the forum and second, the interpretation of the contract will be limited to the domestic rules of a given state. However, some transactions are difficult to classify under certain domestic legislation (v.g., transportation of highly hazardous

³⁷ *Ibid.* at 851.

³⁸ Guido F. S. Soares, “Arbitragem e sua Conaturalidade com o Comércio Internacional” in Adriana Noemi Pucci, coord., *Aspectos Atuais da Arbitragem*, (Rio de Janeiro: Forense, 2001) 121 at 122.

material). Furthermore, when a foreign law is applicable in domestic litigation, proof of the existence of the foreign law is necessary. In addition, it is possible that the judiciaries of both parties are competent to hear the case and in the end, they can have two opposite decisions. Because of this, individuals involved with international trade steer clear of litigation in national courts to avoid the uncertainties surrounding the application of the rules of a particular state.

Another relevant issue regarding international trade concerns the potential use of rules of equity to resolve a contractual dispute. In arbitration, the rules of equity mean the application of any rules that best fulfill the nature of the business, other than the laws of a particular state. Another possibility is the use of *lex mercatoria* to settle a dispute, based on suitability and mutual agreement of the parties involved. This process is rarely seen in domestic court litigation because the judge has to observe other principles first, such as the general theory of contracts. In Brazil, courts can only use rules of equity when the law expressly enables it.³⁹ Thus, in spite of the advantages offered by alternatives, the parties are not totally free to choose the law applicable to their contractual relation in a domestic forum.

However, the skepticism toward litigating in domestic court is higher if one of the parties in international agreement is a state. Foreign investors prefer to avoid the risk of facing impartial domestic courts. And the government can easily enact new decrees or laws, and change its capacity to negotiate in a determined matter, causing disadvantages or damages for the private investor. Moreover, in Brazil, litigating against the state can take up to 10 years owing to the lengthy appeals process.

This leads one to ponder the advantages of confidentiality and celerity provided by arbitration as a means of resolving international commercial disputes. Owing to arbitrators'

³⁹ Art. 127 C.C.P.

expertise in international commercial matters, arbitration is automatically quicker than litigation. Furthermore, depending on the nature of business involved, parties may be reluctant to see their dispute disclosed to the public. In addition, arbitration proceedings will likely lead to agreement and dispute settlement without damaging the continuity of the business.

In this context, international arbitration constitutes a powerful instrument for addressing international trade problems. Unlike litigation, arbitration outlines specific rules and provides the kind of institutional guidance unavailable through the national courts, which are deficient in of their knowledge of international commerce and, more importantly, limited by the scope of their jurisdiction.

Brazil, the leader of MERCOSUL and the world's eighth largest economy, representing almost half of Latin American GDP, is clearly a proponent of international trade. The Brazilian economy, moreover, has an enormous potential for growth, despite instabilities stemming from domestic problems as well as external factors, most notably the Argentine economic meltdown, the collapse of the United States' economy and the war in Iraq.

It is impossible to imagine any major trading nation lacking an effective mechanism for resolving disputes arising from international trade. Because the national courts cannot efficiently settle such disputes, Brazil has had to resort to international arbitration in order to be a player in the international trading system. To meet modern demands, it is essential that Brazil, along with its Latin American neighbours, adapt its domestic arbitration laws to meet the goals of an emerging global economic order and, more specifically, to bring coherence to domestic and international arbitration laws. In order to realize this goal, legislators must

bring domestic arbitration law in line with the principles of international arbitration. One way to achieve this would be the adoption of the *UNCITRAL Model Law* for international commercial arbitration by Latin American countries. For instance, some articles of the *Brazilian Arbitration Act* copied the *UNCITRAL Model Law* and the *New York Convention* of 1958⁴⁰ provisions. Articles 38 and 39, I-II of the *Act* are translations of Article 5, 1(a-e) and 5, 2(a-b) of the *New York Convention*. Another way to harmonize domestic arbitration law with principles of international arbitration is to enact a law with provisions addressing international arbitration and domestic arbitration in separate sections such as the *Federal Arbitration Act*⁴¹ (*FAA*) of the United States enacted in 1925. The *FAA* consists of three chapters: (a) the “domestic” *FAA*, 9 U.S.C. §§1-16, applicable to agreements and awards affecting either interstate or foreign commerce; (b) the *New York Convention*’s implementing legislation, 9 U.S.C. §§ 201-210, applicable only to awards and agreements falling within the *New York Convention*; and (c) the *Inter-American Arbitration Convention*’s implementing legislation, 9 U.S.C. §§301-07, applicable only to awards falling under the *Inter-American Convention*⁴². Instead, the current *Brazilian Arbitration Act* only provides procedural rules for arbitration and its application fails to distinguish between domestic and international disputes.

Notwithstanding any remaining obstacles, Brazil has taken a major step forward in recognizing arbitration as a legal instrument for settling disputes between private parties. Such recognition can only reassure the international business community as to Brazil’s commitment to free trade and its willingness to play a leadership role in Latin America.

⁴⁰ *New York Convention*, *supra* note 4.

⁴¹ *Federal Arbitration Act*, ch.392, §1, 62 Stat. 669 (1947) (as codified at 9 U.S.C. §§1-16).

⁴² Gary B. Born, *International Commercial Arbitration in the United States, Commentary & Materials* (Deventer: Kluwer Law and Taxation Publishers, 1994) at 29.

2.1. Historical Development of Arbitration in Brazil

2.1.1. National Laws

As a method for resolving disputes, arbitration was first formally cited in the *Philippines Legal Norms*, Book III, Title III, XVI and XVII⁴³ in 1603. Article 160 of the 1824 Constitution stated that if the parties had agreed not to appeal, arbitral awards would be enforced without delay. Subsequent constitutions have not contained provisions for arbitration, although no one has yet questioned the competence of arbitral tribunals as a legal tool. The Constitution of 1934 referred to commercial arbitration in Article 5, XIX, c⁴⁴.

The *Commercial Code (C.Com.)* of 1850 established a mandatory arbitration process for matters arising out of commercial contracts, such as partnerships. This mandatory arbitration process was revoked in 1866 on constitutional grounds. However, voluntary arbitration was retained in some articles of the *C.Com.* for matters relating to maritime law.

Articles 1.037 through 1.048 of the *C.Civ.* of Brazil of 1916⁴⁵ contained arbitration provisions without regulating the arbitration clause. In 1939, the first *C.C.P.* was enacted and arbitration was regulated in Book IX, Chapters I, II and III. Articles 1.072 through 1.102 of the *C.C.P.* of 1973⁴⁶ regulated arbitration, defining the arbitrator's function, outlining the procedure and stipulating the means of enforcing arbitral awards. It failed, however, to prescribe a system for specific execution of the arbitration clause.

⁴³ Ordenacoes Filipinas, online: Universidade de Coimbra <<http://www.uc.pt/ihti/proj/filipinas/ordenacoes.htm>>. The compilation of the Philipines Legal Norms was made using an old edition of Candido Mendes de Almeida, found in Rio de Janeiro, 1870. Felipe I, King of Portugal, enacted the Philipines Legal Norms in 1603 and it was in force until 1830.

⁴⁴ Paulo Borba Casella, coord., *Arbitragem: Lei Brasileira e Praxe Internacional*, 2. ed., (São Paulo: LTr, 1999) at 39.

⁴⁵ *C.Civ.*, *supra* note 31.

⁴⁶ *C.C.P.*, *supra* note 22.

Notwithstanding these developments, arbitration has remained unpopular. The *C.Civ.* of Brazil did not recognize the validity of the arbitration clause, which was held to be a *pactum in contrahendo*, and considered only as a promise of a future agreement to arbitrate. In addition, enforcing foreign arbitral awards required the double *exequatur*. For these reasons, arbitration has largely been ignored in Brazilian legal practice.

The debate over arbitration was revived only in 1992 when Mr. Marco Maciel, Brazil's Vice-President at that time, proposed to Congress that a law be enacted to reintroduce arbitration according to modern international practices. The *Brazilian Arbitration Act (Law 9.307/96)*, finally enacted in 1996, became a substitute for the relevant provisions contained in both the *C.Civ.* and the *C.C.P.* It remains the main legal instrument governing all facets of arbitration in Brazil.

2.1.2. International Treaties

The purpose of international conventions is to harmonize the laws of all contracting states on the particular topic dealt with by that convention⁴⁷.

In Brazil, unlike the United States, international treaties and conventions do not have the force of law merely by reason of having been ratified by the government. In Brazil, a treaty provision does not become law until it has been implemented by decree, when it becomes an internal law. The decree will incorporate the translated version of the original convention.

Many Latin American countries subscribe to the monist theory that holds that international treaties take precedence over national laws. This is the case for Argentina and

⁴⁷ Dicey and Morris, *The Conflict of Laws*, 13th. ed., vol.1 (London: Sweet & Maxwell, 2000).

Paraguay, where their Constitutions provide explicitly for the supremacy of international treaties over internal laws⁴⁸. Brazil and Uruguay, on the other hand, defer to the principle of *lex posterior derogat lex priori* in the case of conflicts involving national and international laws⁴⁹. The Federal Supreme Court (STF) of Brazil has historically understood that national and international laws are at a similar jurisdictional level, because as internal laws, international treaties become equivalent to ordinary legislation. This principle carries with it the implication that any national law enacted after international treaty takes precedence. However, Brazilian courts offer four exceptions to the principle of *lex posterior derogat priori* in: 1. extradition cases; 2. all agreements of GATT⁵⁰ and FTAA⁵¹; 3. the Taxation Code (provides in Article 98 that treaties and international conventions revoke or modify the domestic law, and will be applicable according to the principle of *lex posterior derogat priori*); and 4. the *Brazilian Arbitration Act* (Article 34 states “a foreign award shall be recognized and enforced in Brazil in accordance with the international treaties with validity in the internal legal system and, in the absence of that, strictly according to the terms of this law”). Hence, following the ratification and enactment of the *New York Convention* by the Brazilian government in 2002⁵², enforcement of foreign arbitral awards will follow the proceeding of the Convention.

In 1932, Brazil ratified the *Geneva Protocol* of 1923⁵³ governing arbitration clauses, but restricted the use of arbitration to commercial disputes. The *Geneva Protocol* of 1927⁵⁴

⁴⁸ João Bosco Lee, *Arbitragem Comercial Internacional nos Países do Mercosul*, (Curitiba: Juruá, 2002), at 273 [João Bosco Lee].

⁴⁹ *Ibid.*

⁵⁰ *General Agreement on Tariffs and Trade*, 10 October 1949, 55 U.N.T.S. 187, Brazil 62 U.N.T.S. 191, 335.

⁵¹ *Free Trade Agreement of the Americas*.

⁵² Brazil was one of the last of 134 countries to ratify the Convention.

⁵³ *Protocol on Arbitration Clauses*, Geneva, September 24, 1923 (1924) XXVII L.N.T.S. 157.

⁵⁴ *Convention on the Execution of Foreign Arbitral Awards*, Geneva, September 26, 1927 (1929-30) XCII L.N.T.S. 301.

regarding the execution of foreign arbitral awards was never ratified. After the ratification of the *New York Convention*, the *Geneva Protocols* were revoked in accordance with Article VII (2) of the *New York Convention*.

2.1.3. Regional Conventions

The creation of the Inter-American system of arbitration is an effort to standardize international private laws throughout Latin America. The *Inter-American Convention on International Commercial Arbitration* signed in Panama City (*Panama Convention*), January 30, 1975, is in force in 17 Latin American countries⁵⁵. Brazil became a contracting state of the *Panama Convention* after ratification in 1996. The *Convention* laid down rules on the validity of arbitration clauses in international commercial contracts and the enforcement of foreign arbitral awards. The main goal of the *Panama Convention* was to standardize procedures for resolving international commercial disputes. Its norms emphasized recognition and enforcement of foreign arbitral awards, and were aimed at facilitating the circulation of decisions among Latin American countries. However, unlike the *New York Convention* (Article IV), the *Panama Convention* did not specify the requirements for enforcing foreign arbitral awards. The *Montevideo Convention* of 1979⁵⁶ corrected this omission.

One key difference between the *Panama* and *Montevideo Conventions* is that the former focused exclusively on the recognition and enforcement of international commercial

⁵⁵ Inter-American on International Commercial Arbitration, online: OAS
<<http://www.oas.org/juridico/english/treaties.htm>>

⁵⁶ *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, 8 May 1979, OAS Treaty Series 51. Argentina, Bolivia, Brazil, Colombia, Dominican Republic, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

arbitral awards, whereas the latter was broader in scope, addressing judgments in civil, commercial and labour cases. Aside from such differences, the main purpose of the *Montevideo Convention* was to provide a complementary understanding of the *Panama Convention*. Consequently, any disposition of the former that was contrary to the latter had to be disregarded, and the rules of the *Panama Convention* had to be observed.

Within the ambit of MERCOSUL, Brazil ratified the 1992 *Protocol of Las Leñas*⁵⁷ and, more recently, the *Buenos Aires Agreement*⁵⁸, which provide rules of proceedings for international commercial arbitration for private parties. In February 2002, Brazil ratified the *Protocol of Olivos*⁵⁹, revoking the application of the *Protocol of Brasilia* on its dispute settlement mechanism. These treaties confirm the importance of arbitration as a dispute settlement mechanism to facilitate the consolidation of economic integration in the MERCOSUL. In addition, arbitration was chosen for dispute resolution to provide the correct interpretation and application of the resolutions or rules established in the MERCOSUL, in order to assure juridical certainty for investors and the contracting states.

However, in those countries subscribing to *lex posterior derogat priori*, the international conventions are compromised. Brazil enacted the *Brazilian Arbitration Act* in September of 1996 after having ratified the *Panama Convention* in May of the same year. This action in effect nullified the latter because it contained incompatible articles. For example, rulings regarding the arbitration clause and the arbitral tribunal are not applicable. Only Articles 5 and 6⁶⁰ of the *Panama Convention* are applicable owing to a provision in the

⁵⁷ *Protocol of Las Leñas*, *supra* note 8.

⁵⁸ *Buenos Aires Agreement*, *supra* note 10.

⁵⁹ *Protocol of Olivos*, *supra* note 9.

⁶⁰ These Articles of the *Panama Convention* refer to recognition and enforcement of foreign arbitral awards.

Act that specifically excludes from its purview provisions related to the recognition and enforcement of foreign arbitral awards⁶¹.

In a number of cases the Brazilian Federal Supreme Court has ruled international and national laws to be on an equal footing. However, the principle of *lex posterior derogat priori* makes it difficult to standardize international legislation regarding arbitration in Latin America, since newer laws derogate older laws (in every aspect) that are in conflict with the newer ones. More puzzling still is the fact that the *Panama Convention* was conceived as a model for all signatory countries to follow.

⁶¹ See Article 34 of the *Brazilian Arbitration Act* in the Appendix.

CHAPTER III - Constitutionality of the *Brazilian Arbitration Act* (Law 9.307/96)

The Federal Supreme Court of Brazil (STF) is responsible for ruling on the constitutionality of Brazilian laws and for recognizing (homologating)⁶² foreign judicial decisions. The constitutionality issue first emerged in relation to a petition by the Swiss national *MBV Commercial and Export Management Establishment*⁶³ to enforce an award handed down in Spain against a Brazilian company. The discussion in question was the constitutionality of the sole paragraph of Articles 6 and 7 of the *Brazilian Arbitration Act* on enforceability and specific performance of the arbitration clause. Article 6 refers to “blank” arbitration clauses and Article 7 foresees the intervention of the courts to enforce a recalcitrant party to submit to arbitration, providing an arbitration agreement existed between the parties.

The origin of the problem is the *Brazilian Arbitration Act*, which contains two kinds of arbitration agreements (*convenção de arbitragem*): the arbitration clause and the submission agreement. The law clearly differentiates between these two institutes and gives each a definition in separate articles⁶⁴. The arbitration clause⁶⁵ is a contractual agreement to submit *future* disputes to arbitration, while the submission agreement⁶⁶ is an agreement to submit *existing* disputes to arbitration, which may be judicial or extra-judicial. With the

⁶² Homologation and to homologate are words commonly used in civil law jurisdictions meaning: to approve or confirm officially. Confirmation, esp., of a court granting its approval to some action; the approval given by a judge of certain acts and agreements, to render them more binding and executory. Black's Law Dictionary, 7th ed., Bryan A. Garner, Ed., (Minnesota: West Group, 1999).

⁶³ *M.B.V. Commercial and Export Management Establishment v. RESIL Indústria e Comércio Ltda.* STF, SE 5.206-7 [*M.D.V. v. RESIL*]

⁶⁴ Article 4 of the *Brazilian Arbitration Act* defines the arbitration clause and Article 9 defines the submission agreement.

⁶⁵ In Brazil this clause is known as “cláusula compromissória” following the French expression “clause compromissoire”.

⁶⁶ In Brazil this clause is named “compromisso”.

differentiation has arisen the question of whether the parties can waive their constitutional right to be in court under an arbitration clause, since the clause regards only future disputes. (The parties in the Swiss case had undergone an arbitration process through the arbitration clause provided in the contract).

The discussion associated with the case was based on Article 5, XXXV of the Federal Constitution, which reads “*the law will not exclude any injury or threat to a right from the consideration of the Judicial Power*”⁶⁷. On the other hand, the *Act* holds in Article 1, that “*parties may resort to arbitration only in respect to transferable patrimonial rights*”⁶⁸. Furthermore, Article 4 of the *Act* states, “*an arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract*”.

The first problem with the Articles above is an underlying assumption: because the arbitration clause refers to future dispute, the parties cannot waive their right to have a case heard by a court through a contractual agreement, since the matter of dispute is still unknown. Since the *Brazilian Arbitration Act* applies only to transferable patrimonial rights, the party cannot dispose of its right while being ignorant of the transferability of that right. Thus the arbitrability of the dispute remains undefined. Such was the opinion of the Reporting Justice Sepúlveda Pertence, who argued that only the submission agreement could set in motion an arbitral proceeding since the dispute was already present⁶⁹. Consequently, the arbitration clause is not capable of initiating the arbitral process.

⁶⁷ Constitution, Article 5, XXXV: “*a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito*”. The English version of the Constitution can be downloaded from the internet at: www.senado.gov.br.

⁶⁸ The terminology is explained in Chapter IV, 4.1., General Provisions.

⁶⁹ In line with Justice Sepúlveda Pertence against the *Brazilian Arbitration Act* were: Justice Moreira Alves, Justice Sydney Sanches and Justice Néri da Silveira.

Nevertheless, the seven⁷⁰ Justices who delivered dissenting opinions from Justice Pertence interpreted the arbitration clause in a different context. They perceived that the arbitration clause was not meant to be read literally. Instead, they decided the clause was to be embedded in the context of a commercial contract, and that the clause should be applied to the contract as problems arise under the terms and context of the contract. Furthermore, they said the Constitution does not prohibit the contractual parties from seeking extra-judicial means to solve disputes, because no abstract waiver of jurisdiction exists, only the recognition of individual liberty. The dissenting Justices asserted that access to the courts could not be denied, since the Judicial Power can always exercise the control over an arbitral process if a party brings an action questioning the impartiality or the proceedings of the arbitral tribunal. Furthermore, Justice Pertence did not consider in his decision Brazil's ratification of the *Geneva Protocol* of 1923 and the *Panama Convention* of 1975, each of which recognizes the validity of the arbitration clause. In this decision, the Supreme Court confirmed the validity of the arbitration clause to initiate an arbitration process and consequently, the constitutionality of Articles 6 and 7 of the *Brazilian Arbitration Act*, which regards the arbitration clause and its enforcement⁷¹.

⁷⁰ The Constitution establishes in Article 101 that the Federal Supreme Court is composed of eleven members. Against Justice Pertence were: Justice Maurício Corrêa, Justice Nelson Jobim, Justice Marco Aurélio, Justice Ilmar Galvão, Justice Ellen Gracie, Justice Carlos Velloso.

⁷¹ Under the *Brazilian Arbitration Act* Article 7 states that when the parties introduce an arbitration clause in their contract and one of them is resisting to the establishment of the arbitration, the interested party may plead a claim in the court before the competent body. The purpose of the claim is to draw up the submission agreement. Here we can clearly see the emphasis given to the submission agreement in Brazilian legislation and also that the arbitration clause is not self-sufficient to establish the arbitral tribunal. This petition to the court aims only to write the submission agreement and does not establish the arbitral tribunal and does not initiate the arbitral procedure. The ideal rule in such cases would be the one in which the court would confirm the competence of the arbitral jurisdiction to resolve the dispute, initiating the arbitral process. This is a vestige of the interpretation held in the past in Latin American countries, where the submission agreement was not subordinated to a previous existence of the arbitration clause; but if an arbitration clause was made, the submission agreement should be written.

In order for the Federal Supreme Court (STF) to recognize and enforce a foreign arbitral award in Brazil, summons (legal notice) is necessary. *TARDIVAT*, a French corporation, was granted an award by the Arbitral Coffee and Pepper Chamber of Le Havre, which condemned B. Oliveira to pay losses and damages of US\$ 690,822.56, plus interest and procedural costs⁷². *TARDIVAT* had bought 3,600 coffee bags that, under the contract, should not have been sent before samples were duly approved, a formality not followed by the seller. The quality of the products was unacceptable to the claimant, which led to the arbitration⁷³. Since the Brazilian party did not voluntarily comply with the award, *TARDIVAT* initiated enforcement proceedings before the STF. The STF denied the request for homologation of the award for fear of contravening the principle of the contradictory and the right of defence. The contract of purchase and sale had been signed by agents Wolthers & Associates, allegedly holding the power to represent and engage B. Oliveira. During the arbitration, the same agents were entitled to argue on behalf of B. Oliveira, but there was no documentary evidence of the existence of a specific power of attorney. The STF held the summons to be obligatory as if the party were present in the arbitral tribunal without the document, granting the agent the power to represent the company, a requirement of Article 284 of the *C.C.P.* Since illegitimacy of representation was proved, the STF denied homologation of the award.

In another case concerning recognition and enforcement of a foreign arbitral award, the STF abstained from questioning the merits of the dispute. The Liverpool Cotton Association Ltd. (acting as an arbitral institution) issued an award in England whereby *TEKA Kuenrich S.A.*, a Brazilian corporation, was required to compensate *AIGLON Dublin Ltd.* for

⁷² *TARDIVAT International S.A. v. B. Oliveira S.A.* (2000), D.J. p.00054, 2000 STF SEC-5.378.

⁷³ Carlos Nehring, "Arbitration and Brazilian Court Decisions", (2003) 20 (4) *Journal of International Arbitration* 409-420 [Carlos Nehring].

losses and damages (US\$ 1,893,318.09) caused by not fulfilling certain obligations foreseen in a purchase and sale contract⁷⁴. In *AIGLON v. TEKA*⁷⁵ the reporting judge affirmed that the STF should limit itself merely to analyzing the formal requirements for homologation and refrain from examining its merits. The homologated award confirms that even an arbitration award, delivered in a country with which Brazil has not signed a bilateral treaty concerning the enforcement of arbitral awards, will face no obstacles respecting homologation under the new law.

The preceding judgments reflect the Supreme Court's positive approach towards arbitration. Furthermore, discussions about the possibility of initiation of arbitration through an arbitration clause will likely cease, because of the enactment of the *New Civil Code*⁷⁶. Article 853 of the *New Civil Code* admits the capacity of arbitration clauses (*cláusula compromissória*) to establish arbitration for the settlement of disputes. The *Code* refers specifically to the arbitration clause. Thus, this Article is leading to eradication of the issue of the unconstitutionality of arbitration clauses establishing arbitration to solve transferable patrimonial rights disputes.

⁷⁴ *Ibid.* at 414.

⁷⁵ *AIGLON Dublin Limited v. TEKA Tecelagem Kuenrich S.A.*, (1999) DJ p. 00004, STF SEC-5.847.

⁷⁶ *C.Civ.*, *supra* note 31.

CHAPTER IV – *BRAZILIAN ARBITRATION ACT (Law 9.307/96)*

4.1. Understanding the *Brazilian Arbitration Act*

In accordance with Article 22 of the Constitution, the Brazilian state has exclusive competence to legislate on civil law, criminal, commercial, procedural law, maritime law, aeronautic law, aerospace law and labour law. All issues related to specific matters of law (v.g. arbitration, consumer protection, invitations to bid and others) are governed primarily by federal law, rather than state law. Hence, the *Brazilian Arbitration Act* is an ordinary federal law, setting out the basic proceeding pertaining to arbitration (arbitral centres or the parties themselves can provide complementary rules, as long as they do not contradict the *Act*). Unlike the *FAA* of the United States, which distinguishes between the rules applicable for domestic arbitration and the rules for international arbitration⁷⁷, the *Act* is one body of procedural rules applicable to both domestic and international arbitration.

The aim of this section is to highlight the relevant articles of the *Act* as a foundation for the critique presented in Chapter V. In other words, the study of the *Act* is important for understanding arbitration as a mechanism for solving disputes. The law is divided into the following subsections: 1. General Provisions, 2. The Arbitration Agreement, 3. The Arbitrators, 4. The Arbitral Proceedings, 5. The Award, 6. The Recognition and Enforcement of Foreign Arbitral Awards and 7. Final Provisions. In this section, each of the aforementioned topics will be discussed, following the same order established in the *Act*. A description of the most important Articles will be accompanied by a definition or explanation

⁷⁷ Gary B. Born, *supra* note 42 at 24.

as a reference point for the analysis. In addition, certain Articles of the *Brazilian Arbitration Act* will be compared with the *UNCITRAL Model Law* and the *New York Convention*.

4.1.1. General Provisions

The general provisions are composed of Articles 1 and 2 of the *Brazilian Arbitration Act*. Article 1 states that capable parties may only resort to arbitration in cases related to transferable patrimonial rights. This implies that disputes related to bankruptcy, family law, antitrust, hereditary succession and certain intellectual property rights are not arbitrable because they deal with inalienable rights, under which the state holds exclusive jurisdiction. This is the first difference from the *UNCITRAL Model Law*, which is only applicable for international commercial arbitration. The Brazilian legislator preferred to extend the use of arbitration for all matters of a contractual, though not necessarily commercial, nature.

There is a discussion of whether Articles 88 and 89 of the *C.C.P.*, which establish the competence of the Brazilian judiciary in international litigation, forbid the use of arbitration under specified conditions. Flavia Savio C.S. Cristofaro⁷⁸ argues that the rules of competence in Articles 88⁷⁹ and 89⁸⁰ of the *C.C.P.* are inapplicable to international arbitrations. According to her, Article 88 was only intended to specify Brazilian judiciary competence,

⁷⁸ Flavia Savio C.S. Cristofaro, "A Relação entre a Arbitragem e as Regras sobre Competência Internacional Previstas nos Artigos 88 e 89 do Código de Processo Civil Brasileiro", in Ricardo Ramalho Almeida, ed., *Arbitragem Interna e Internacional: Questões de Doutrina e da Prática* (Rio de Janeiro: Renovar, 2003) 417 at 433.

⁷⁹ Art. 88 of the *C.C.P.* state:

"Art.88. The Brazilian judiciary is competent to adjudicate when:

I – the accused is domiciled in Brazil, regardless of his nationality;

II – the obligation is to be performed in Brazil;

III – action originated from fact occurred in Brazil."

⁸⁰ "Art. 89. The Brazilian judiciary is competent, excluded any other jurisdiction:

I – to adjudicate matters related to real estate located in Brazil;

II- for proceedings related to division of real estate and heritage, located in Brazil..."

not to forbid the participation of foreign judges or even the participation of arbitrators. If the dispute concerns a freely transferable property right, she argues: Even if the executed party is a Brazilian resident, or a contractual obligation is to be executed in Brazil, or even if some action was originated from facts that occurred or were practised in Brazil, the controversy can be settled by arbitration. According to Cristofaro, Article 89 of the *C.C.P* regarding real estate in Brazil is irrelevant to international arbitration. She says that when the STF upheld individual choice over whether to litigate or use the private method of dispute resolution, that meant as long as the dispute concerns freely transferable property right, the parties can arbitrate.

The meaning of “transferable” in Article 1 of the *Brazilian Arbitration Act* is controversial in the literature. Some authors contend the term refers to rights over which the parties have complete control and are thus available for negotiation⁸¹. On the other hand, Redfern and Hunter stated, “*if the parties are free under the relevant law to reach a compromise or settlement in respect of a particular matter, they are free to arbitrate over it*”⁸². Nevertheless, some issues are not connected to the idea of renunciation implied by the *Act*. To illustrate, matters related to competition law are considered part of economic public policy, impossible to renounce, although arbitrable.

Article 1 of the *Act* implies that the object of the contract should receive a monetary evaluation in order to ascertain its transferability. In fact, all extra-patrimonial rights cannot be submitted to arbitration. To clarify which subject matters can be settled by arbitration, the concept of public policy is included to outline the arbitrability of the dispute. Redfern and Hunter point out:

⁸¹ José Maria Rossani Garcez, *Arbitragem na Era da Globalização*, (Rio de Janeiro: Forense, 1997) at 185.

⁸² Redfern and Hunter, *supra* note 18 at 104.

[T]he concept of arbitrability is, in effect a public policy limitation upon the scope of arbitration as a method of settling disputes. Each State may decide, in accordance with its own public policy considerations, which matters may be settled by arbitration and which may not. If the arbitration agreement covers matters incapable of being settled by arbitration, under the law of the agreement or under the law of the place of arbitration, the agreement is ineffective since it will be unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought.⁸³

The concept of public policy is more obvious when states are involved in arbitration. Every country has internal rules dictating which subjects concern public law. For instance, in the United States, arbitral awards may be granted regarding unfair competition and bankruptcy, but in Brazil, bankruptcy is exclusively related to public law, and therefore not arbitrable. National laws outline the circumstances that permit the inclusion of an arbitration clause for states involved in the arbitral process. For example, in *Law 9.074/95*, which relates licensing of public services to private investors, Article 23, XV introduces the possibility of including an arbitration agreement clause to solve disputes arisen from this contract. EMBRATEL⁸⁴ (Empresa Brasileira de Telecomunicações) is one such contract: its License of Public Service contains an arbitration agreement clause in chapter III⁸⁵.

Another example of the permission given to states to arbitrate certain matters is contained in the *Law of Energetic Policy*, also known as the "*Petroleum Law*"⁸⁶. Article 43, X establishes, as an essential clause of the contract of concession, the rules regarding resolution of disagreements related to the contract and its performance, including conciliation and international arbitration.

⁸³ Redfern and Hunter, *supra* note 18 at 105.

⁸⁴ Brazilian Telecommunication Company.

⁸⁵ This contract can be accessed from the internet at:

<www.anatel.gov.br/biblioteca/Contrato/Contr_Conc_Lng_Nac_EBT.htm>

⁸⁶ *Lei n. 9.478/97 de 6 Agosto 1997*, D.O.U., 7 August 1997, 16925.

However, administrative rights in Brazil are not arbitrable, since the law expressly prohibits the use of arbitration. The *Law of Invitation to Bid, Law 8.666/93*⁸⁷, states in Article 55, § 2º, that contracts ratified by the Public Administration with natural persons or other legal entities (including those established in foreign territories) must include a clause declaring the competence of the state jurisdiction where the Administration is located in order to solve any contractual issue. Notwithstanding, the Court of Justice of the Federal District had another view of *Law 8.666/93*. Their decision stated that administrative contracts should be governed first by the principals of public law, and second by the principle of general theory of contracts and private law. This interpretation suggests arbitration could be used to solve contractual matters⁸⁸, and it is a promising decision, because it shows the Courts' positive attitude toward the use of arbitration. This case demonstrates that although the subject matter is driven by the principles of public law, the contract derived from it should be analyzed under the principals of the general theory of contracts when conflicts refer back to the contract. Therefore, whenever the state is acting *public utilitatis causa*, inclusion of an arbitration agreement clause in the contract is forbidden. However, if the contracts are *iure gestionis*, then the state behaves as a private entity, and the use of arbitration is allowed.

As the opening of the first section indicated, the general provisions of the *Brazilian Arbitration Act* are stated in Articles 1 and 2. Article 2 is of particular interest, because it allows the parties to choose between the rules of equity or substantive laws in relation to the matter of the dispute. The parties can also choose the rules of law applicable to the arbitration process. Moreover, the parties are not limited to the use of national laws, but international

⁸⁷ *Lei n. 8.666 de 21 de Junho de 1993*, D.O.U., 22 June 1993, 8269.

⁸⁸ João Bosco Lee, *supra* note 48 at 55.

rules of commerce, customs and *lex mercatoria*. As long as the choice of the parties does not infringe the public order of the place where the agreement was made, the chosen law will be applicable to the contract in question.

4.1.1.1. Public Order (Public Policy)

The subject of public order is highly relevant in arbitration, not only because it imposes limits to the principle of the parties' autonomy while drafting an international contract, but because public order is one of the grounds for denial of recognition and enforcement of arbitral awards.

The choice of law applicable to international contracts depends on the will of the parties involved. However, all international contracts are necessarily connected to the law of one state⁸⁹. Consequently, the parties' contractual freedom is constrained by violation of state public policy in the state affected by the contract. Nonetheless, each state has its own public order, depending on the importance each state places on morality. Irineu Strenger defined public order as a group of norms and principles, which in a given historical moment reflects the essential values of a determined juridical system⁹⁰. Lauro da Gama e Souza Jr. defines public policy as the reflection of the sociopolitical juridical philosophy of all legislation, which represents the basic morals of a nation that in turn supports the economic needs of each state⁹¹. These definitions help to clarify the concept of public order.

⁸⁹ But see P. Lavive "Transnational (or Truly International) Public Policy and international Arbitration" in Pieter Sanders, ed., *International Arbitration Congress* (8th: 1986 New York, N.Y.). *Comparative arbitration practice and public policy in arbitration* (Netherlands: Kluwer, 1987)

⁹⁰ Strenger, *supra* note 32 at 215 [translated by author].

⁹¹ Lauro da Gama e Souza Jr., "Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras" in Paulo B. Casella, ed., *ARBITRAGEM: lei brasileira e praxe internacional*, 2ed., (São Paulo: LTr, 1999) 406 at 422 [translated by author].

The study of public order must take historical context into account. In other words, the concept of public order varies over time, and can change from state to state depending on its economic and political goals. For instance, if governments are opening the national economies to international trade, or political decisions are promoting foreign investments in the country, or the state is interested in promoting arbitration to ease the workload of the judiciary, the traditional concept of public order will be interpreted at a national level, thus minimizing its effects on an international sphere. As is demonstrated below, the only possible manner for notification of a Brazilian party from a foreign court is through letter rogatory or *affidavit*. The Federal Supreme Court would deny every request for homologation of a foreign judgment that did not comply with this condition, arguing offence of the procedural public policy of the country. But following the enactment of the *Brazilian Arbitration Act*, the Supreme Court changed its policy.

The public order will always bend to the limitations of the will of the parties. They cannot defer to the arbitral tribunal powers capable of infringing upon the public order of the country chosen as the place of arbitration. As a consequence, any disposition given to the arbitral tribunal powers that contradicts an imperative norm or the public policy removes from its decisions the possibility of execution.

Almost every legislation or convention, national or international, has a public order exception, but at the same time public policy tends to have a lesser impact in connection with matters relating to international trade. Article V, 2, (a) and (b) of the *New York Convention* of 1958 establishes as a condition for recognition and enforcement of arbitral awards, the affirmation of the arbitrability of the dispute where the recognition is being sought and also, that the award cannot confront the public order of that country. Article 36, b, (ii) of the

UNCITRAL Model Law, enables the annulment of the arbitral award if it is seen to violate the public order. Similarly, the *Brazilian Arbitration Act* provides in Article 2, §1° that the parties' choice of law applicable to the dispute cannot oppose the public order. Not surprisingly, these laws always refer to domestic public policy. In composing the draft of the *New York Convention* of 1958, working groups realized that it was difficult to define the boundaries of international public order⁹². Furthermore, for some states the arbitrability of disputes concerning public policy was a nebulous legal area, complicated by the difficulty of establishing non-arbitrable matters for each contracting state. In addition, the groups rejected the effort to classify all situations capable of settlement by arbitration, because states could argue the list was exhaustive, and that only the matters mentioned would be arbitrable. In the end, the legislators decided to leave the public policy issue for individual states to define.

In Brazil, public policy lacks clear, consistent guidelines useful for application in the abstract. Legal dispositions are merely general concepts, leaving the judge a broad scope for assessing public policy as an exception to the application of foreign law⁹³. Article 17 of the *Introductory Law to the Brazilian Civil Code* offers a clear example of the sweeping nature of its legal concepts, as follows:

"Laws, acts and decisions of another country, as well as any statement of will, have no effect in Brazil when contrary to the national sovereignty, public policy or bonos mores."

The Code's vague vocabulary leaves the door open for Brazilian judges to invoke the public policy exception.

⁹² Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (The Hague: Kluwer, 1989).

⁹³ Irineu Strenger, "The Application by the Arbitrator of Public Policy Rules to the Substance of the Dispute" in Pieter Sanders, ed., *International Arbitration Congress (8th: 1986 New York, N.Y.) Comparative arbitration practice and public policy in arbitration* (Deventer: Kluwer, 1987) at 353.

The *Brazilian Arbitration Act* makes reference to public order in Article 39, II, stating that recognition of an award will be denied when it is deemed contrary to the Brazilian public order. The sole paragraph of Article 39 contains a peculiar provision in the case of international arbitration. It reads that the notification (summons) of a Brazilian resident should be made according to the arbitration agreement or the procedural law where the arbitration took place. The notification, admissible as a citation through regular mail, is not considered a public policy offence, providing unequivocal proof of receipt exists, and as long as the notification offers the Brazilian party reasonable time to exercise its right of defence. This sole paragraph is a clear example of a public order violation. Until very recently, the only admissible way of notifying a Brazilian party was via letter rogatory (*affidavit*) through the STF. Any other form of notification, such as an official letter of Consulate Agencies, was considered inappropriate according to the Constitution.

The Constitution of Brazil of 1988 in Article 102, I, "h", establishes the STF's competence to adjudicate the request for homologation of foreign sentences granted abroad in order to be executed in Brazil. It states:

"Art. 102. Compete to the Supreme Court to be the guardian of the Constitution, and mainly:

I – to process and to judge, originally:

(...)

h) the homologation of foreign sentences and the concession of exequatur to affidavits, which can be conferred accordant to the Supreme Courts' regulation by its President."

Furthermore, the STF is the competent organ for the concession of *exequatur* for *affidavits*. Historically, the STF frequently frustrated the recognition of foreign judicial decisions because of the lack of proper citation, by alleging violation of procedural public

policy of the country⁹⁴. At that time, arbitration was not widely practised in the country, and such formality frustrated the recognition of many arbitral decisions granted abroad owing to lack of knowledge of Brazilian laws. After the enactment of the *Brazilian Arbitration Act*, the need for an affidavit consistent with the Constitution has been interpreted as referring exclusively to foreign *judicial* decisions when enforcement was requested. The purpose of the sole paragraph of Article 39 of the *Act* was to avoid discussions about the necessity of *affidavits* prior to the homologation of a foreign *arbitral* award. Now a regular letter is sufficient to notify a Brazilian party that a foreign award is being executed against him, as long as he or she is not deprived of a right of defence. Prior to the *Act*, the STF's requirement of the letter rogatory for enforcement proceedings hampered the development of international arbitration.

The truth is, despite each state's differing legal interpretation of public policy, every national legal system provides some sort of annulment procedure against arbitral awards. As stated previously (under General Provisions), the annulment procedure recognizes that some subject matters are of special relevance for states (in Brazil, v.g., bankruptcy, antitrust, unfair competition, intellectual property rights and others—objective arbitrability) that have the exclusive jurisdiction to adjudicate such issues. Also, some states recognize that certain groups of people need more protection than others, particularly concerning issues related to consumer protection (assuming that the buyer is in a weaker position than the seller, which is subjective arbitrability).

The relevance of national public policy to international commercial arbitration is clear in two major instances: First, when a party opts for litigation despite the existence of an

⁹⁴ *Legumbre S.A. v. Central de Cooperativa de Produtores Rurais do Rio Grande do Sul Ltda.*, (1995), D.J. 26 May 1995, p.15154, 1995 STF SEC 3897; *Parties omitted*, (1989), D.J. 17 February 1989, p. 00970, 1989 STF SE 3.707; *Parties omitted*, (1984), D.J. 22 June 1984, p.10129, 1984 STF SE 3.236.

arbitration agreement. In this case, the courts have to analyze the arbitration agreement and the arbitrability of the dispute, or the courts have to determine whether or not it has the exclusive jurisdiction over the issue. Second, when enforcement of foreign awards is requested before national courts. In this instance, the courts will have to re-analyze the arbitrability of the dispute, and decide whether the arbitration process or the arbitral award violated any fundamental precept of public order⁹⁵. In accordance with the Brazilian conflict of law rules, if arbitration is domestic, the execution court is the Civil Court where the resistant party has its business or assets, consistent with Article 575 of the *C.C.P.*⁹⁶ The STF is the competent court of enforcement of foreign arbitral awards. Such competent courts are responsible for observing the arbitrability of the dispute and ensuring the fair proceedings of the arbitral tribunal.

However, when the arbitration is international, the perception of public order is less restrictive than the national view. A truly international (or transnational) public order idea has been gaining popularity, which is confined to real, fundamental principles of law. Likewise, the idea of international public order acts to regulate the freedom of international trade. Its limitation is rooted in the morals of the international community, which may condemn the use of illicit procedures to achieve questionable goals, overriding good customs. For instance, contracts involving bribery or drug trafficking that contaminates the trade transaction are unacceptable. No judiciary or arbitral tribunals could give decisions regarding contractual disagreement under these circumstances (where the transnational public policy must first be safeguarded).

⁹⁵ Strenger, *supra* note 32 at 231.

⁹⁶ This question is deeply analyzed on Chapter IV, 4.2., item 5 (Annulment of the Arbitral Award)

Nobody can clearly define truly international public policy. However, a few essential principles are supported by a widespread, if not universal, consensus. These important principles possess a social imperative⁹⁷. Among these principles are the *bona fide* contractual, and *bonos mores*, which appear vague yet intrinsically ethical, stressing the correctness of human behavior. With regards to arbitral proceedings, one can highlight the principle of equality of the parties, impartiality of arbitrators, principle *auditor et altera pars* (contradiction), due process, and obligation to motivate the award⁹⁸. In addition, failure to observe one of these principles can nullify arbitral awards in accordance with the *Brazilian Arbitration Act*. However, principles such as autonomy of will, “closest connection” and legitimate expectation of the parties belong to the realm of private international law. At the same time, the arbitrator should be familiar with all relevant principles in order to protect the transnational public order.

In general, the arbitrator must respect the parties’ choice of law for dispute resolution. However, take into account one instance in which the parties have chosen the law of a country that allows drug trafficking as a business. In this case, the arbitrator is obliged to disregard the rules of applicable law made by the parties because it offends the general morality. Since most nations are continually fighting drug trafficking, the arbitrator is only bound to take into account the legitimate expectations of the parties. In order to monitor the legitimacy of the parties’ choice, the arbitrator will observe not only the “international public policy” of the state but first and foremost, the transnational public policy.

⁹⁷ Lavive, *supra* note 89 at 289.

⁹⁸ In Brazil, the motivation of judgments or awards is mandatory in accordance with Article 93, XI, of the Constitution, consisting in cause for annulment. Notwithstanding, in other countries this is unnecessary when concerning arbitral decisions.

With regards to the principle of “closest connection”, Lavive suggests that the arbitrator is not necessarily compelled to find the law applicable to the case in connection with a particular state⁹⁹. For instance, the contract of the parties may have its closest connection with the international community of merchants, hence it resorts to *lex mercatoria*, to the usage of international trade, general principles and the like. Furthermore, the parties usually choose a neutral country for international arbitration, one with no connections to the parties or to the business.

Clearly, all principles of transnational public policy overlap both private international law and concepts of public policy. In general, every nation recognizes these larger principles. But for international arbitration purposes, only transnational public policy should matter, and any other restriction of national character should be set aside. For example (as previously stated), Brazil’s non-observation of formal proceedings for notification of a national who is being executed from a foreign arbitral award is considered a violation of the procedural public policy. In international arbitration, this kind of national consideration of public policy should be disregarded. Notwithstanding, most legislation possesses public policy restrictions embedded within the national concept, because of the difficulty of anticipating the influence of transnational public policy.

Yves Derains proposed some solutions for arbitrators facing the issue of public order. First, if transnational public policy is excluded, the arbitrator has to confront the public order under two optics: 1. The domestic public order of the *lex contractus* and the mandatory rules from elsewhere; and 2. If the arbitrator’s plan of action is different whether the parties have chosen the *lex contractus* or whether the arbitrator has determined it himself. More importantly, the arbitrator has to respect the will of the parties. He can speculate the parties’

⁹⁹ Lavive, *supra* note 89 at 304-305.

intention by observing the contractual clauses or through the choice of the rules to be applied to the contract¹⁰⁰.

A different problem arises with regard to the mandatory rules of the *lex contractus*. These laws are likely to be applied in spite of the proper law of the contract. Thus, if the arbitrator were to consider that the parties had wished to avoid the laws, he should only consider their intention, if he was of the opinion that the intent was not contrary to truly international public policy¹⁰¹.

So far as mandatory rules are concerned, when the parties have failed to stipulate the *lex contractus*, the arbitrator does not have to determine that law prior to deciding on the applicability of a mandatory rule. The arbitrator must apply that rule directly if he considers that its operation falls within the legitimate expectation of the parties.

In conclusion, public order control is first exercised at the beginning of the arbitral process. At this moment, the arbitrator must determine if the matter of dispute is arbitrable. Article 8 of the *Brazilian Arbitration Act* states that the arbitrator decides *ex officio* or under the request of the parties, regarding the existence, validity and efficiency of the arbitration clause, likewise the *UNCITRAL Model Law* Article 16 (1). At the same time, the arbitrator should raise any questions about violations of transnational public policy. Public order control is again exercised when the award is granted. Then, the arbitrability of the dispute is examined, taking into consideration the matter and the law applicable to the dispute. For example, the matter of the dispute may not be arbitrable under the laws of a given state, (in Brazil, Article 33 of the *Act* allows for the annulment of the award). Finally, public order

¹⁰⁰ Yves Derains, "Public Policy and Law Applicable to the Dispute in International Arbitration" in Pieter Sanders, ed., *International Arbitration Congress* (8th: 1986 New York, N.Y.) *Comparative arbitration practice and public policy in arbitration* (Netherlands: Kluwer, 1987) 254-255 [Yves Derains and Public Policy]

¹⁰¹ This is in line with the previous assumption that the transnational public policy comes in the first place.

control is exercised once again when the arbitration is international and recognition and enforcement is requested by a given state. As indicated above, Article 39 of the *Act* authorizes the Federal Supreme Court to deny recognition and enforcement of a foreign award that violates the Brazilian public order. Identical to Article 36, (1), (b), of the *UNCITRAL Model Law* and Article V (2) of the *New York Convention*, the *Act* refers to the domestic public order of the state where recognition is being sought¹⁰². Thus, The *Brazilian Arbitration Act* is consistent with the *UNCITRAL Model Law* and the *New York Convention* with regards to public policy.

4.1.2. Arbitration Agreement (“*Convenção de Arbitragem*”)

One of the main differences between the *Brazilian Arbitration Act* and the *UNCITRAL Model Law* are the arbitration agreements. The *Act* distinguishes between the arbitration clause and the submission agreement. Both forms of the arbitration agreement must be written to ensure validity and enforceability. Furthermore, they are essential documents for future homologation of a foreign arbitral decision.

The most controversial aspect of the *Brazilian Arbitration Act* concerns the arbitration clause. Historically, Brazil never recognized the effectiveness of arbitration clauses to start arbitral proceedings. Arbitration clauses were only enforceable if followed by a submission agreement. But if a party refused to enter into a submission agreement, that party could not be compelled to do so. This is one of the main reasons for the rare use of arbitration: The Brazilian civil law system was highly influenced by French and Italian laws.

¹⁰² Manoel J. Pereira dos Santos, “Ordem Pública e Arbitragem” in Paulo Borba Casella, ed., *Arbitragem: Lei Brasileira e Praxe Internacional*, (Sao Paulo: LTr, 1999) 391 at 401.

This division of arbitration agreements into arbitration clause and submission agreement existed in the French domestic rules for arbitration until 1925. French courts would also protect weaker parties from arbitration clauses contained in standard form agreements and deny the effectiveness of the clauses. However, at the end of 1925, another French law ended this practice by making arbitration clauses enforceable, even in domestic cases¹⁰³. Although the current distinction between arbitration clauses and submission agreements has lost its significance (especially for international commercial arbitration), the *Brazilian Arbitration Act* remains conservative¹⁰⁴.

The *Brazilian Arbitration Act* embraces the principle of independence of the arbitration agreement in relation to the contract, whereby the nullity of the agreement does not nullify the whole contract (Article 8 of the *Act*). The *Act* also contemplates expressly the principle of “competenz-competenz” by which the arbitrator shall decide at his discretion or under request by the parties the degree of his independence and impartiality as well as the existence, validity and efficiency of the arbitration agreement and the contract that contains the arbitration clause. Parties are free to stipulate the type of arbitration in their arbitration clause, either choosing from a specialized institution such as the ICC¹⁰⁵, whose rules of procedure would be applicable, or to opt for an *ad hoc* arbitration.

Article 6 of the *Brazilian Arbitration Act* determines that, if there is no prior agreement between the parties on how to institute the arbitral tribunal (blank arbitration clause – *clause blanche*), the interested party will notify the other party of his interest to initiate arbitral proceedings, outlining meeting particulars to comply with terms of the

¹⁰³ Phillipe Fouchard, Emmanuel Gailard and Berthold Goldman, *On International Arbitration*, (The Hague: Kluwer International, 1999) at 194 [Fouchard, Gailard and Goldman].

¹⁰⁴ *Ibid.* at 384.

¹⁰⁵ International Chamber of Commerce, founded on 1919 in France.

submission agreement. If the notified party does not appear or refuses to sign the agreement, the other party may submit its claim in court in accordance with Article 7. This Article states the resisting party must to be summoned to appear in court to execute the submission agreement. During the hearings, if the parties do not reach an agreement on the terms of the submission agreement, the judge will nominate the arbitrator and specify the arbitral proceedings, and his decision will be as valid as the submission agreement. This part of the law is the origin of most requests for suspension of arbitral proceedings in courts. As discussed previously¹⁰⁶, the party resisting dispute judgment by the arbitral tribunal usually argues the invalidity of the arbitration clause to start the arbitration, even though the arbitration clause provides for an institutional arbitration. Instead, the party argues that the submission agreement is the valid instrument to initiate the arbitration. However, the jurisprudence has been consistent in confirming the validity of arbitration clauses to start the arbitration, especially if the parties had previously agreed in a given arbitral institution to oversee the arbitral process. As a result, the submission agreement becomes necessary only when the arbitration clause does not provide complete set of rules of proceedings for the initiation of the arbitration. The use of submission agreements is usually applicable to *ad hoc* arbitrations.

The validity of the arbitration clause was addressed in an interesting case involving the State of São Paulo¹⁰⁷. A dispute arose between Renault S.A of France and Carlos Alberto de Oliveira Andrade, the Renault representative in Brazil. The parties concluded an agreement whereby Renault S.A would compensate Oliveira Andrade for potential losses and damages to his business accruing from the opening of a new Renault plant. The agreement

¹⁰⁶ See case laws in Chapter III about the constitutionality of the *Brazilian Arbitration Act*.

¹⁰⁷ *Renault S.A v. Carlos Alberto de Oliveira Andrade*, (1999), TJ/SP Ag. n. 124.217.4/0, 16/09/1999.

provided that expert accountants be appointed by each party to evaluate the losses and damages and that differences arising between them would be examined according to the rules of the International Chamber of Commerce or some other reputable authority agreed upon by the parties. However, the audit companies (Arthur Andersen and Cooper & Lybrand) appointed by each party, presented conflict of interest and the parties could not agree on a third audit company. Consequently, Renault S.A initiated the arbitration before the International Chamber of Commerce and Oliveira Andrade plead before the First Instance Court of the State of São Paulo for the execution of the arbitration clause in accordance to Article 7 of the *Brazilian Arbitration Act (Law 9.307/96)*. The court of São Paulo understood that in this case intervention by the state was unnecessary, the judge explaining that when an arbitration clause included the rules establishing the arbitral tribunal, it is meaningless for the state to intervene in order to render a submission agreement. In this case, the parties had chosen the ICC to administer the arbitral proceedings, which provides the rules for this purpose¹⁰⁸.

Supreme Court Justice Nelson Jobim took a similar position with regard to the Swiss case¹⁰⁹ that gave rise to the constitutionality discussion of the *Brazilian Arbitration Act*. The Brazilian and Swiss decisions allowed for two interpretations of the enforceability of the arbitration clause. If the arbitration clause includes the form of the arbitration to the institution, then it is not mandatory to execute a submission agreement. However, if these rules are not present in the arbitration clause, the submission agreement is mandatory.

¹⁰⁸ Carlos Alberto de Oliveira Andrade appealed from this decision, aiming to stay arbitral proceedings in the ICC, but the court denied his request to challenge the previous decision, confirming the validity of the arbitration clause to initiate the arbitration, especially when institutional arbitration, such as the ICC, provides the rules of proceedings.

¹⁰⁹ *M.B.V. v. Resil*, *supra* note 63.

Whether judicial or extra-judicial, the submission agreement identifies the parties, the arbitrators and the entity to which they belong, the matter in dispute and the location of arbitration. If the dispute is to be settled by *ex aequo et bono* the parties must insert a clause authorizing this kind of judgment. The submission agreement must provide the time frame for presenting the award, indicate the applicability of substantive rules and declare liability for the payment of arbitration fees.

The circumstances regarding termination of the submission agreement are established in Article 12 of the *Brazilian Arbitration Act*. Termination occurs if any of the arbitrators excuse themselves prior to their nomination's acceptance, or if the death of the arbitrator occurs and the parties have declared the non-acceptance of substitutes. The agreement will also be terminated if the arbitrator did not render an award in due time (established in the submission agreement), even if the arbitrator is forewarned by the parties or by the president of the arbitral tribunal.

4.1.3. The Arbitrator

Under the *Brazilian Arbitration Act*, any capable person can be chosen as an arbitrator, if he or she has the confidence of the parties. According to the *C.Civ.* "capable" means any person with the normal mental ability to perform civil acts¹¹⁰. In accordance with the *Act*, the parties can choose one or more arbitrators, always in an odd number to avoid tie decisions. The arbitrator can be an accountant, an engineer, a psychologist, or lawyer, depending on the expertise needed for the case. The law offers this choice to allow the parties

¹¹⁰ Art. 1, 3, 4 and 5, *C.Civ.* (2002) establish the capacity and incapacity of natural persons. In Brazil, after 18 years old someone is considered legally capable to perform civil acts.

to get the optimum solution for their problem. However, institutions such as the Chamber of Commerce Brazil-Canada and the Federation of Industries of São Paulo, recognized arbitration centres in Brazil, have lists of registered arbitrators permitted to work for the institution. The Chamber of Commerce Brazil-Canada allows the parties to nominate their own arbitrator who, if accepted by the Chamber of Commerce, will act on the case. However, if more than one arbitrator is chosen, the president of the arbitral tribunal must be appointed from the list provided by the Chamber. According to the Chamber of Commerce Brazil-Canada, the process is designed to ensure the arbitration is conducted by someone with knowledge of the arbitral process and rules applicable to the case.

The Federation of Industries of São Paulo conducts arbitration with arbitrators registered in their institution as well, but the parties are free to choose their own arbitrator(s), even if the arbitral tribunal is composed of a sole arbitrator. If more than one arbitrator is selected, the arbitral tribunal will have at least three arbitrators in order to avoid tie decision, in which each party indicates one arbitrator. However, it is still preferable for the presiding arbitrator of the arbitral tribunal to be indicated from the list of arbitrators provided by the Federation of Industries of São Paulo. If the parties cannot agree on the appointment of arbitrators, the president of the Chamber of Mediation and Arbitration of the Federation of Industries of São Paulo will nominate the arbitrator, preferably from its own list. In practice, most of the arbitrators listed by the two institutions belong to well-known law offices in São Paulo, and only a few are engineers, physicians or accountants. This is understandable, given the fact that most professionals lack the legal background to comprehend the arbitral procedure. In addition, the majority of cases brought to arbitration arise out of contract

disputes. Moreover, in the history of both institutions, no case has been heard without the parties being assisted by their lawyers.

Article 13, §6 of the *Brazilian Arbitration Act* states that the arbitrator must be impartial, independent, competent, and in addition, he or she must act with diligence and discretion. Article 14, following the logic of the previous Article, forbids an individual to act as an arbitrator if he or she has any connection to the case or the parties, in order to avoid creating impediments or suspicions arising from an impartial decision.

The party who has any suspicion about impartiality or other reason liable to impede the arbitrator must alert the arbitral tribunal at its first opportunity to present the case¹¹¹. The concerns must be brought directly to the arbitrator or to the president of the arbitral tribunal, according to Article 15 of the *Act*. At first glance, these rules offer the impression that the principle of the “competenz-competenz” is embraced in Brazilian law. However, the validity of this principle in the *Act* is questionable. When one of the parties is refusing to establish the arbitral tribunal, the *Act* permits the court’s intervention. In fact, the court will write the submission agreement for the parties, in the form of a judgment indicating the arbitrator and all proceedings for initiation of the arbitral tribunal. The judgment is the submission agreement for the parties. Article 10 establishes the mandatory information in the submission agreement, such as the controversial points to be submitted to arbitration. As a result, the judge observes the arbitrability of the dispute and then analyzes the competence of the arbitral tribunal to make a decision. Consequently, the principle of “competenz-competenz” is undermined, if not overlooked altogether.

The *Brazilian Arbitration Act* mentions nothing about the civil responsibility of the arbitrator in executing his duties. For instance, could he or she be charged with losses and

¹¹¹ Se Article 20 of the *Brazilian Arbitration Act* in the Appendix.

damages when promoting an unfair proceeding during the arbitration? For example, what if someone's right to a hearing was denied, which led to an unfavourable decision? The *Act* is silent in this respect, but the *C.Civ.* states in Article 186, that "*whoever by action or voluntary omission, by negligence or imprudence, may violate someone's right or cause damages, is compelled to compensate the damage*"[translated by author].

The arbitrators are deemed to be equivalent to public employees for the purpose of penal legislation according to Article 17 of the *Brazilian Arbitration Act*, which states that the function of the judge and the arbitrator are alike. However, the jurisdiction of the arbitrator originates from the will of the parties; as arbitrators are private citizens they do not render a decision in the name of the state. Consequently, the arbitrator is not a public employee and could never be submitted to the criminal sanctions imposed upon judges¹¹². However, Article 32 of the *Brazilian Arbitration Act* says that the award is nullified when rendered by prevarication, *concussio* or passive corruption. As a result, the arbitrator is criminally responsible under Articles 319, 316 and 317, respectively, of the *Criminal Code*.

4.1.4. The Arbitral Proceedings

The arbitration process is outlined in Articles 19 to 22. When arbitrators accept their nomination, the arbitration tribunal is deemed complete. Following the formation of the tribunal, each party must immediately present any concerns regarding the competence or disability of the arbitrator(s), nullity, invalidity or non-enforceability of the arbitration agreement. If any of the preceding allegations are confirmed, the arbitrator will be replaced according to Article 16 of the *Act*.

¹¹² João Bosco Lee, *supra* note 48 at 98.

The arbitration proceeding must observe the principle of fair treatment and equality between parties, as stated in Article 21 of the *Brazilian Arbitration Act*. Violation of this principle will result in the nullity of the arbitral procedure.

Difficulties regarding the institution of the arbitral tribunal may arise when parties do not agree in some aspect of the procedure, and the conditions for judicial intervention are not made clear by the law. As stated previously, the *Act* affirms the parties' autonomy to choose the law applicable to the arbitral proceedings and to the merits of the dispute¹¹³. The parties can choose to make their own rules of procedure, or adopt institutional rules such as the ICC, or adopt the UNCITRAL Arbitration Rules, or decide to use the arbitration law of a specific state. However, when the parties do not establish the rules of procedure in the arbitration agreement, two subsidiary criteria are generally used to regulate the arbitral process: the principle of the arbitrator's autonomy to regulate procedural matters, and the submission of the problem to the law of the site of arbitration.

The *Brazilian Arbitration Act* decided to adopt the principle of the arbitrators' autonomy to regulate procedural matters in Article 21, §1º of the Act. Besides, the *Act* exalts the principle of equality of the parties, impartiality and free conviction of the arbitrator. For arbitration occurring in Brazil, one may ask whether the arbitrator is attached to the national law of the site of arbitration. Some authors say the arbitrator should respect the arbitral legislation of the site of the arbitral tribunal¹¹⁴, while others disagree¹¹⁵. However, the law does not expressly state that the rules of the site of arbitration take precedence. In the past, in fact, the location of arbitration automatically invited the application of local

¹¹³ Article 2, § 1º, of the *Brazilian Arbitration Act*. The Article 21 of the *Act* confirms the principle of the autonomy of the parties.

¹¹⁴ This is the opinion of Vicente Marota Rangel, Pinheiro Carneiro and José Maria R. Gacez in João Bosco Lee, *Arbitragem Comercial Internacional nos Países do MERCOSUL*, (Curitiba: Juruá, 2002) at 183-184.

¹¹⁵ See João Bosco Lee, *supra* note 48 at 184.

legislation into the arbitral procedure. However, in many Latin American countries, submission to the law of the site of arbitration remains a strong tradition. Over time, international arbitration has evolved, providing some freedom to the arbitrator to choose the appropriate rule when the parties did not make the choice. By contrast, the *UNCITRAL Model Law* takes a more cautious approach to awarding the arbitrator a choice of laws, in case of a default of the parties. Article 28 (1) reflects the principle of party autonomy, giving ample opportunity for parties to choose the law applicable to the substance of the dispute¹¹⁶. On the other hand, Article 28 (2) requires the arbitral tribunal to apply the necessary conflict-of-law rules, in order to determine the law applicable to the substance of the dispute¹¹⁷. Such a differentiation makes sense because paragraph (1) is addressed to the parties who are free to take advantage of a wider scope, while the narrower scope presented in paragraph (2) aims to provide greater predictability and certainty to ensure the arbitral tribunal gives reasons for its choice of law¹¹⁸.

The location of arbitration is also important to determine, in order to define the nationality of the award; the location is also relevant when parties decide to use the arbitral regulation of a particular state. The location of the tribunal also determines the competence of the courts for intervention, in case of difficulties in the constitution of the arbitral tribunal.

The *Brazilian Arbitration Act* distinguishes between the geographic location where an award is rendered and the origin of arbitration. Article 10, IV of the *Act*, contains a

¹¹⁶ Article 28 of the *UNCITRAL Model Law*:

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law of the legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of law rules.

¹¹⁷ Article 28 of the *UNCITRAL Model Law*:

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict-of-law rules that it considers applicable.

¹¹⁸ Holtzmann and Neuhaus, *supra* note 92 at 770.

mandatory provision to define where the arbitral award will be granted in order to determine the nationality, recognition and enforcement effects. However, Article 11, I, continues by stating that the arbitration can develop in one or more places. For example, the hearings of an arbitration process can occur in two different countries and the award can be rendered in a third country. Nevertheless, the place where the award is granted is the criterion to define the place of arbitration established in Article 10, IV of the *Act*.

Another aspect regarding arbitral proceedings concerns controversies that may arise pertaining to inalienable rights during the course of arbitration. In this case, the dispute will be remitted to the courts, suspending the arbitration procedure until the resolution, otherwise an award cannot be granted.

With regard to the length of arbitral proceedings, the award shall be delivered within the terms stipulated by the parties. If there is no provision regarding this effect, an award should be rendered within six months, following the initiation of the arbitration process.

4.1.5. The Arbitral Award

Articles 23 to 33 of the *Brazilian Arbitration Act* refer to the arbitral award. Certain conditions are necessary to have a valid award. For instance, the decision must name the parties and provide a summary of the dispute. In addition, the award must contain the reasoning of the decision and the arbitrator must state whether he or she made a judgment under principles of equity. The arbitrator must also summarize issues addressed and resolved under the scope of the arbitration clause. Finally, the award must specify the date and location where the decision was made and be signed by the arbitrator(s), with a copy of the

decision given to each party. Failure to adhere to such procedures may nullify the arbitral award.

Whenever more than one arbitrator is involved in the arbitral process, a voting majority is required to render the award. Again, the *UNCITRAL Model Law* has influenced the adoption of this procedure in Brazil¹¹⁹. However, the *Brazilian Arbitration Act* states that if an agreement cannot be reached by majority decision, the vote of the president of the arbitral tribunal will prevail.

After receiving the copy of the award, each party has five days to appeal to the arbitral tribunal (Article 30 of the *Act*). Appeals can be made to clarify any contradictory statements within the award, or to ask for an explanation about a topic that was omitted and that the arbitrator should have addressed. The arbitrator will then have 10 days to amend the award (Article 30, sole paragraph).

The nullity of the award is ruled in Article 32 of the *Act*. In short, the award is null if:

- The submission agreement¹²⁰ is null;
- The award was rendered by someone who could not be an arbitrator;
- The award does not contain the report with the summary of the dispute and the name of the parties;
- The arbitrator failed to mention that the decision was based under principles of equity;
- The award was not dated and addressed;

¹¹⁹ Article 31, 1 of the *UNCITRAL Model Law*:

(1) The award should be made in written and shall be signed by the arbitrator or arbitrators. In arbitral proceeding with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

¹²⁰ This wording of the law is discussed in Chapter IV, 4.2., Defects and Omissions of the *Brazilian Arbitration Act*.

- The award was *extra* or *infra petita* or did not completely decide the matter of dispute;
- The award was rendered by prevarication, *concussio* or passive corruption;
- The award was rendered after the time limit established in the arbitration agreement;
- The award did not observe the principles of due process, equality of the parties, and impartiality of the arbitrator(s).

It is the parties' responsibility to plead nullity to the court. This action will be submitted according to the rules provided in the *C.C.P.*, and shall be proposed in the first 90 days following receipt of notification of the arbitration award or its amendment. If the plead for nullity is judged valid, the court decision will declare the nullity of the award or will determine the preparation of a new award by the arbitrator or tribunal.

4.1.6. Recognition and Enforcement of Foreign Arbitral Awards

The recognition and enforcement of foreign arbitral awards is presented in Articles 34 to 40 of the *Act*. Article 34 begins by stating that recognition and enforcement will be administered in accordance with the international convention valid in the Brazilian legal regime, or in its absence, according strictly to the wordings of the *Act*¹²¹.

When the *Brazilian Arbitration Act* was enacted, Brazil was not a signatory of the *New York Convention* of 1958. Hence, legislators predicting that recognition and enforcement could be a problem decided to incorporate the provisions of Article 5 of the *New*

¹²¹ See the Article 34 of the *Brazilian Arbitration Act* in the Appendix.

York Convention, aiming to avoid future impediments for choosing Brazil as a venue for arbitration. Article 38 of the *Act* is literally a copy of the aforementioned Article.

Briefly, recognition and enforcement of a foreign arbitral award may be denied under the following circumstances:

- The absence of an agreement to arbitrate, or the submission agreement already being null or void;
- An irregularity in the composition of the arbitral tribunal;
- Prevention of one of the parties from fully defending itself or failure to notify the parties of the designation of the arbitrator or arbitration procedure;
- The award dealing with a difference not contemplated by or not falling within the terms of the submission to arbitration;
- The ruling not yet being binding to the parties;
- The award having been set aside by a competent authority of the country in which it was made;
- The subject matter of the dispute deemed not capable of settlement by arbitration;
- The recognition or enforcement of the award being contrary to Brazilian public policy.

If any of the above can be substantiated, recognition or enforcement of an arbitral award may be denied, according to Article 38 of the *Act*.

The *Brazilian Arbitration Act* adopted a territorial notion to define a foreign arbitral award, and thus any award delivered outside Brazil is considered a foreign award. However, this definition is not the only aspect that qualifies an award as a foreign one. For awards delivered in any foreign country, if the parties involved are Brazilian and abide by Brazilian

law for resolution of the dispute, the award rendered should be considered national and not international. However, Brazilian legislators created the former definition, and consequently the parties must assume the consequences when writing the arbitration agreement to establish arbitration abroad. To enforce such an award in Brazil, the award must be recognized by the Supreme Court, even though the parties and the law applicable to the dispute are Brazilian.

4.2. Defects and Omissions in the *Brazilian Arbitration Act (Law 9.307/96)*

The *Brazilian Arbitration Act* was the first law in Brazil to establish rules of proceedings specific to arbitration. In all contracting states of the MERCOSUL, the specific rules pertaining to arbitration are addressed in the *Code of Civil Procedure*, whose rules are naturally designed for litigation. Brazil was the only country to address arbitration in a separate Statute. However, the *Act* has imperfections that could cause problems for dispute resolution, and which need to be addressed below.

4.2.1. Arbitration Clause and Submission Agreement

One of the main problems posed by the *Brazilian Arbitration Act* is the difficulty in determining when to apply the submission agreement when the arbitration clause is present in party contracts. The *Act* was written in light of the *UNCITRAL Model Law*, the *New York Conventions* of 1958 and the *Panama Convention* of 1975. These laws, however, do not require the execution of the submission agreement, and consequently the Brazilian law

should not either, because requiring a submission agreement undermines both the effectiveness of the arbitration clause and the purpose of arbitration.

The STF of Brazil has already decided a case¹²² that upholds the validity of the arbitration clause for initiating the arbitral process. Apparently, the interpretation of the court is that the submission agreement is not necessary when the parties choose institutional arbitration, or if the arbitration clause provides all the prerequisites for the initiation of the arbitral tribunal. Therefore, the submission agreement is only necessary in the case of a void arbitration clause, and furthermore, when there is no indication, either directly or by reference to arbitration rules or to an arbitral institution, as to how the arbitrators are appointed (blank clause). In this case, the judicial execution of the arbitration clause would apply, resulting in a judicial submission agreement, binding to both parties.

One of the latest decisions granted by the Court of São Paulo confirms the understanding of the STF. The case was an appeal of *Celso Varga*¹²³ against the *Chamber of Commerce Brazil-Canada*. *Celso Varga* signed a contract that contained a clause saying that any dispute arising under the contract was going to be solved through arbitration at the *Chamber of Commerce Brazil-Canada* and under its regulation, without possibility of recourse. After the establishment of the arbitral tribunal according to the *Chamber of Commerce Brazil-Canada*'s rules of procedure, the party alleged the nullity of the arbitration agreement, stating that a signed acceptance of the arbitration agreement did not mean a waiver of his right to plead in court. According to *Celso Varga*, in order to gain a resolution for the dispute from an arbitral tribunal, a submission agreement was necessary, but it was never signed. The Court of São Paulo ruled there was no need for a submission agreement,

¹²² *M.D.V. v. RESIL*, *supra* note 63.

¹²³ *Celso Vargas v. Câmara de Comércio Brasil-Canada*, (2003) 17 December 2003, TJ/SP Ap.civ. n. 296.036-4/4.

since Article 5 of the *Act* states that when the parties choose an institution, such as the *Chamber of Commerce Brazil-Canada*, the arbitration will be held according to the rules of that institution, because they are sufficient to start the arbitral tribunal. The Court completed the reasoning by saying that the provision of Article 7 of the *Act* refers to blank clauses, incapable of initiating such procedures, and in such a circumstance, the submission agreement becomes necessary. It appears that Brazilian Courts are following this line of reasoning, and ideally the Federal Supreme Court will continue to confirm decisions based on these precedents. If not, the efficacy of the arbitration clause will be jeopardized.

A discussion about the validity of the arbitration clause to start arbitral proceedings leads one to speculate whether the execution of the submission agreement via the courts is even necessary. Legislators have proposed introducing this court-free concept, since the *UNCITRAL Model Law*, the *New York Convention* and the *Panama Convention* did not have such a provision. The function of the judge, however, should be limited to helping the parties and not to writing the arbitration agreement for them. One example of necessary judicial interference would occur if the parties could not agree on the nomination of an arbitrator, as provided on Article 13 of the *Act*. Other outstanding issues could be established directly by the arbitral tribunal.

In the *AMERICEL v. COMPUSHOPING*¹²⁴ case, the question of the submission to arbitration by court intervention provided in Article 7 of the *Brazilian Arbitration Act* when there is a party resisting to arbitration was upheld by the Appeal Court of Justice of the Federal District and Territories. The various respondents (a group of nine companies operating in the electronic and information market) had all signed agency agreements with

¹²⁴ *Americel S.A. v. Compushoping Informática Ltda. and others*, (2003), D.J. 26 May 2003, p. 00360, 2003 STJ REsp. n. 450881.

AMERICEL containing similar arbitration clauses¹²⁵. In view of alleged contractual defaults by *AMERICEL*, the respondents summoned *AMERICEL* to sign a submission agreement. However, *AMERICEL*'s refusal to initiate arbitration led the respondents to issue a lawsuit under Article 7 of the *Act*. *AMERICEL* argued there was no valid ground for an arbitration to be held, and the lawsuit provided in this Article of the *Act* was contrary to Article 5, XXXV of the Constitution. However, the Court followed the proceedings provided in the *Act*, nominating an arbitrator and two possible substitutes, and forcing the parties to arbitration, providing the existence of arbitration clauses in the contracts. *AMERICEL* unsuccessfully appealed this decision. The preceding case is important because it recognizes the validity of Article 7 of the *Act*, which provides for the procedure to force the resistant party to start arbitration¹²⁶. Such a decision again shows that the Brazilian Courts are taking a very positive approach towards arbitration.

4.2.2. Who are the parties?

Another problem with the *Brazilian Arbitration Act* relates to the parties involved in the arbitral proceedings. The law does not have any articles regarding the involvement of third parties in the arbitral process, since the agreement to arbitrate is a consensual contract between two parties. It is likely that the courts in Brazil will remain conservative and forbid the participation of parties not part of the arbitration agreement. In fact, the decision of the Tribunal of the State of São Paulo, between *Aga do Brasil Participações Ltda v. Mansur José Farhat* did not enforce the arbitration agreement on a third party who was not part of the

¹²⁵ Carlos Nehring, *supra* note 73 at 418.

¹²⁶ See also *Rodrigo Silva Esteves v. Themilson Loyola*, (2003), D.J. 22 September 2003, p. 00320, 2003 STJ REsp. n. 470226.

contract¹²⁷. The *Act* also fails to mention the possibility of multi-party arbitration. However, in international businesses involving many parties, the contractual agreement usually contains arbitration clauses requiring all parties to sign; should a conflict occur, all parties would resolve the matter through arbitration.

The issue gets more complicated when one of the parties is the Brazilian state or government institution. The *Brazilian Arbitration Act* does not have any article that expressly authorizes the state to adopt arbitration for its contracts, and the *Law of Invitation to Bid*¹²⁸ only invites greater uncertainty about the role of arbitration vis-à-vis the state.

Article 55, §2º of the *Law of Invitation to Bid* states that when the Public Administration concludes contracts with natural persons or legal entities, including those established in foreign territories, the contracts must include a clause declaring the competence of the state jurisdiction where the Administration is located in order to solve any contractual issue. Thus, the adoption of an arbitration clause to arbitrate matters related to this type of contract is unlikely to be accepted by the Judiciary in Brazil, even though different opinions exist among legal scholars. Carlos Alberto Carmona, for example, represents one voice trying to convince others that arbitration is admissible even when the law seems to give clear limitations on its use¹²⁹. He argues that the purpose of the *Law of Invitation to Bid* was to say that the jurisdiction where the Administration is located has exclusive preference over other factors determining competence, such as the residency of the party, location where the incident occurred and the place where the object in question is

¹²⁷ *Aga do Brasil Participações Ltda and others v. Mansur José Farhat and others*, (1999) 31 August 1999, T.J/SP Agr.Instr. no. 123.567-4/9.

¹²⁸ *Law of Invitation to Bid*, *supra* note 87.

¹²⁹ Carlos Alberto Carmona, *Arbitragem e Processo – Um Comentário à Lei 9.307/96*, São Paulo, Malheiros, at 54-55 cited in, Ricardo Ramalho Almeida, *Arbitragem Interna e Internacional: Questões de Doutrina e da Prática*, (Rio de Janeiro: Renovar, 2003) at 272.

located, for the purpose of litigation. According to Carmona, the *Law* is not incompatible with arbitration. Once the *locus fori* is established, the judiciary has concomitant competence with the arbitrator to decide matters where the latter is incompetent to act (such coercive measures, and enforcement of arbitration agreements and awards).

Notwithstanding Carmona's opinion, the *Law of Invitation to Bid* is very clear in this instance, because Article 32, §6º, expressly excludes the obligation to adopt the *locus fori* when the contract concerns international bids. Such a contract takes three possible forms: 1. a contract for the acquisition of goods and services financed by an international financial institution, with which Brazil has an existing agreement; 2. a contract for the purchase of products produced and delivered abroad, under the previous authorization of the Chief of the Executive Power; and 3. a contract for the acquisition of goods and services by administration offices located abroad. Hence, the *Law* permits the use of arbitration under these specific conditions and expressly declares its use in a specific article (Article 32, §6º).

The *Law* 8.987/95¹³⁰ governs the contracts of licensing (permission) to provide public service. Article 23 determines the essential clauses of the contract of licensing, such as the election of the *locus fori* and amiable compositeur for the solution of contractual controversies in section XV. This section has been interpreted as an authorization for the adoption of arbitration for contracts of concession of public services, because this Statute has no definition for the term "amiable compositeur". Recently, a decision from the Department of Finance (Tribunal de Contas) clearly expressed a favourable approach to arbitration:

The utilization of arbitration finds, therefore, legal support, being unthinkable to talk about violation of the principle of legality, and it constitutes a fast and economic method to solve disputes in contracts of

¹³⁰ *Lei* 8.987 de 13 de Fevereiro de 1995, D.O.U., 14 February 1995, 1917.

concession, which can only bring advantages to the Public Administration.

It must be concluded, as a result, that the utilization of arbitrators has the legal support (Law 8.987/95) and it is convenient for the Public Administration, being impossible after the enactment of the aforementioned Law, to talk about the inefficiency of the clause in Contract of Concession...¹³¹

In contrast to recent signs of a more positive approach towards arbitration, some members of the legal community hold strict opinions about Article 23, XV of Law 8.987/95. Clávio Valença Filho¹³² argues that amiable composition is understood as mediation, conciliation and a mini-trial, but not arbitration. Despite his strict interpretation, the effectiveness of the arbitration clause in contract of concession of public services should not be affected. The writing of this particular Article has left the door open for alternatives such as arbitration in favour of litigation, since the Law 8.987/95 did not define amiable compositeur. Arbitration agreements sometimes specify that arbitrators are to act as amiable compositeur¹³³. Unlike the previous Law (*Invitation to Bid*), where the Article 55, §2º did provide clear limitations for the use of any alternative dispute resolution, the Law of Concession (*Permission*) of Public Services is more flexible toward such alternatives.

Nevertheless, the state has always resisted adoption of arbitration to settle conflicts involving state companies or public utility concessionaires. This is the area of law where court judges refused in the first instance to recognize the effect of the arbitration clause¹³⁴. In

¹³¹ Processo nº 006.0986/93-2, Rel. Min. Paulo Affonso Martins de Oliveria, Decisão nº 188/95, cited in Ricardo Ramalho Almeida, ed., *Arbitragem Interna e Internacional: Questões de Doutrina e da Prática* (Rio de Janeiro: Renovar, 2003) at 277.

¹³² Clávio Valença Filho, cited in Ricardo Ramalho Almeida, ed., *Arbitragem Interna e Internacional: Questões de Doutrina e da Prática*, (Rio de Janeiro: Renovar, 2003) at 277.

¹³³ Redfern and Hunter, *supra* note 18 at 18.

¹³⁴ Maurício Gomm Ferreira, *supra* note 12 at 15.

the case law *COPEL v. UEG Araucária Ltda.*¹³⁵, *COPEL* filed a preliminary injunction against *UEG* before the Third Lower State Treasury Court of the City of Curitiba, in order to stay arbitral proceedings of the ICC. The parties were under a contract of purchase and sale of natural gas from *UEG* (thermoelectric power station), which said that in case of controversy originating from the contract, the issues were to be solved through arbitration in accordance with the rules of the ICC-France. *UEG* initiated arbitral proceedings in the ICC, and *COPEL* requested intervention of the Brazilian Court to suspend the efficacy of the arbitration clause. *COPEL* argue that the arbitration clause was null and void, because arbitration was not the competent jurisdiction for claims (public related matters) involving a government controlled company. *COPEL* further alleged that the contractual agreement was of interest to the state and regarded inalienable rights, thus the issue was not arbitrable. Unfortunately, the preliminary injunction was granted. *UEG* appealed this decision, but the Appeal Court of Paraná confirmed the judgment of the Treasury Court.

The Brazilian Congress has introduced arbitration in contracts under the legal regime of Regulatory Agencies (Agências Reguladoras), which the state oversees. In Brazil, Regulatory Agencies are created to control activities of the licensee of public services in key sectors of the economy. For instance, *Law 9.478/97*¹³⁶ created the Petroleum National Agency (Agência Nacional do Petróleo - ANP) including Article 43, X, which stipulates as an essential contractual clause the establishment of rules for the resolution of controversies, related to the contract or its execution, including conciliation and international arbitration. *Law 10.233/01*¹³⁷ that created the National Agency of Maritime Transportation (Agência

¹³⁵ *Companhia Paranaense de Energia (COPEL) v. UEG Araucária Ltda.*, (2003) 3 June 2003, 3ª Vara da Fazenda Pública de Falências e Concordatas de Curitiba, Liminar n. 24334.

¹³⁶ *Petroleum Law*, *supra* note 86.

¹³⁷ *Lei 10.233 de 5 de Maio de 2001*, D.O.U., 6 May 2001, 1.

Nacional dos Transportes Marítimos – ANTAQ) and the National Agency of Ground Transportation (Agência Nacional dos Transportes Terrestres – ANTT) also states that contracts of concession (permission) under their control must contain an arbitration clause¹³⁸.

However, some regulatory agencies are naming “arbitration” as the mechanism to resolve internal conflicts within these agencies. The National Agency of Postal Services (Agência Nacional de Serviços de Correios - ANAPOST)¹³⁹ mandates the use of arbitration to deal with conflicts originating among its different departments¹⁴⁰. In other words, if an issue arises between the finance department and the purchasing department of ANAPOST, the law mentions the use of arbitration to resolve the issue, even if the problem is internal and involves two different departments of the same institution.

4.2.3. Omission Regarding the Law Applicable to the Merits of Dispute

The choice of law is one of the most complex aspects of international arbitration. The application of the wrong law for the proceedings, or for the matter of disputes, or even the application of the wrong rules to the contract, can frustrate the enforcement of the final award. Typically, the international arbitration features four different choice-of-law issues: 1. the substantive law governing the merits of the parties’ contract (*i.e.*, the choice of law that is to govern the parties’ rights and obligations); 2. the law applicable to the arbitration proceedings (*lex arbitri*); 3. the substantive law governing the parties’ arbitration agreement; and 4. the conflict-of-law rules to select each of the foregoing laws. Although such a

¹³⁸ Article 35, XVI of the *Law 10.233/01*.

¹³⁹ The establishment of the ANAPOST is still waiting for the approval of the Project of Law 1.491/99 in the National Congress.

¹⁴⁰ Article 130, XXIX of the *Project of Law 1.491/99*.

circumstance is rare, each of these four issues can be governed by a different national law¹⁴¹. Thus, the first step in conflict resolution is to select the conflict-of-law principles that determine the substantive law applicable to the merits of the dispute.

A variety of authorities influence which conflict-of-law rules the tribunal will apply, in order to determine the substantive law governing the merits of the parties' dispute. These rules include any applicable treaty, the conflicts rules of the arbitral *situs*, the conflicts rules of other interested states, and the institutional arbitration rules selected by the parties.

A legal challenge occurs when the parties fail to choose the law applicable to the merits of the dispute. The *Brazilian Arbitration Act* has no provision to overcome this problem. The Article 2, §1° states, "*The parties may freely choose the rules of law to be applied in arbitration, as long as there is no violation of good customs and public policy*". The first impression this Article offers is that the "*law applicable in the arbitration*" refers to the arbitral proceedings rules and not to the law of the subject matter. However, Article 21 of the *Act* addresses the rules of proceedings chosen by the parties for use in arbitration. This Article states that the parties are free to choose any rules of proceedings to govern the arbitration. The parties can also choose an arbitral institution that will provide these rules or even delegate this choice for the arbitrator. Consequently, Article 2, §1° of the *Act* is referring to the substantive rules governing the contractual obligations.

Next, Article 2, §2° says that the parties can also choose to apply the general principles of law, customs and *lex mercatoria* to their arbitration. In the case law between *Total Energie do Brasil Ind. e Com. Ltda., S.N.S and Others v. Thorey Invest Negócios*

¹⁴¹ Gary B. Born, *supra* note 42 at 24.

*Ltda*¹⁴², the parties were under an agency contract to be performed in Brazil, which stated that any disputes deriving from the agreement should be construed according to the French law, and resolved by the International Chamber of Commerce. When the dispute arose, *Thorey Invest Negócios* (Brazilian party) initiated judicial proceedings in São Paulo and the court disregarded the existence of the arbitration agreement. Using recourse, *Total Energie* (French) argued the existence of an arbitration agreement for the establishment of the ICC Tribunal, under French law. The Court of Civil Matters of São Paulo recognized the validity of the arbitration agreement and the application of French law to the case, reasoning the existence of the principle of the parties' autonomy in Article 2 of the *Brazilian Arbitration Act*. This decision is very important because it recognizes the choice of law made by the parties applicable to the merits of the dispute. Otherwise, the autonomy of the parties could be threatened if the Court had not recognized the validity of their choices.

The *Brazilian Arbitration Act* is silent regarding the capacity of the arbitrator to decide which law to apply to the case in instances where the parties have failed to do so. Unfortunately, the *Act* did not follow the provision of the *UNCITRAL Model Law* allowing the arbitral tribunal to choose the law that will be most applicable to the merits of the dispute¹⁴³.

Despite diminishing the arbitrator's authority to choose the most appropriate law for the case, the *Brazilian Arbitration Act* in Article 5 refers to institutional arbitration, which the parties may choose to settle their dispute. Under institutional arbitration, the arbitration works under the rules of proceedings of the chosen institution and, in general, leading institutions contemplate choice of law decisions by the arbitrator. Such is the case in relation

¹⁴² *Total Energie, S.N.S and Others v. Thorey Invest Negócios Ltda.*, (2002), 24 September 2002, 1º Tribunal de Alçada Civil do Estado de São Paulo Agr. Instr. no. 1.111.650-0.

¹⁴³ See *supra* note 117.

to Article 13(3) of the ICC Rules, “[i]n the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rules of conflict that he deems appropriate”¹⁴⁴.

The conflicts rules of the arbitral *situs* are another alternative for the arbitrator to decide which law is applicable to the merits of the dispute. With this in mind, some authors contend that the arbitrator should apply the Brazilian conflict-of-law rules, which submit the contract to the laws (statutes) of the place of arbitration, or to the law where the obligation originated. Such an understanding is possible when the arbitration takes place in Brazil in order to solve domestic matters between Brazilian nationals. Nevertheless, in an international arbitration, this position contravenes the fundamental basis of arbitration, since the arbitrator has no determined jurisdiction. In most cases, parties under an arbitration agreement choose a neutral place for the hearing of the arbitration that has no connection to the parties or the subject of the contract. Thus, the arbitrator is not attached to any national legal regime and therefore does not need to observe the conflict-of-law rules pertaining to the seat of arbitration. He or she is free to apply the rule(s) that best conforms to the needs of the case. Nonetheless, the local law may require arbitrators to apply local conflict-of-law rules. In this case, the arbitrator must apply the mandatory rules to avoid future requests to set aside an arbitral award owing to the use of the wrong law. Hence, in this situation, the autonomy of the conflict of law cannot be absolute, and the mandatory rules of the place of arbitration must be observed¹⁴⁵.

¹⁴⁴ Chamber of Mediation and Arbitration of the Federation of Industries of São Paulo ensures the capacity of the arbitrator to choose the laws he deems appropriate for the matter of dispute, in case of default of the parties (Section 17.1 of their Rules of Proceedings).

¹⁴⁵ Filip De Ly, “The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning” (1991) 12:48 *Northwestern Journal of International Law & Business* 68.

To ascertain the proper law of the contract, the arbitrator can also consider other criteria: He or she can observe the nationality of the parties, the place where the contract was made, the place or places where the contract was to be performed, and the language and terminology of the contract¹⁴⁶. If the arbitration clause is Brazilian for instance, each of the aforementioned characteristics can add useful information to the arbitrators' decision, in cases where the parties did not choose the proper law of the contract.

Another mechanism of conflict-of-law rules has been identified in contemporary international arbitration, that is, the cumulative application of conflict-of-law rules to all countries affected by the dispute. If an arbitrator confronted with the choice between the laws of two countries cannot show that either country's laws agree on the substance of the issue, he or she can sometimes demonstrate that their conflict-of-law rules agree on the application of one of their laws¹⁴⁷ ("renvoi").

Finally, the arbitrator can choose the law of the state whose courts would have had jurisdiction but for the agreement to arbitrate, and the state where enforcement of the award is likely. Unfortunately, there is no clear trend towards conflict-of-law determinations of an international arbitral tribunal. The law applicable to the merits of a dispute will be a concern until the Brazilian Courts are confronted with a case discussing the issue of conflict-of-law rules.

¹⁴⁶ Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* (London: Butterworths, 1982) at 317.

¹⁴⁷ Reisman, Craig, Park and Paulsson, *International Commercial Arbitration: Cases, Materials and Notes on The Resolution of International Business Disputes* (New York: The Foundation Press Inc., 1997) at 716 [Reisman, Craig, Park and Paulsson].

4.2.4. Interim Measures

Another theme addressed in the *Brazilian Arbitration Act* is the power of the arbitral tribunal to order interim measures. Article 22, §4° of the *Act* fails to clarify whether the arbitrator is allowed to order interim measures or if he or she has to request the order from a judge. The law states,

“Subject to paragraph 2, the arbitrators may request to the judicial body that would have originally been competent to hear the case, to grant interim measures of protection.”

Actually, §4° of Article 22, inspired by Article 17 of the *UNCITRAL Model Law*¹⁴⁸, authorizes the arbitral tribunal to order interim measures. Thus, the arbitral tribunal under the *Brazilian Arbitration Act* should be competent to order interim measures. Yet, if the arbitrator is competent to judge the matter of dispute, why would he or she not be able to render a provisional remedy whose aim is to guarantee the effectiveness of the final award? In fact, interim measures are temporary instruments to protect someone's rights whenever necessary until the end of the dispute. An interim measure ceases when a final decision is rendered settling the conflict, or when the threat to someone's rights is no longer present. Although the arbitrator has the jurisdiction to order such measures, he does not have *imperium*, i.e., he or she cannot execute coercive measures. Therefore, whenever it is

¹⁴⁸ Article 17 of the *UNCITRAL Model Law*:

“Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure”.

necessary to compel the parties to obey an order, the arbitrator will have to request intervention from the court.

A slightly different situation may occur when the arbitral tribunal is yet to be established, and a provisional measure is required to safeguard the object in dispute. In this case, the interested party can request an interim measure from the court, to obtain protective measures at the place of arbitration, regardless of an existing arbitration agreement. Alternatively, the party can employ the concept of “pre-arbitral interim measure” of the ICC, if the parties had previously agreed to use ICC rules in arbitration proceedings¹⁴⁹.

Whenever the parties require an interim measure from the courts for protective relief, under the principle of concurrent jurisdiction, the party is not waiving the application of the arbitration agreement to the merits of the dispute. The fact that provisional remedies are compatible with the arbitration agreement is set forth in the ICC Rules of Arbitration in Article 23(2) of the 1998 Rules, the UNCITRAL Rules in Article 26(3), UNCITRAL Model Law in Article 9, the AAA International Arbitration Rules of 1997 in Article 21(3), and the Rules of the Stockholm Chamber of Commerce in Article 31(2) of the 1999 Rules¹⁵⁰.

In the case, *GKW Equipamentos Industriais S.A. v. Daimler Chrysler do Brasil Ltda.*¹⁵¹, the Court of Appeal of Minas Gerais held that Courts have jurisdiction to grant provisional measures without representing a waiver of the arbitration, even though the parties are under an arbitration agreement. The parties were under a contractual agreement stating

¹⁴⁹ ICC Rules for a Pre-arbitral Referee Procedure (in force as from January, 1990). The Article 1 provides the definition of the pre-arbitral referee procedure stating:

“1.1 These rules concern a procedure called the “Pre-arbitral Referee Procedure” which provides for the immediate appointment of a person (the referee) who has the power to make certain orders prior to the arbitral tribunal or national court competent to deal with the case (the “competent jurisdiction”) being seized of it.”

¹⁵⁰ Fouchard, Gailard and Goldman, *supra* note 103 at 715.

¹⁵¹ *GKW Equipamentos Industriais S.A. v. Daimler Chrysler do Brasil Ltda.*, (2003), 15 May 2003, 5ª Câmara Civil do Tribunal de Alçada do Estado de Minas Gerais, Apelação Cível (Civil Appeal) n. 393.297-8 [translated by author].

that any dispute arising under the scope of the contract would be solved through arbitration in London. The contract stated that interim measures could be granted by the Court, if necessary, with respect to the subject matter of the dispute. It is worthwhile to examine a partial transcript the judges' decision:

[T]hus, as to the case being scrutinized, the parties had opted for a private jurisdiction, and as soon as the arbitration agreement is signed and the arbitral tribunal is established, the arbitrator has the power to judge the merits of the dispute, and to solve all the issues pertaining to the case, except, obviously, to provisional measures, as provided in the contract, and to the inalienable rights, because in this particular, there is public interest involved.

In fact, the Court of Appeal's decision confirmed that a request to the court for an interim measure does not prevent the matter from being referred to the arbitrators after the Court's issuance of a preliminary order. If an interim measure is granted in the judiciary before the formation of the arbitral tribunal, can an arbitrator challenge the court decision? The very nature of interim measures as provisional remedies allows the arbitral tribunal to challenge the interim measure granted by the courts. Whenever a doubt or conflict emerge between the measures granted by the judiciary and the arbitral tribunal, the understanding of the arbitral tribunal should prevail, since the arbitral tribunal has the jurisdiction to decide the merits of the dispute¹⁵². The only reason the parties might resort to the courts to ask for an interim measure is because a person's rights may vanish before the arbitral tribunal is established. Thus, the courts may provide prompt relief for the parties involved.

In 1990, the ICC introduced rules dealing with pre-arbitral interim measures¹⁵³ that surpassed the problem of the delays in establishing the arbitral tribunal. The pre-arbitral

¹⁵² Fouchard, Gailard and Goldman, *supra*. note 103 at 723.

¹⁵³ Pre-arbitral Referee, online: International Court of Arbitration
<http://www.iccwbo.org/court/english/pre_arbitral/all_topics.asp

interim measures rules can apply only while the arbitral tribunal has yet to be formed, in order to have a third person (referee) provide a provisional measure when necessary. The referee who confers the measure cannot be an arbitrator of the tribunal. The parties themselves may select the referee, and if they fail to do so, the Chairman of the International Court of Arbitration will appoint the referee. Whatever measures the referee orders are binding until decided otherwise by a Court or Arbitral Tribunal. The application of the ICC Pre-Arbitral Referee Procedure requires written agreement between the parties, concluded either as part of the relevant contract or later in the process. In practice, many countries approve of and defer to the ICC rules governing pre-arbitral referees. The *Brazilian Arbitration Act* makes no mention of the utilization of the pre-arbitral referee. A thorough reading of the *Act* indicates a preference to defer to the judicial system whenever the arbitral tribunal is unable to resolve an issue. The *Act* provides for three situations allowing court interference: 1. When the arbitration agreement is insufficient to compose the arbitral tribunal, support will come from a judge who will write the parties' submission agreement; 2. If the parties do not agree on the nomination of the arbitrator, or when a witness refuses to appear in the arbitral tribunal, one of the parties will request the court's interference to fill the gaps and; 3. When the aggrieved party refuses to comply with the final award, the execution of the award will occur before a court. Thus, the *Act* considers intervention by the courts significant, demonstrating the principle of concurrent jurisdiction. In a similar vein, when provisional measures are necessary, the *Act* states that the arbitrator should request the measure from the court originally deemed competent to decide the case. Consequently, the *Act* does not embrace the pre-arbitral referee procedure of the ICC in arbitrations. However, as the *Act* notes in Article 5, if the arbitration agreement makes reference to the rules of a

particular arbitral institution, the arbitration shall be conducted in accordance with such rules, unless otherwise agreed by the parties. In spite of this understanding, that courts and arbitral tribunals have concurrent jurisdiction to grant provisional measures, two exceptions exist: first, the parties may agree to depart from the principle of concurrent jurisdiction; and second, the courts have exclusive jurisdiction in certain areas.

Some provisional measures can facilitate the enforcement of subsequent arbitral awards by freezing assets against which the award is likely to be enforced. For example, such a procedure can take place with attachment orders: The courts have exclusive jurisdiction to grant orders of this kind, and their jurisdiction is not affected by the existence of an arbitration agreement¹⁵⁴.

Because the *Brazilian Arbitration Act* applies to domestic and international arbitration, the interpretation of Article 22, §4 regarding interim measures should be as follows: If arbitration is domestic, the arbitral procedure will follow the *Act*. Should a party fail to comply with an order of a provisional measure, the arbitrator will initiate the appropriate court to execute it. If the arbitration is international and the parties decide to use the *Act*, the same rules apply. However, if the arbitration is international and the parties agree to use the rules of a particular institution, the institution's rules will apply and interim measures will take place as previously stated.

¹⁵⁴ Fouchard, Gailard and Goldman, *supra* note 103 at 726.

4.2.5. Annulment of the Arbitral Award

The *Brazilian Arbitration Act* is clear in confirming that the award is not subject to appeal or recognition of the courts in Article 18¹⁵⁵. The *Act* is applicable to domestic and international disputes, while the award provision of the *Act* applies specifically to domestic arbitration. Chapter VI of the *Act* clarifies the rules pertaining to recognition and enforcement of foreign arbitral awards; consistent with Article 35 of the *Act*: foreign awards are subject to the homologation of the Federal Supreme Court of Brazil (STF). Despite the impossibility of recourse, the *Act* gives the aggrieved party the opportunity to challenge the arbitral award in two ways: first, by bringing an annulment action through the courts¹⁵⁶; and second, through a stay of execution during the process of execution or enforcement (*embargos de execução*)¹⁵⁷.

The annulment action follows the ordinary proceeding of the Brazilian *C.C.P.* This action must be proposed within 90 days after the parties have been notified of the final award. The *Act* does not mention what court is competent to hear the annulment action. However, the court where the award was granted should be competent to adjudicate the request for annulment. Article V, 1, (e) of the *New York Convention*, providing the conditions for denying enforcement of international arbitral awards¹⁵⁸, states that the court of the country where the award was made is competent to set aside the award. The *UNCITRAL Model Law* is consistent with the *New York Convention* in Article 36, 1, (v)¹⁵⁹.

¹⁵⁵ See Article 18 of the *Brazilian Arbitration Act* in the Appendix.

¹⁵⁶ See Article 33 of the *Brazilian Arbitration Act* in the Appendix.

¹⁵⁷ See Article 33, §3 of the *Brazilian Arbitration Act* in the Appendix.

¹⁵⁸ Article V, 1, (e) of the *New York Convention*:

“(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

¹⁵⁹ Article 36, 1, (V) of the *UNCITRAL Model Law*:

“(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.”

The other opportunity to challenge the arbitral award comes during the process of execution, when one of the parties does not voluntarily comply with the decision. In fact, the *Act* offers a second chance for the resistant party to challenge the arbitral award during the execution. Furthermore, the stay of execution immediately suspends the execution, according to Article 739, §1º of the *C.C.P.* and 791, I of the *C.C.P.*¹⁶⁰. However, the annulment action does not suspend the execution of an award. Therefore, it is more convenient for the resistant party to wait for the process of execution to be initiated, and to raise any questions about nullity of the award during the stay of execution. This provision is an unfortunate feature of the *Act* because it gives the aggrieved party the chance to delay compliance with the arbitral decision.

The judgment of the First Tribunal of Civil Matters of the State of São Paulo¹⁶¹ addressed the annulment action's inability to suspend execution of the award. *GVA Representações e Engenharia Ltda. and GEVISA S.A.*¹⁶² had a contractual agreement to provide services (Service Contract) that was interrupted by *GEVISA*. Because of the interruption in the contractual agreement, *GVA Representações e Engenharia Ltda.*, started arbitral proceedings in the Chamber of Mediation and Arbitration of São Paulo with the consent of *GEVISA*. During the arbitration process, *GEVISA* argued that the nature of the contract was commercial representation, instead of an agreement to provide services, and thus a matter of Brazilian public policy, which was not arbitrable. The arbitral award was favourable to *GVA*, and *GEVISA* motioned an annulment action of the award, requesting the suspension of the execution of the award until the Court had analyzed the case. However, the

¹⁶⁰ Not all the appeals provided in the Brazilian *C.C.P.* suspend the effectiveness of the court decision.

¹⁶¹ Primeiro Tribunal de Alçada Civil do Estado de São Paulo.

¹⁶² *GEVISA S.A. v. GVA Representações e Engenharia Ltda.*, (2002) 15 April 2002, Primeiro Tribunal de Alçada Civil do Estado de São Paulo Agr.Instr. n. 1.085.233-4.

Court denied the suspensive effect of an annulment action, because Article 489 of the *C.C.P.* states that annulment action does not have suspensive effect. Therefore, the Court could not prevent the party from enforcing the award. The Court also said that *GEVISA* could have challenged the arbitral award using the stay of execution recourse (*embargos*), which would automatically suspend the enforcement action. Hence, this decision confirms the presumption that a party interested in challenging arbitral awards in Brazil will prefer to use the stay of execution rather than the annulment action, because of the former's power to suspend the execution of the award.

The granting of arbitral awards has the same effects as judicial decision in accordance with Article 31 of the *Brazilian Arbitration Act*. Consequently, the stay of execution recourse can only address circumstances provided in Article 741 of the *C.C.P.*, as in judicial sentences, in order to nullify the award¹⁶³. As a result, the stay of execution recourse cannot readdress the merits of the dispute, but only revisit questions of irregular proceedings. Some examples of irregular proceedings include: 1. A lack of summons or nullity of notification is present for the initiation of the arbitral tribunal, 2. Execution of the title is impossible, 3. One of the parties is illegitimate, 4. More than one execution and more than one judge competent to analyze the stay of execution, 5. Excessive execution has taken place, 6. Execution is unnecessary because the amount awarded in the decision (or any other satisfactory compensation) has already been paid, and, 7. The court is incompetent to appreciate the stay of execution.

Article 575 of the *C.C.P.* declares the competent court to adjudicate the execution of judicial sentences. Before the amendment of the *C.C.P.* by the *Law 10.358/2001*¹⁶⁴, Article

¹⁶³ See Article 33, §3.º of the *Brazilian Arbitration Act* in the Appendix.

¹⁶⁴ *Lei 10.358 de 27 de dezembro de 2001*, D.O.U., 28 December 2001, 2.

575, III of the *C.C.P.* stated that the competent court of execution was the one that homologated the arbitral award. However, the *Brazilian Arbitration Act* eliminated the double *exequatur* in Article 18¹⁶⁵. As a result, no competent court was available to recognize the arbitral awards, and consequently, the court of execution did not exist either. Notwithstanding, the aforementioned law amended this omission in the *C.C.P.*, introducing the competence of Civil Courts to judge the requests of enforcement of arbitral awards (Article 575, IV of the *C.C.P.*).

According to Article 32 of the *Act*, an individual has eight situations for arguing the nullity of the arbitral award¹⁶⁶. Under Article 33, §2, I of the *Act*, the competent judge must declare the nullity of the award: 1. When the submission agreement is null, 2. If the award was rendered by someone who could not be an arbitrator, 3. When the award was rendered under prevarication, *concussio* or passive corruption, 4. If the award was rendered after the time limit established in the arbitration agreement, and 5. If the award did not observe the principles of right of defence, equality of the parties, and impartiality of the arbitrator(s). When other circumstances are present, the court will order to the arbitrator to render a new award¹⁶⁷ (the award does not contain the report with the summary of the dispute and the name of the parties; the arbitrator failed to mention that the decision was based under principles of equity; the award was not dated and addressed; the award was *extra* or *infra petita* or did not completely decide the matter of dispute). This procedure differs slightly from the *UNCITRAL Model Law*, that states in Article 34, (4), that the court, under the request of the party, may give the arbitral tribunal the opportunity to resume the arbitral

¹⁶⁵ See Article 18 of the *Brazilian Arbitration Act* in the Appendix.

¹⁶⁶ See Article 32 of the *Brazilian Arbitration Act* in the Appendix.

¹⁶⁷ Article 33, §2, II of the *Brazilian Arbitration Act*.

proceedings in order to eliminate the grounds for setting aside the award. The arbitrator is not compelled to render a new award.

The ambiguous writing of the *Brazilian Arbitration Act* gives rise to greater uncertainty. Article 32 establishes the causes of nullity of an arbitral award stating in n° I that *the award is null when the submission agreement is null*¹⁶⁸. One could suggest that the legislators made a mistake and intended to say *arbitration agreement*. Two interpretations can be offered for this article. First, if legislators really intended to say *submission agreement*, the courts could never set aside an arbitral award under a null arbitration clause. Second, if the wording of this article is correct, then the law enforcing the execution of the submission agreement and the effectiveness of the arbitration clause to start arbitral proceedings would be undermined¹⁶⁹. However, these Articles should be understood in the context of the *Act*, which is inspired by the *New York Convention* and the *UNCITRAL Model Law*. Both laws always mention the arbitration agreement when analyzing the validity of the agreement to arbitrate, because a dichotomy between the arbitration clause and the submission agreement does not exist. The *Act*, while addressing the causes for denial of recognition and enforcement of foreign arbitral awards, refers to an invalid arbitration agreement (Article 38, I). As a result, perhaps the correct interpretation of Article 32, I, in the *Act*, should be the same as provided in Article 38, I, which is consistent with the *New York Convention* and the *UNCITRAL Model Law*. Legislators should clarify this section of the *Act* to avoid confusion the courts over the correct interpretation of Article 32, I.

The *UNCITRAL Model Law* also establishes the non-arbitrability of the dispute, the incapacity of one of the parties and the public policy in Article 34, (2) (a) and (b) as causes

¹⁶⁸ Article 32, I of the *Brazilian Arbitration Act*.

¹⁶⁹ João Bosco Lee, *supra* note 48 at 92.

for setting aside the award. The *Brazilian Arbitration Act* is silent regarding public policy, but when referring to the arbitrability of the dispute and the incapacity of one of the parties, the *Act* refers to public policy indirectly by observing the validity of the submission agreement according to Article 32, I.

4.2.6. Questions Concerning Recognition and Enforcement of Foreign Arbitral Awards

When the arbitrator renders the award his function ends and the jurisdiction that was conferred on him by agreement of the parties no longer applies. With the final award, the aggrieved party is expected to voluntarily comply with the order. Enforcement is usually not necessary because the parties settle their dispute by obeying the decision. However, if a party resists compliance with an award, a judicial motion is necessary to execute the award, since the arbitral tribunal does not have the coercive powers to enforce it.

The first problem regarding recognition and enforcement of arbitral awards is that the award is deemed equivalent to a judgment. The *Brazilian Arbitration Act* confers to arbitral awards the characteristic of executive title. At the same time, the *C.C.P.* divides the executive titles into judicial and extra-judicial titles¹⁷⁰. Before the enactment of the *Act*, Article 584 of the *C.C.P.* defined the following as judicial executive titles: civil condemnatory sentences, criminal condemnatory sentences, sentences that homologate conciliations and transactions, and foreign judgments homologated by the Federal Supreme Court. Thus, all of these titles are rooted in judicial decisions. However, after the enactment of the *Act*, which deemed arbitral awards equivalent to judgments, Article 584 of the *C.C.P.*

¹⁷⁰ Art. 583, *C.C.P.* (1973).

was amended to include the arbitral award as an executive judicial title¹⁷¹. This amendment, however, was a mistake, because the arbitral award is not a judgment; arbitration is a private method to resolve disputes where the parties renounce the formalities of litigation. What the legislator intended to do was confer compulsory execution on to arbitral awards. But it is pointless to compare an arbitral award with a judicial decision, since extra judicial title offers the same enforcement power to the award. Hence, Article 585 of the *C.C.P.*, determining the extra judicial titles such as cheques, promissory notes, life insurance, etc., also specifies in Article 585, VII, that extra judicial titles are all other titles that the laws (statutes) define as such. Thus, it is redundant to compare the arbitral awards to judicial sentences, because Article 31 of the *Act* states that arbitral awards are considered executive titles, which fall under Article 585, VII of the *C.C.P.*

The equivalence of arbitral awards with court judgments was addressed in the case of *Carlos Alberto de Oliveira Andrade v. Renault do Brasil S.A.*¹⁷², where the Court of the State of São Paulo stated that the Judicial Power has the monopoly and competence to render judicial sentences, in accordance with Articles 101 and subsequent to the *Magna Carta*. Furthermore, the Court held that the executive title originating from an arbitral award is an extra judicial title, even after homologation of the courts. Thus, the Court implicitly recognized the mistakes inherent in the *Brazilian Arbitration Act*.

This equivalence creates another issue for debate in terms of the recognition and enforcement of foreign arbitral awards. According to Article 35 of the *Brazilian Arbitration Act*, foreign arbitral awards should be homologated by the Federal Supreme Court (STF) of

¹⁷¹ Article 41 of the *Brazilian Arbitration Act* defines the arbitral award as executive judicial title.

¹⁷² *Carlos Alberto de Oliveira Andrade v. Renault do Brasil S.A.*, (2003), 12 June 2003, TJ/SP Agrav. Instr. n. 285.411-4/0.

Brazil in order to be enforceable in that country. However, Article 102 of the *Magna Carta* establishes the competence of the STF to judge the homologation of foreign sentences.¹⁷³

Arbitration was not addressed when the Constitution was enacted in 1988, since the *Brazilian Arbitration Act* was enacted in 1996. Consequently, the Article in the Constitution was referring to foreign judgments rendered in a foreign state. Thus, foreign judgments are official documents from a foreign state, which in order to be enforced in another country, need to be recognized (depending on international conventions about recognition of foreign judicial decisions) in accordance with conventions signed between countries. When the *Act* laid out the conditions for the validity of a foreign arbitral award to the homologation of the Federal Supreme Court (STF), it augmented the original competence of the STF established in the Constitution. However, according to Article 60 of the Constitution, the Constitution can only be changed through an amendment. This means the *Act*, as an ordinary federal law, could not introduce another competence to the STF, in this case, recognition of foreign arbitral awards. The question is: what will happen if someone gives rise to the unconstitutionality of Article 35?

At the same time, one may say that the Constitution refers only to “foreign sentences” not specifying if they come from a public jurisdiction (state) or private jurisdiction (arbitration). The contents of the *Act* prompt this discussion by calling the award a “sentence”, which reflects the contrast between arbitration and state jurisdiction. If the *Act* referred to awards (“laudo arbitral”), one could assure that the Constitution refers to judgments.

The legislators could have avoided the aforementioned problem by stating that foreign arbitral awards, in order to be enforced in Brazil, should be recognized by Civil

¹⁷³ See the Article 102 of the Constitution, above at page 40.

Courts in the same manner as domestic awards are enforced. Such formal recognition prevents the transfer of responsibility to the STF, and at the same time, the arbitral award is treated as a regular international contract. Since arbitration is a private mechanism, it is the third person who confers the decision without the authority of a judicial sentence. As clearly demonstrated by José Carlos de Magalhães¹⁷⁴, if two parties are involved in an international contract, and get into a disagreement requiring enforcement of the contract, the interested party could start a judicial motion, enabling the courts to examine the appropriateness of the contract according to domestic laws for contracts. Alternatively, the *Act* could have recognized foreign awards by incorporating the previous writing of the *C.C.P.* (now revoked), stating that the competence to homologate an arbitral award should be given to the court originally deemed competent to decide the dispute¹⁷⁵.

The international competence of the Brazilian jurisdiction is established in Articles 88 and 89 of the *C.C.P.*¹⁷⁶. Article 88 of the *C.C.P.* determines the international competence of the Brazilian judiciary in three areas: 1. When the defendant is resident in Brazil (nº I), 2. When the contract is to be performed in Brazil (nº II) and 3. When the action originated from the facts occurred in Brazil. The competence established in Article 88 of the *C.C.P.* refers to concurrent competence, *i.e.*, not only foreign Courts are able to decide such disputes, but also the Brazilian Courts. On the other hand, Article 89 of the *C.C.P.* establishes the Brazilian judiciary's exclusive competence to scrutinize matters related to real estate located in Brazil, along with the inventory and division of estates. Consequently, if an award is to be executed in Brazil, Article Art. 88, II of the *C.C.P.* would apply, giving the ordinary judge competence

¹⁷⁴ José Carlos de Magalhães, "Reconhecimento e execução de laudos arbitrais estrangeiros", *Revista de Informação Legislativa* (1997) Brasília a.34 n. 134 abr/jun. at 44.

¹⁷⁵ Art. 1.098 *C.C.P.* The *Brazilian Arbitration Act* revoked all the previous rules concerning arbitration.

¹⁷⁶ See *supra* notes 79 and 80.

to homologate an arbitral decision. However, the legislators preferred to submit the enforcement of foreign arbitral awards to the STF.

Ultimately, the decision of the legislator to shift the determination of competence to homologate foreign arbitral decision to the STF is a positive development, considering that ordinary courts deal with all kinds of disputes, and that homologation of foreign awards could take a long time. Meanwhile the STF's competence to judge is limited to subjects outlined in the Constitution. In comparison with lower courts, which can grant judgments on almost any subject brought before them, the competence of the STF is considerably smaller. As a result, the court finds itself less busy to judge requests for homologation of foreign decisions, perhaps a key reason for the legislator to submit the homologation of foreign awards to the STF. Moreover, in conferring to the STF the competence to execute and enforce foreign arbitral awards, the legislator maintains the historical competence of the STF to homologate foreign decisions.

The necessity for the homologation of foreign arbitral awards by the STF was questioned again after the ratification of the *New York Convention*¹⁷⁷, whose Article III states:

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards."

¹⁷⁷ *New York Convention*, *supra* note 4.

The purpose of this Article was to extend to foreign arbitral awards the same efficiency found in the execution of national arbitral awards.

Article 31 of the *Brazilian Arbitration Act* says that national arbitral awards have the same effect as decisions granted by the judiciary and thus constitute an executive title. This Article replaced the previous Article 1.073 of the *C.C.P.* requiring homologation of the judiciary of in order for a national arbitral award to be executed. As a result, current national arbitral awards are executable immediately. However, Article 34 of the *Act* states that foreign awards shall be recognized and enforced in Brazil in accordance with international treaties valid in the internal legal system and, in the absence of such treaties, strictly according to the terms of the *Act*. Next, Article 35 of the *Act* requires the homologation of the STF for foreign arbitral awards. Consequently, some people argue that after the ratification of the *New York Convention*, homologation by the STF is no longer necessary, since the execution of foreign awards is more onerous than the execution of national awards, which conflicts with the spirit of the *New York Convention*.

In spite of this argument, the legal community tends to favour the opinion of José Emilio N. Pinto¹⁷⁸, who demonstrates that the homologation requirement by the STF of foreign arbitral awards does not conflict with the *Convention*.

Article III of the *New York Convention* starts by stating that contracting states shall recognize arbitral awards as binding and *enforce them in accordance with the rules of procedure of the territory where the award is relied upon*. This means that contracting states have to observe the local rules of procedure for recognition and the enforcement procedures in place where the award is being enforced. Thus, the first part of the convention regards the

¹⁷⁸ José Emilio Nunes Pinto, "A Arbitragem no Brasil e a Convenção de New York de 1958 – Questões Relevantes", on line: Câmara de Arbitragem Empresarial <<http://www.camarb.com.br>>

rules of **proceeding** for recognition or enforcement. As a result, the internal rules of each contracting state can forward the responsibility for recognition and enforcement of foreign awards to the domestic Judiciary, in accordance with that states' own internal judicial system. In the case of Brazil, the STF is the proper court for recognition and enforcement of foreign arbitral awards, and this is consistent with the Brazilian judicial tradition, where all foreign judicial sentences are homologated by the STF¹⁷⁹.

The next part of Article III of the *Convention* cites the conditions for recognition and enforcement, *i.e., under the conditions laid down in the following articles*. This section outlines the conditions for execution, without discussing proceeding to execution. Thus, contracting states must observe the local rules of procedures for the execution, where enforcement is sought, but the competent judiciary is restricted to the conditions set out in the *Convention, i.e., Articles IV, V and VI of the Convention*¹⁸⁰.

Subsequently, the *Convention* states, "*there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards*". As previously disclosed, these conditions for enforcement of Article IV, V and VI of the *Convention* are not associated with the rules of procedures of enforcement. Such conditions are determined by each contracting state.

In conclusion, the STF's competence for enforcement of foreign arbitral awards is in harmony with the *New York Convention*. The STF must only consider the conditions outlined in the *Convention*. Furthermore, these conditions are exactly the same as Articles 37, 38 and 39 of the *Brazilian Arbitration Act*.

¹⁷⁹ *Ibid.*

¹⁸⁰ Albert Jan van der Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, (Deventer: Kluwer Law and Taxation Publishers, 1981) at 239 [Van der Berg].

It is worth mentioning that Brazil has been a party to the *Panama Convention* of 1975 since 1995, a convention that regards recognition and enforcement of foreign arbitral awards prior to the Brazilian ratification of the *New York Convention*. What are the conflicts-of-law rules applicable to treaties? Should it be assumed that *lex posterior derogat priori* is in accordance with the Brazilian view about the validity of international conventions?

Regarding conflicts between treaties, the four most important principles to consider are *lex posterior derogat priori*, *lex specialis derogat generalis*, the primacy of regional conventions over international conventions, and the principle of maximum efficacy. The principle of maximum efficacy has been used more frequently in recent years and has increasingly been replacing the other two traditional methods. In the case of arbitration, the principle of maximum efficacy means if an award is unenforceable under one applicable treaty, but enforceable under another applicable treaty, the other treaty will apply, regardless of whether it is an earlier or later treaty, and regardless of whether that treaty is more general or specific¹⁸¹. However, in a conservative Latin American country such as Brazil, the *lex posterior derogat priori* principle is still the rule. Nevertheless, before coming to a conclusion about the application of treaty principles, some issues should be highlighted.

The *New York Convention* states in Article VII(1):

(1) The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

¹⁸¹ *Ibid* at 90-91.

On the one hand the aforementioned Article is providing a compatibility provision, and on the other hand, is the Article allows for the application of any other law more favourable to the recognition and enforcement of arbitral awards. Such a law may be a domestic law or another Treaty. The *Panama Convention*, however, lacks similar provisions. Thus, in relation to the most favourable provision, one could argue that whenever the *Panama Convention* fails to provide solutions, the *New York Convention* should have subsidiary application. On the other hand, some scholars¹⁸² argue that if the parties involved in arbitration belong to the *Panama Convention* from contracting states, then only this *Convention* should apply. This solution was found in Chapter 3 of the *U.S. Arbitration Act (FAA)* in Section 305¹⁸³.

However, the *Panama Convention* does not provide mechanisms for the recognition and enforcement of foreign arbitral awards, leaving the issue to the *Montevideo Convention* of 1979. This *Convention* presents the requirements for recognition and enforcement of foreign arbitral awards and foreign judgments. However, instead of providing complementary rules to the *Panama Convention* on recognition and enforcement of foreign arbitral awards, the *Montevideo Convention* contradicts the *Panama Convention*. Article 3 (c) of the *Montevideo Convention* requires the party requesting recognition and enforcement of foreign arbitral awards “the authenticated copy of the *Act* which declares that the judgment or award has *res judicata* effect.” Hence, the *Montevideo Convention* is reestablishing the double *exequatur* system that the *Panama Convention* eliminated.

Nevertheless, according to Brazilian practice regarding international law, *lex posterior derogat priori*, thus the recognition and enforcement of arbitral awards should

¹⁸² Flávia Bittar and João Bosco Lee.

¹⁸³ Van der Berg, *supra* note 180 at 104.

follow the proceedings of the *New York Convention*. Furthermore, the *Panama Convention* and the *New York Convention* do not conflict with each other, taking into consideration that Article 5, (1) and (2) of the *Panama Convention* is a verbatim copy of Article 5, (1) and (2) of the *New York Convention*. However, with respect to the proceedings for enforcement, the *Panama Convention* refers to the *Montevideo Convention*, which provides more conditions for recognition and enforcement than the *New York Convention*. Thus, consistent with the principle of maximum efficacy of international treaties, the *New York Convention* applies for recognition and enforcement of foreign arbitral awards, because it contains the most favourable provisions.

CHAPTER V – The Dispute Settlement Mechanism of the MERCOSUL

5.1. Transitory Dispute Settlement Mechanism

In 1991, the *Treaty of Asuncion*¹⁸⁴ established the regional economic integration agreement (MERCOSUL) between Brazil, Argentina, Uruguay and Paraguay that aimed to develop a common market¹⁸⁵. The MERCOSUL outlines two different systems of arbitration regulated by distinct norms: the first is subject to public international law and the second is subject to private international law.

The arbitration regulated by public international law was born with the *Treaty of Asuncion*, a transitional arrangement during the period prior to the entry of the treaty into force until December of 1994. The *Treaty* was supposed to be supplemented by later agreements providing details of the structure of the MERCOSUL, *i.e.*, the means of establishing the Council of the Common Market and Common Market Group, the functioning of these core institutions, their regulations, and the goals that the contracting states should achieve in future years.

The mechanism of dispute resolution of Annex III of the *Treaty of Asuncion* initially emphasized direct negotiation between conflicting states. Whenever negotiations were unsuccessful, the two political institutions, the Council of the Common Market (CMC) and the Common Market Group (GMC), would intervene by making recommendations, but never imposing solutions. The *Treaty of Asuncion*'s transitory period excluded dispute resolution between private parties.

¹⁸⁴ Treaty of Asuncion signed on March 26, 1991 and entry into force on November 29, 1991. Dec. Leg. 197 de 25 de setembro de 1991.

¹⁸⁵ MERCOSUL, *supra* note 6.

Because the recommendatory character of the solutions given by the CMC the GMC rendered the mechanism inefficient, the authors of the *Treaty of Asuncion* created another transitory process for settlement of disputes, known as the *Protocol of Brasilia*¹⁸⁶, which came into force April 22, 1993. The *Protocol* provided rules for establishing “ad hoc” arbitration to resolve disputes among contracting states. Later, the *Protocol of Ouro Preto*¹⁸⁷ came to complement the *Protocol of Brasilia*. Although it was not the perfect permanent system envisioned by the *Treaty of Asuncion*, Article 44 of the *Protocol of Ouro Preto* states, “Before the common external tariff convergence process is complete, the states parties shall review the present MERCOSUL dispute settlement system with a view towards adopting the permanent system referred to in paragraph 3 of Annex III to the *Treaty of Asuncion* and article 34 of the *Brasilia Protocol*.” Basically, the *Protocol of Ouro Preto* returned to the temporary dispute settlement system of the *Treaty of Asuncion* and the *Protocol of Brasilia*. Thus, the rules regarding dispute resolution were determined by the *Protocol of Brasilia*.

Whether the complaint comes from a state party or an individual, it may ultimately be resolved by arbitration in the MERCOSUL system when the negotiation process fails to resolve the concerns of the parties. The process required for obtaining an arbitral decision for a complaint varies based upon the status of the initiator. State parties are required to negotiate directly with the Common Market Group (GMC) of the MERCOSUL prior to invoking the right to a three-member arbitral panel. Individual complaints, which must be represented by the respective state government, must proceed to an administrative review, the National Section of the Common Market Group or the MERCOSUL Trade Commission. If the

¹⁸⁶ *Protocol of Brasilia*, *supra* note 7.

¹⁸⁷ *Protocol of Ouro Preto* was enacted in December 31, 1994. *Protocol of Ouro Preto*, online: MERCOSUL <www.mercosur.gov.br>

administrative review fails to produce a consensus regarding the claim, or if the offending state fails to comply with the recommendations issued by the appropriate authority, the representative complainant state can then turn to arbitration. The arbitral process established under the *Protocol of Brasilia* produces decisions that are final and binding. There is no right to appeal the decision, but the parties are allowed to seek a clarification of the decision or an interpretation from the panel regarding compliance with the arbitral ruling¹⁸⁸.

Private party access to the MERCOSUL dispute settlement mechanism is very complicated because access is channeled through the government of the private party's place of residence or centre of business (the National Section of his or her country). The National Section complainant must decide whether or not to seek consultation with the National Section of the offending country, or to submit its claim to the full Common Market Group or the MERCOSUL Trade Commission. The issue is dependent on the country having enough interest to support the private party's case. Furthermore, a private investor case is limited to claims against the adoption of measures by the state (which is not his or her own) that can produce a discriminatory effect or unfair competition on trade¹⁸⁹. Hence, numerous matters limit the participation of private parties in the MERCOSUL dispute settlement mechanism. On the other hand, the states can make a request for the correct interpretation and application of the rulings of the *Treaty of Asuncion*, whereas private investors cannot make such a request, translating into a broader scope of application of the rules for states than for private parties.

¹⁸⁸ Cherie O' Neal Taylor, *supra* note 36 at 878.

¹⁸⁹ This provision it is also present on Article 39 of the *Protocol of Olivos* recently enacted.

5.2. Introduction to Protocols of Las Leñas and Olivos

Two additional agreements aid the dispute settlement mechanism in the context of MERCOSUL: the *Protocol of Las Leñas*¹⁹⁰, and the *Protocol of Olivos*¹⁹¹. The main purpose of the *Protocol of Las Leñas* is to promote and intensify jurisdictional cooperation in order to promote the commercial integration of member states under the principles of respect of national sovereignty, equality of rights and mutual interests. Under this protocol, the state members compromise to give jurisdictional cooperation in civil and commercial matters, labour, and administrative matters. However, in Articles 18 to 24, the *Protocol of Las Leñas* refers to the recognition and enforcement of judgments and arbitral awards in the MERCOSUL area. But the main goal of the *Protocol of Olivos* is to provide the correct interpretation, application or breach of the *Treaty of Asuncion*, the *Protocol of Ouro Preto*, the Protocols and agreements executed within the framework of the *Treaty of Asuncion*, the Decisions of the Council of the Common Market, the Resolutions of the Common Market Group and the Instructions of the MERCOSUL Trade Commission¹⁹². Nevertheless, the *Protocol of Olivos* expressly declares that disputes falling within the scope of application of the Protocol may also be referred to the dispute settlement system of the World Trade Organization. This section of the *Protocol of Olivos* received much criticism, including allegations the wording would cause “institutional weakness” of the dispute settlement mechanism of MERCOSUL.

¹⁹⁰ *Protocol of Las Leñas*, *supra* note 8.

¹⁹¹ *Protocol of Olivos*, *supra* note 9.

¹⁹² Article 1, §1 of the *Protocol of Olivos*.

5.2.1. Protocol of Las Leñas

The *Protocol of Las Leñas* was designed to improve the jurisdictional cooperation among the contracting states of the MERCOSUL, with regard to civil, commercial, labour and administrative matters, in order to consolidate the integration process of the region¹⁹³.

The *Protocol* provides that each state must establish its own Central Authority to promote jurisdictional cooperation and to facilitate the circulation of documents, judgments and arbitral awards in the region. Each Central Authority is responsible for receiving any petition of jurisdictional cooperation on the matters described above and forwarding the request to the Central Authority of another contracting state. All formalities and proceedings concerning disclosure of public documents, private proof documentation, affidavits and enforcement of judgments are outlined in the *Protocol*.

With regard to the recognition and enforcement of foreign arbitral awards, the rules are set out in Articles 18 to 24. Two articles deserve special mention: Article 19 states, "*the request for recognition and enforcement of sentences and arbitral awards made by jurisdictional authority will be processed through letter rogatory and through the intermediation of a Central Authority*". This Article is only concerned with the judicial authority's request to recognize or enforce an award, and requests from private parties are excluded. The procedure is inconvenient because the party interested in executing the arbitral award must request execution from the judicial authority in the place the award was rendered. The judicial authority will then intervene and request recognition from the authority of the country where enforcement is being sought. As a result, a third party is involved, and ultimately, the procedure almost qualifies as a double *exequatur*.

¹⁹³ Article 1 of the *Protocol of Las Leñas*.

Another important point to note is that the procedure to enforce an arbitral award and a judicial decision is the same. Article 20 states the conditions for recognition and enforcement of an award. Usually, arbitral tribunal competence is determined by observing the validity of the arbitration agreement. If the arbitration agreement is considered valid, then the arbitral tribunal is competent to resolve the conflict. However, Article 20 states that the law of the country where enforcement is being sought is the law applied to analyze the competency of the arbitral tribunal and the arbitration agreement. This Article disregards the provisions of the *New York Convention*¹⁹⁴ and the *Panama Convention*¹⁹⁵, where the laws applicable to define competence are either the laws where the arbitration agreement was signed or the laws of the place of arbitration granting the award.

5.2.2. Protocol of Olivos

The *Protocol of Olivos* was developed as a substitute for the transitory legal regime provided in the *Protocol of Brasilia*. In fact, the *Protocol of Olivos* expressly derogates the *Protocol of Brasilia* in Article 55 (1). The *Protocol of Olivos* provides the rules for the settlement of disputes within the scope of the MERCOSUL. The *Protocol of Olivos* is composed of 56 articles. Articles 1 to 38 introduce the rules regarding state disputes; Articles 39 to 44 introduce the rules concerning state and private investors disputes. In Articles 45 to 56, the *Protocol* considers general rules, such as the settlement or abandonment of claims, confidentiality, languages, etc. The *Protocol of Olivos* also includes details about the administrative and arbitral procedures, time limits, composition of the arbitral tribunal,

¹⁹⁴ Article V, §1, "a" of the *New York Convention*.

¹⁹⁵ Article 5, 1, "a" of the *Panama Convention*.

nomination of arbitrators, and awards. Notwithstanding the derogation of the *Protocol of Brasilia*, the *Protocol of Olivos* maintains basic characteristics of the former protocol.

The dispute resolution process emphasizes initial negotiations between the states and, later, arbitration. The MERCOSUL envisages no supranational court, such as the Court of Justice of the European Communities. Private investors are still dependent on representation through the National Section of the Common Market Group in the country where either they or their business interests reside, in order to bring forward their claim. Again, the National Section of the private party is responsible for deciding whether or not to present the motion to the National Section of the state infringing upon their rights¹⁹⁶. Private investor access to the dispute settlement mechanism in the MERCOSUL is both limited and difficult. The system provided by the *Protocol of Olivos* is a temporary one, and must be changed when the process of convergence of the Common External Tariff (TEC-Tarifa Externa Comum) takes place.

A summary and explanation of the mechanism of the *Protocol of Olivos* is provided below, with further explanation outlined in later paragraphs. Each system has different phases:

- First, the *Protocol of Olivos* encourages direct negotiation among contracting states;
- When the negotiations are proceeding unsuccessfully, non-mandatory intervention of the Common Market Group can occur depending on the request of the interested state;

¹⁹⁶ Article 41, 1 of the *Protocol of Olivos*.

- If a solution is not achieved by taking the preceding steps, an *ad hoc* arbitration is initiated with three arbitrators, or five arbitrators when more than two states are involved in the dispute;
- The possibility of recourse to the Permanent Court of Review (appellate body of the arbitral award) always exists;
- Another possibility of recourse is to clarify any obscure part of the arbitral award;
- The aggrieved state is expected to comply with the award;
- The complainant state can request the aggrieved state to acknowledge the measures it has taken to comply with the award and the time limits;
- The complainant can adopt compensatory measures.

As stated previously, the scope of application of the *Protocol of Olivos* on disputes among contracting states regards the interpretation and application of all regulations and protocols created in favour of development of the MERCOSUL.

States may settle a dispute through direct negotiations as a first step. If they do not reach any agreement through direct negotiations, they can initiate the arbitral proceeding or submit the dispute to the Common Market Group for consideration. The Common Market Group will give recommendations to the states that are non-mandatory. If the suggestions are not satisfactory, the states can apply for an *ad hoc* arbitration. Three arbitrators will be nominated by each of the states involved in the dispute (one each) from a list of 48 names (12 nominees for each contracting state)¹⁹⁷. The list of arbitrators must also provide

¹⁹⁷ Article 11, n.1 of the *Protocol of Olivos*.

representatives to act as third arbitrators to preside over the *Ad Hoc* Arbitration Court¹⁹⁸. The presiding arbitrator can be a national fellow of the state or an arbitrator that does not belong from a contracting state of the MERCOSUL, excluding all nationals of the states involved in the dispute¹⁹⁹. However, when more than two states are involved in a dispute, the tribunal will be composed of five arbitrators.

In relation to arbitration agreements, the *Protocol of Olivos* recognizes the validity of such agreements to initiate the jurisdiction of the arbitral tribunal and the Permanent Court of Review. The *Protocol* identifies no distinction between the arbitration clause and the submission agreement. The *Protocol* ensures the principle of confidentiality of documents and proceedings, with the exception of arbitral awards. The *Protocol* also ensures the principles of autonomy, impartiality and independence of arbitrators, as well as due process.

The matter of the dispute should be defined in writing at the very beginning of the dispute. The *Ad Hoc* Arbitration Court can order provisional measures to prevent irreparable damages to the state requesting the measure. This rule was not present in the *Protocol of Brasilia*. In its first meeting, the Permanent Court of Review can challenge the provisional measures of the *Ad Hoc* Arbitration Court. The *Ad Hoc* Arbitration Court will have 60 days from the beginning of the arbitral process to render the final award. A 30 day-extension of the process may be allowed, depending on the complexity of the dispute.

¹⁹⁸ Article 10, n.3, (i) of the *Protocol of Olivos* states:

“(i) The states involved in the dispute will agree on a third arbitrator from the list included in Article 11.2 iii) within fifteen days as from the date on which the Administrative Secretariat of the MERCOSUL has communicated to the states involved in the dispute the decision taken by one of them to submit to arbitration. The third arbitrator will preside over the *Ad Hoc* Arbitration Court.”

¹⁹⁹ Article 11, n.2 of the *Protocol of Olivos* states:

“2. Each state Party shall propose four (4) candidates for the list of third arbitrators. At least one of the arbitrators designated by each state Party for inclusion in the list shall not be a national of any of the state Parties of the MERCOSUL.”

Apart from the *Ad Hoc* Arbitration Court option, following unsuccessful negotiations, the states may agree to submit their case directly to the Permanent Court of Review without going through the arbitration process. States unwilling to postpone an unfavourable decision may opt for the Review Court process. In this instance, the decision of the Permanent Court of Review is binding, not subject to appeals, and has the effect of *res judicata*. The Permanent Court of Review will be composed of five arbitrators, where four of them are nationals of a contracting state with a two-year mandate.

The creation of the Permanent Court of Review is the biggest innovation of the *Protocol of Olivos*. This appellate body will bring coherence to decisions while providing the correct interpretation of the rules of the MERCOSUL. Hence, notwithstanding the *res judicata* effect of the Permanent Court of Review decisions' to the parties involved, the jurisprudence of this court will likely carry considerable weight for future decisions, just like the Appellate Body of the World Trade Organization.

Either party involved in the dispute can request a review of the award before the Permanent Review Court. The request is limited to legal issues pertaining to the dispute, and to the arguments brought before the *ad hoc* tribunal. This innovation of the *Protocol of Olivos* is particularly important because it prevents introducing a new argument (*fato novo*) to the dispute during this step of the process. The parties should present arguments similar to the ones presented previously to the *ad hoc* tribunal. On the one hand, this measure ensures certainty for the states, but on the other hand, it highlights the relevance of the proceedings and presenting complete documentation at the beginning of the controversy.

The awards rendered under the principles of *ex aequo et bono* are not subject to review. The decision rendered by the Permanent Review Court is also not subject to review

when the states choose the court to settle the dispute. In this instance, the states can only request clarification of the award and enforcement of that award. While under review, the enforcement of an award is suspended.

Since the establishment of MERCOSUL in 1991, only nine cases have been decided under arbitration²⁰⁰. One possible reason for the low arbitration caseload is the lack of a definitive dispute settlement mechanism, a problem the *Protocol of Olivos* recently addressed with its approval in 2002. For continued development of international commercial arbitration in South America, more disputes should be settled under the scope of MERCOSUL. However, Article 1, paragraph 2, of the *Protocol of Olivos* states that whenever an issue can be resolved by either the *Protocol of Olivos* or the World Trade Organization (WTO) dispute settlement mechanism, the MERCOSUL state parties shall refer to one forum or the other. This distinction is important in order to prevent divergent international decisions about the same issue. Furthermore, the possibility of having two international organizations analyzing the same problem is eliminated. In two previous disputes in the MERCOSUL prior to the ratification of the *Protocol of Olivos*, the parties resorted to the World Trade Organization at the same time. In 2000, Brazil and Argentina required *ad hoc* arbitration in the MERCOSUL to solve a dispute on safeguard measures of certain imports of woven fabrics of cotton originating from Brazil. At the same time, both countries initiated proceedings in the WTO (WT/DS-190/1 of February 11, 2000). Another case also involved Brazil and Argentina in a dispute regarding anti-dumping measures on imports of poultry from Brazil (WTO DS-241/2 of September 22, 2001)²⁰¹. Such a process begs the following question: to what extent will

²⁰⁰ Arbitragem, online: MERCOSUL <www.mercosul.org.br>

²⁰¹ Dispute Settlement, online: World Trade Organization <<http://www.wto.org>>

the MERCOSUL dispute settlement mechanism be effective if the MERCOSUL members can choose to have their conflict decided in the WTO?

Conversely, the option to defer to a different forum outside the MERCOSUL when the contracting states have ratified other multilateral treaties will determine the appropriate international forum, depending on the particulars of each case. The institution that provides solid juridical foundation to support the claimant arguments will ultimately influence the claimant's decision to choose such a forum for the dispute²⁰². This option is particularly relevant considering the MERCOSUL countries have little legislation on specific issues, such as antidumping.

Another original feature of the *Protocol of Olivos* is its principle proportionality of compensatory measures. When the *Ad Hoc* Arbitration Court or by the Permanent Court of Review renders an award, the award must be enforced within the terms provided therein. If the aggrieved state does not comply with the decision, the other party is authorized to apply compensatory measures, in order to enforce it to comply with the decision. However, the retaliatory measures must be proportional to the consequences of non-compliance with the award and, preferably, in the same affected industrial sector. Hence, no other mechanism exists to enforce the aggrieved state to comply with the tribunal decisions (*Ad Hoc* and Permanent Court of Review). The states are responsible for applying economic sanctions, such as interruption of concessions or benefits, in order to get compensation. Furthermore, the aggrieved state can request a review of the compensatory measure to the Permanent Court of Review to analyze the proportionality of the measures taken by the other state.

²⁰² According to Article 1 (2) of the *Protocol of Olivos*, the forum for the dispute is a choice of the claimant, unless otherwise agreed by the parties.

Regarding the enforcement of awards in the MERCOSUL, the *Protocol of Las Leñas* applies, since the *Protocol* provides the rules for judicial cooperation among the contracting states. More importantly, the *Protocol of Las Leñas* applies the enforcement requests of the judicial authority of one country to the judicial authority of another country and it does not apply on behalf of private parties. As stated previously, *Panama* and *Montevideo Convention* applies to private parties in accordance with Article 23 of the *Buenos Aires Agreement*. However, all countries of the MERCOSUL are signatories of the *New York Convention*, which provides more favourable provisions for recognition and enforcement of foreign arbitral awards. Consequently, the *New York Convention* applies to enforcement for private parties.

5.3. The Buenos Aires Agreement

The *Buenos Aires Agreement*²⁰³ was created to benefit private parties in the use of arbitration to solve international commercial disputes arising under the scope of MERCOSUL. Thus, the *Agreement* came into existence to harmonize the rules of international arbitration among the contracting states in order to promote regional and international trade. Before enactment of the *Agreement*, the rules concerning arbitration in Argentina, Paraguay, Uruguay and Brazil were considered inappropriate for governing international arbitration because the rules did not separate domestic and international arbitration.

The scope of application of the *Buenos Aires Agreement* is noted in Article 3, and it presents five situations in which the agreement should apply: 1. When the parties' domicile

²⁰³ Decreto Legislativo n. 265 de 31 de Dezembro de 2000, D.O.U., 02 January 2001, p.2.

or the place of their business is located in more than one state of the MERCOSUL, 2. When the contract has juridical or economic contact with more than one state, 3. Unless the parties otherwise agree, the contract has juridical or economic contact with one State of the MERCOSUL, and the tribunal to solve the dispute has its place in one state of the MERCOSUL, 4. The contract has juridical or economic contact with one state of the MERCOSUL, but the tribunal to resolve the dispute is not placed in any contracting state; however, the parties expressly agree to submit their dispute to the *Agreement*, and 5. The contract does not have any juridical or economic contact with a contracting state, the parties have chosen a tribunal placed in a state of the MERCOSUL, and the parties have declared their intention to submit their dispute to the present *Agreement*.

The *Buenos Aires Agreement* embraces the principles of equitable treatment, *bona fide*, autonomy of the arbitration agreement from the main contract, impartiality of arbitrators, principle of “competenz-competenz” and due process.

With respect to the validity of the arbitration agreement, the *Buenos Aires Agreement* differentiates the formal validity from the intrinsic validity concerning the consent, object and cause of the arbitration agreement. In the former instance, the *Agreement* allows the laws where the arbitration agreement was signed to apply for verifying formalities. On the other hand, the laws of the place of arbitration apply for verifying the consent of the parties, object and cause of the arbitration agreement.

Another controversial aspect of the *Buenos Aires Agreement* is related to the law applicable to the merits of the dispute. According to Article 10, the parties are free to choose the applicable laws of private international law, principles of international law or *lex*

mercatoria. If the parties fail to do so, the arbitrators are free to choose any rule among these laws. In short, the *Agreement* excludes the application of any national law.

The *ad hoc* arbitration and the institutional arbitration are admissible according to Article 11. If institutional arbitration is chosen, the rules of proceedings provided therein will apply; if *ad hoc*, the parties are free to stipulate the rules of proceedings that comply with their dispute. However, if the parties have not decided the rules of proceedings for the *ad hoc* tribunal, the *Buenos Aires Agreement* states that the rules of the *Panama Convention* of 1975 will apply. If the rules of the *Panama Convention* are insufficient to provide all the solutions for the regular proceeding of the arbitral tribunal, the rules of the *UNCITRAL Model Law* of 1985 have supplementary application, in accordance with Article 25, (3) of the *Agreement*.

Arbitration must take place in one of the MERCOSUL countries. If the parties do not agree on the place of arbitration, the arbitrator is free to decide in which country the arbitration will take place, taking into consideration the circumstances of the dispute and the intention of the parties.

One important provision of the *Buenos Aires Agreement* is the explicit mention of the arbitral tribunal's capacity to confer interim measures in Article 19. The parties can also request these kinds of measures to the competent judicial authority, which is the judiciary where the arbitration takes place. Furthermore, this Article states that the request of a provisional measure to the judiciary does not imply renunciation to the arbitral tribunal. If the measure is to be enforced in another contracting state, the arbitral tribunal will follow the proceedings of the *Protocol of Provisional Measures* of the MERCOSUL approved by the Council of the Common Market in the Decision n. 27/94. If a country has yet to ratify this

Protocol, the arbitral tribunal will follow the proceedings of judicial cooperation provided under the *Protocol of Las Leñas*.

The award will decide all matters of the dispute and must contain the reasoning of the decision, the place where the award was granted, and the arbitration fees. The award will be binding to the parties and no recourse admissible, unless recourse is required to clarify the basis for the award or to support an area of omission. The arbitral tribunal's decision is taken by majority, and in case of a tie decision, the vote of the president will decide the matter. The request for amendment of the arbitral award to eliminate any obscurity or omission must be completed within 30 days after the receipt of the award.

The court competent to judge the annulment action is the one in which the arbitral tribunal took place, according to Article 22 of the *Buenos Aires Agreement*. The causes for annulment are as follows:

- The arbitration agreement is null;
- The arbitral tribunal establishment is irregular;
- The arbitral proceedings do not comply with the rules of the *Agreement*;
- The principle of due process was not respected;
- The award was rendered by someone incapable of acting as an arbitrator;
- The award deals with differences not contemplated by the arbitration agreement;
- The award contains decisions on matters beyond the scope of the arbitration agreement.

Thus, the causes for nullity of the arbitral award are very similar to those provided in the *Brazilian Arbitration Act* in Article 32, except that the *Buenos Aires Agreement* makes no reference to offence of the public policy of the state where arbitration took place, and no

reference to the capacity of the subject matter to be settled by arbitration in this state. Furthermore, the *Agreement*, unlike the *Act*, avoids mistakenly referring to the nullity of the *submission agreement*, which implies a difference between the arbitration clause and the submission agreement.

Concerning enforcement of the award, Article 23 expressly outlines the rules applicable in a manner implying hierarchical order:

"For the execution of foreign arbitral award, will apply accordingly, the Provision of the Interamerican Convention of International Commercial Arbitration of Panama 1975; the Protocol of Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative Matters for the MERCOSUL, approved in the decision of the Council of Common Market n. 5/92, and the Interamerican Convention about the Extraterritorial Efficiency of Judgments and Foreign Arbitral Awards of Montevideo 1979" [translated by author].

In conclusion, the *Buenos Aires Agreement* provides to private investors the rules of proceedings for the use of arbitration to solve disputes arising under the scope of the MERCOSUL. This *Agreement* was extremely necessary, given that the mechanisms provided in the *Protocol of Brasilia*, and later, the *Protocol of Olivos*, gave very limited scope for the claims of private parties, each of which depended on the interest of the National Section of its own country to pursue the claim before the MERCOSUL dispute settlement tribunal. Therefore, the *Agreement* provides direct access to *ad hoc* and institutional arbitration for private parties. The use and familiarity with arbitration is expected to grow in direct proportion to the increase in economic transactions among MERCOSUL states. The future of arbitration looks promising, but it depends on the continual development of appropriate laws for international arbitration that take into consideration the peculiarities of international trade. Besides, economic integration within the scope of MERCOSUL is unattainable without the

development of an efficient dispute settlement mechanism to promote the ideal environment for trade and the crucial accompanying support of the governments involved.

CHAPTER VI: Summary of Recommendations for Improvement in the *Brazilian Arbitration Act*

The most controversial part of the *Brazilian Arbitration Act* is the one related to the arbitration clause, which gave rise to the argument of the unconstitutionality of this clause to start arbitral proceedings. The best way to end the argument about the unconstitutionality of the clause would be to eliminate the division of arbitral agreements into an arbitration clause and a submission agreement. However, this solution is not as simple as it first appears. Introducing a general expression such as "arbitration agreements" implies the elimination of various Articles regarding proceedings to start the arbitral tribunal (Articles 4, 5, 6, 7, and 9). In fact, the implementation of the expression "arbitration agreement" would transform the *Act* completely, and such a transformation would encounter great opposition, since practitioners (lawyers) have only had the last eight years to become familiar with the *Act*. Thus, the Congress decided to introduce in Article 853 of the New Civil Code of 2002²⁰⁴ an express recognition of the arbitration clauses establishing the arbitration to resolve disputes. Article 853 was introduced to improve the efficiency of arbitration clauses to start arbitral proceedings.

Although the differentiation of the arbitration clause and submission agreement remains, the arbitration clause is now enforced as a valid means of establishing the jurisdiction of an arbitral tribunal. Consequently, the unconstitutionality argument associated with arbitration clauses as a means to stay arbitral proceedings in courts has diminished over time. In fact, the existence of arbitration agreements in contracts is a cause for stay of litigation, according to Article 301, IX of the *C.C.P.*

²⁰⁴ *C.Civ.*, *supra* note 31.

Another part of the *Brazilian Arbitration Act* requiring clarification is the substantive law applicable to the dispute. In accordance with the *Act*, the principle of the arbitrator's autonomy to regulate procedural matters is embraced in Article 21, §1 of the *Act*. However, the autonomy of the arbitrator is not provided with respect to the law applicable to the merits of the dispute. Thus, if the substantive law governing the subject matter is not stated in the contractual agreement of the parties, then the arbitrator lacks procedural guidance. Unless the arbitration is being administered by an arbitral institution, which provides rules allowing the arbitrator to choose the law applicable to the dispute in the case of party omission (v.g. the Chamber of Mediation and Arbitration of the Federation of Industries of São Paulo and the ICC), the arbitrator must observe the conflict of law rules to apply the most appropriate law.

This key omission in the *Act* could be improved by the inclusion, in Article 21, giving permission to the arbitrator to choose the law applicable to the dispute in the case of omission of the parties. Two options are available: 1. The arbitrator could directly choose the applicable law without the observance of the conflict-of-law rules, or 2. The arbitrator could take a more cautious approach by finding the law applicable to dispute through the conflict-of-law rules. The *UNCITRAL Model Law* has used the latter approach, a solution the *Brazilian Arbitration Act* should consider to counteract the traditionally conservative attitude towards arbitration among Brazilian jurists. In this way, the parties have more freedom and a wider scope for adjusting their contractual agreements while the arbitrator gives his or her reasoning for the choice of law to be applied to the contract in case of the omission of the parties.

The arbitrator can find the appropriate law of the contract by considering characteristics of previous agreements made by the parties: such as the nationality of the

parties, the place where the contract was made or to was to be performed, the conflict-of-law rules of all countries affected by the dispute, and the state where enforcement is likely.

Regarding interim measures, Article 22, §4 of the *Act* implies the arbitrator may order such measures, but that he or she lacks power to enforce the order if the party fails to comply. In this case, the interference of the courts is necessary. However, the *Brazilian Arbitration Act* offers no guidelines about the interaction between the arbitrator and the judge that will enforce his or her order. Does the party interested in getting the interim measure have to request enforcement by the competent judge? Or does the arbitrator have to request the enforcement of his order by the judge? Do judge and arbitrator work under the basis of mutual cooperation? In order to eliminate these doubts, the *Act* requires an explicit paragraph stating the proceedings should enforcement of an interim measure become necessary. In this case, the best solution is to argue that arbitrators and judges should work in cooperation, in the same manner as judges work with each other in Brazil. The rogatory letter is the official document in which a judge from a determined jurisdiction requests a diligence to a judge from another jurisdiction²⁰⁵. Hence, the *Act* should state that in case an enforcement action of interim measures by the arbitrator become necessary, then the rules of proceedings regarding rogatory letters among judges provided in Article 202, and following the *C.C.P.*, are applicable to arbitrators.

The *Act* should also address the issue of interim measures prior to the formation of the arbitral tribunal. In keeping with Article 22, §4 of the *Act*, the court originally deemed competent to adjudicate the case is competent to grant the measure, if the arbitral tribunal has

²⁰⁵ In Brazil, the letter rogatory (carta rogatória) is a specific designation for letters addressed to a foreign judge. In the domestic level, official letters among judges are named 'carta precatória'.

yet to be consolidated. This approach has been used in Brazilian courts dealing with domestic arbitration, owing to the principle of concurrent jurisdiction.

However, in cases involving international arbitration, more than one court may be considered competent to resolve a dispute. In this circumstance, the *Act* should have a provision stating that in instances of international arbitration, the competent court to order a provisional measure is the court of the place of arbitration. This suggestion is consistent with Article 26, IV, and 34, sole paragraph of the *Act*, which highlights the importance of the place of arbitration. Furthermore, the court of the place of arbitration is the competent court to decide on the annulment of arbitral awards (Article 38, VI of the *Act*, Article V, 1, (e) of the New York Convention).

The *Brazilian Arbitration Act* provides the proceedings in case of nullity of an arbitral award. Accordingly, the first cause of nullity of an arbitral award is a void submission agreement (Article 32, I of the *Act*). As discussed earlier, legislators made a mistake in paragraph I of this Article: if only a void submission agreement can set aside an award, then an invalid arbitration clause cannot nullify an award. Furthermore, when the *Act* refers to foreign arbitral awards in Article 38, one cause for denial of enforcement of the award is a null arbitration agreement, which implies both the arbitration clause and the submission agreement. Thus, the *Act* should be amended in Article 32, I to change the expression “submission agreement” to “arbitration agreement”.

Nevertheless, the most problematic part of the *Act* refers to the recourses available against the award. The *Act* permits the use of annulment action and a stay of execution proceedings against the arbitral award. These two features are a clear example of assimilation of litigation proceedings into the arbitral process. According to the Brazilian *C.C.P.*, the

litigant can use an annulment action against a Court's final judgment (strictly in situations provided in the *C.C.P.*) and during enforcement proceedings through stay of execution. Annulment actions are a fairly common procedure in the domestic litigation process, making it impossible to impede a party from seeking this kind of recourse. As a result, the *Act* cannot prevent a party facing an enforcement action to defend himself using the stay of execution recourse.

However, in international arbitration, the annulment action is usually the only mechanism available to challenge an arbitral award. Unfortunately, the *Act* did not provide separate proceedings to deal with international arbitration. As a result, no solution is available to overcome the stay of execution recourse because such an alternative is permitted in law. Nonetheless, the parties can waive this part of the *Act* in their arbitration agreement if they want to avoid the stay of execution recourse. Thus, a well-written arbitration agreement offers one important way of getting around such problems.

The equivalence of arbitral awards to those provided by judgments also presents a challenge to enforcement proceedings. The *Brazilian Arbitration Act* confers to arbitral awards the characteristics of executive titles, divided into judicial and extra-judicial title. The award receives enforcement power from the simple fact that the *Act* states that final awards are executive titles. However, the *Act* preferred to categorize arbitral awards as a judicial title. Therefore, the enforcement action has to follow the proceedings of the *C.C.P.* for judicial title. Until the enactment of *Law 10.358 of 2001*²⁰⁶ amending some Articles of the *C.C.P.*, no competent court was available to adjudicate enforcement of arbitral awards, because Article 18 of the *Act* eliminated the double *exequatur* procedure. Hence, *Law 10.358*

²⁰⁶ *Law 10.358, supra* note 164.

corrected this omission by introducing in Article 575, IV of the *C.C.P.* the competence of Civil Courts to enforce arbitral awards.

In relation to enforcement of foreign arbitral awards, the greatest problem is associated with the competence of the Federal Supreme Court (STF) to enforce this award. The doctrine is divided, occasionally affirming that the STF has the competence to enforce foreign "judicial" sentences only, or stating that the Constitution refers to "foreign sentences", and not specifying if they come from a foreign courts or from a private jurisdiction. In order to eliminate discussions about this issue, the expression "arbitral sentence" throughout the *Act* should be replaced with "arbitral award" ("laudo arbitral"). If the *Act* were to refer to the award, one might be assured the Constitution referred to judicial sentences. As a result, the STF would no longer be the competent court to adjudicate enforcement requests of foreign arbitral awards. This competence would be transferred to Civil Courts in line with Article 575, IV of the *C.C.P.* The main counterargument to such proposal are overcrowded Civil Courts, leading to an even lengthier enforcement process for foreign arbitral awards. As a result, although the competence of the STF for enforcement of foreign awards is questionable, the status quo may be the best answer at present.

In conclusion, recommendations to correct the flaws of the *Brazilian Arbitration Act* were made in order to clarify the *Act*, particularly in sections characterized by ambiguous writing or lack of information. The *Act* is a modern piece of legislation on arbitration, and should the recommended improvements take place, the *Act* has the potential to offer a more suitable structure to support international commercial arbitration. In the long run, a revised version of the *Act* will help Brazil become recognized as a good venue for international commercial arbitration in Latin America.

CONCLUSION

Although international commercial arbitration has gained credibility as a dispute resolution mechanism, it remains under development in Brazil. After decades of expressed reluctance toward the use of arbitration, Brazil finally embraced arbitration as an alternative dispute resolution method, chiefly by enacting *Law 9.307/96, the Brazilian Arbitration Act*. Brazil is following a worldwide trend to use arbitration to settle disputes arising from commercial trade.

Although inspired by the *UNCITRAL Model Law*, the *New York* and the *Panama Conventions*, the *Act* maintains obsolete concepts and reflects vestiges of skepticism concerning arbitration. For example, the *Act* allows the annulment of arbitral awards at two different phases of the arbitration process: after the granting of the arbitral award, and during the enforcement proceedings of the award through a stay of execution (“embargos de execução”). Another retrograde provision of the *Act* is the division of the arbitration agreement into the arbitration clause and the submission agreement. This division gives rise to questions about the constitutionality of the *Act*. Furthermore, the legislation regarding arbitration is rooted in the traditional juridical values that assimilate the arbitral jurisdiction to the judiciary.

Despite the aforementioned flaws, national courts have shown a favourable attitude towards arbitration. Some lower court judgments in Brazil already recognize the competence of an arbitral tribunal to judge disputes in the presence of an arbitration agreement as a cause for a stay of proceedings in courts, in accordance with Article 301, XI, of the *C.C.P.* The attitude of Brazilian courts is critical to ensure the validity of arbitration clauses, which

parties have freely agreed upon in their contractual relationship. Most importantly, a positive outlook by the courts also provides assurance to foreign investors that their previous agreements will be respected. Furthermore, the support for arbitration clauses indicates that arbitral awards will be enforced when necessary, as long as the arbitral proceedings did not violate any principles of fairness, due process, impartiality of the arbitrator, public policy and so forth.

Academic discussions are important among lawyers in order to familiarize and demystify the arbitration proceedings. Universities are now aware of arbitration as an alternative dispute resolution method. However, courses on arbitration, mediation, and negotiation have not yet been added to the curriculum of law studies in Brazil, a department that currently focuses on litigation. Arbitration courses have been implemented recently in some universities for Masters of Laws degrees or specialization courses after the Bachelor degree in Law²⁰⁷. Legal practitioners are even more obliged to become familiar with arbitration proceedings and practice, because many companies and foreign investors are seeking alternatives to litigation. Thus, further studies in this field are welcomed to provide key resources for lawyers and most importantly, to inform the parties involved in an arbitral process regarding the advantages and disadvantages of this method of dispute resolution.

Since the enactment of the *Brazilian Arbitration Act*, a demand for arbitration has clearly arisen. As mentioned previously, at least 75 arbitral institutions are spread across Brazil, although most of these institutions deal primarily with domestic cases. Recent data from CONIMA report an increase of 29.25% in the use of arbitration in Brazil between 1999 and 2003, referring to a jump from 2,591 cases in 1999 to 3,644 disputes solved by

²⁰⁷ In São Paulo, the Fundação Getúlio Vargas (FGV-SP) and the Instituto Brasileiro de Mercado de Capitais (Ibmec) launched the first courses in August 2003.

arbitration in 2003²⁰⁸. Surprisingly, the report states that arbitration has been largely used to solve labour disputes, rather than civil and commercial matters. When the *Act* was introduced, labour unions were highly skeptical about the use of arbitration to resolve disputes, alleging that balance of power to negotiate leaned in favour of the employers. The increase in arbitration cases remains insignificant when compared to the high number of litigation cases in Brazil, but the use of the arbitration option continues to grow.

Moreover, the consistent support of the Brazilian government and its courts is vital to solidify arbitration practice. In order to eliminate uncertainties in the application of the *Brazilian Arbitration Act*, a few legislative changes have already taken place. For example, the *New Civil Code of 2002*²⁰⁹ included a provision recognizing the validity of arbitration clauses to start arbitral proceedings in Article 853. This important innovation reduces the possibility of further discussion in court regarding the unconstitutionality of arbitration clauses to establish arbitration. The Brazilian Parliament also made improvements through the enactment of *Law 10.358*²¹⁰ of 2001, which introduced changes to the *C.C.P.* Article 575 of the *C.C.P.* was modified in order to establish the competence of Civil Court for enforcement of arbitral awards. Previously, this Article was flawed, because Article 18 of the *Act* eliminated the double *exequatur* procedure, and Article 575, III stated that the competent court of enforcement was the one that homologated the arbitral award²¹¹. Thus legislative improvements made since the enactment of the *Act* in 1996 demonstrate an interest in promoting arbitration in the country.

²⁰⁸ Information provided by CONIMA (Conselho Nacional das Instituições de Mediação e Arbitragem); the research was made among the 75 arbitration centers in the country.

²⁰⁹ *C.Civ.*, *supra* note 31.

²¹⁰ *Law 10.358*, *supra* note 164.

²¹¹ See discussion in CHAPTER IV, 4.2., topic 4.2.5 "Annulment of the Arbitral Award".

Ironically, the major threat to developments in arbitration has come from the government. Important reforms are currently being considered to bring back efficiency to the Brazilian Judiciary System. The Commission of Constitution and Justice (Comissão de Constituição e Justiça – CCJ) are responsible for the main projects underway toward amending the Constitution. One of the projects suggested for amendment of the Constitution is a section that prohibits the use of arbitration by state-owned entities. This prohibition has posed the biggest concern for arbitration promoters, who fear the prohibition will diminish the interest of foreign investors in Brazil. Apparently, the existence of arbitration as a dispute resolution mechanism is an important factor in determining the site of future foreign investment, because if a dispute arises under the contractual agreement, investors want a fast, specialized and non-biased solution. Since the 1970s, Brazil has been party to international arbitral agreements regarding external financing, and during the privatization boom of state-owned companies in the 1990s, provisions for arbitration were inserted into the relevant statutes. The prohibition of state-owned entities to participate in arbitration is a step backwards, and is bound to affect the economy of the country, since major investment projects take place in the areas of civil construction, natural resource exploitation, energy and others.

If the project for amendment of the Constitution is approved, the death of international commercial arbitration in Brazil is certain. However, a number of Senators (led by Mr. Marco Maciel, who promoted the enactment of the *Brazilian Arbitration Act*) are making an effort to remove this part of the Brazilian government reform project to be sent to the Congress for approval. If Brazil wants to have a leading role in Latin America and the

MERCOSUL, with the Free Trade Agreement of the Americas just behind it, arbitration is the ideal mechanism of dispute resolution for the economic integration process.

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APPENDIX

BRAZILIAN ARBITRATION ACT

Law nº 9.307, 23 September 1996

- Regarding Arbitration -

THE PRESIDENT OF THE REPUBLIC

Let it be known that the National Congress decrees and I ratify the following law:

CHAPTER I

GENERAL PROVISIONS

Article 1 - Persons capable of entering into contracts will be able to avail themselves of arbitration in order to resolve disputes relating to freely transferable property rights.

Article 2 - Arbitration may be in law or *ex aequo et bono*, depending on the will of the parties.

§ 1 - The parties may freely choose the rules of law to be applied in arbitration, as long as there is no violation of good customs and public order.

§ 2 - The parties may also stipulate that the arbitration be based on the general principles of law, customs and usages and the rules of international trade.

CHAPTER II

THE ARBITRATION AGREEMENT AND ITS EFFECTS

Article 3 - The parties can submit their disputes to arbitration by virtue of the arbitration agreement, being such the arbitration clause and the submission agreement. (*compromis*)

Article 4 - An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract.

§ 1 - The arbitration clause shall be in writing and it can be inserted in the main contract or in a document to which it refers.

§ 2 - In adhesion contracts, the arbitration clause shall not be deemed to have efficacy unless the adherent takes the initiative to initiate arbitration proceedings or agrees expressly to its initiation as long as it is in writing or in an attached document or in bold, with a signature or endorsement made specially for this clause.

Article 5 - When the arbitration clause makes reference to the rules of a particular arbitral institution or specialised entity, the arbitration shall be instituted and conducted in accordance with such rules, unless otherwise agreed by the parties.

Article 6 - In the event of absence of provision as to the method of initiating the arbitration, the interested party shall serve the other party with a written notice by registered letter or by any other means which provides a record of delivery, calling for the other party to appear at a set date, time and place in order to sign the *compromis*.

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

Article 7 - Where there is an arbitration clause but one of the parties shows resistance as to the initiation of arbitration, the interested party may request a subpoena for the other party to appear in court in order to prepare the *compromis*, with the judge designating a special hearing for such a purpose.

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

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

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

§ 4 - If the arbitration clause has no provision as to the appointment of arbitrators, it will be the judge's task, after having heard the parties, to rule with respect to this, having the option of nominating a sole arbitrator for the resolution of the conflict.

§ 5 - Should the claimant, without reasonable excuse, fails to appear at the hearing to determine the preparation of the *compromis*, the proceedings shall be deemed to have been terminated without entering into the merits.

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

§ 7 - The judge's decision shall be deemed to be the *compromis* itself.

Article 8 - An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Sole paragraph - It shall be up to the arbitrator to decide on its own motion or per request of the parties, the issues concerning the existence, validity and efficacy of the arbitration agreement and of the contract which contains the arbitration clause.

Article 9 - The *compromis* is the convention by which the parties submit an existing dispute to arbitration by one or more persons, either judicially or extra-judicially.

§ 1 - The judicial *compromis* shall be held on the file before the court or tribunal where the suit is pending.

§ 2 - The extra-judicial *compromis* will be deliberated under private signature, signed by two witnesses or by a public notary.

Article 10 - The following shall be mandatory in the *compromis*:

I - the name, profession, marriage status and the place of residence of the parties;

II - the name, profession, marriage status and the place of residence of the arbitrator or arbitrators, or, if applicable, the identification of the institution to which the parties have entrusted the appointment of the arbitrators;

III - the matter which will be the object of the arbitration; and

IV - the place where the award shall be rendered.

Article 11 - The *compromis* may also contain:

I - the place or places where the arbitration will be held;

II - if the parties so agree, the provision authorising the arbitrators or arbitrators to decide *ex equo et bono*;

III - the time period in which the award shall be made;

IV - an indication of the national law or corporate rules applicable to the arbitration, if agreed upon by the parties;

V - a statement about the responsibility of the fees and of the arbitration expenses; and

VI - the setting of the fee of the arbitrator or arbitrators.

Sole paragraph - If the arbitrators' fees are mentioned in the *compromis*, this will be interpreted of being enforced as such. In the absence of such provision, the arbitrator will request the state judge who would originally have jurisdiction to hear the case, to fix them by way of judgement.

Article 12 - The *compromis* shall be deemed to be terminated:

I - should any of the arbitrators, before accepting the nomination, refuse to act as long as the parties have expressly declared that they will not accept a substitute;

II - should any of the arbitrators die or become unable to act as such as long as the parties have expressly declared that they will not accept a substitute; and

III - should the time period referred to in article 11 (III) expires as long as the interested party has notified the arbitrator - or the chairman of the arbitral tribunal - giving him a 10 day-notice for rendering and presenting the award.

CHAPTER III

THE ARBITRATORS

Article 13 - Any person of legal capacity who enjoys the confidence of the parties may be appointed as arbitrator.

§ 1 - The arbitral tribunal shall be composed of an uneven number of arbitrators. The parties are free to appoint substitute arbitrators.

§ 2 - When the parties have agreed on an even number of arbitrators, the arbitrators are deemed to be entitled to appoint an additional arbitrator. Failing such agreement, the parties shall apply to the court which originally would have heard the case in order to have the arbitrator's nomination, being applicable, where pertinent, the provisions of article 7 of this law.

§ 3 - The arbitrator(s) shall be appointed by any method agreed by the parties or through the rules of the arbitral institutional or specialised entity chosen by them.

§ 4 - Once several arbitrators have been appointed they shall elect, by majority, the chairman of the arbitral tribunal. Should there be no consensus, the eldest shall be designated the chairman.

§ 5 - The arbitrator or the chairman of the arbitral tribunal may designate a secretary who may be one of the arbitrators.

§ 6 - In the performance of his duty, the arbitrator shall proceed diligently, efficiently, independently and shall be free and remain free from bias.

§ 7 - The arbitrator or the arbitral tribunal may order the parties to advance the funds for expenses and services deemed necessary.

Article 14 - Persons are disqualified from serving as arbitrators should they have with one of the parties or with the subject-matter of the arbitration any relationship falling into the cases of being disqualified as a state judge and, where applicable, they should be held up to the same duties and responsibilities as are set forth in the Code of Civil Procedure.

§ 1 - A person appointed to serve as arbitrator, before accepting the case, shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

§ 2 - A party may challenge the appointed-arbitrator only for reasons of which he becomes aware after the appointment has been made, unless:

I - the arbitrator was not appointed directly by the party; or

II - the reason for the challenge was known after the arbitrator's appointment.

Article 15 - The party who intends to challenge the arbitrator shall, pursuant to article 20, file the respective plea directly to the arbitrator or the chairman of the arbitral tribunal, setting forth his reasons and presenting pertinent evidence.

Sole paragraph - When the challenge is accepted, the suspect or disqualified arbitrator shall be removed and shall be replaced in the manner set forth in article 16 of this law.

Article 16 - If the arbitrator should excuse himself before accepting the nomination, or after the nomination he dies, becomes unable to carry out his duties or is removed, the substitute indicated in the *compromis*, if there is one, shall serve as substitute.

§ 1 - In the case that there is no substitute indicated for the arbitrator, the provisions of the rules of the arbitral institution or specialised entity shall apply, if the parties have invoked them in the arbitration agreement.

§ 2 - In the absence of any provision in the arbitration agreement and the parties fail to reach an agreement as to the appointment of the substitute arbitrator, the interested party shall proceed in the manner set forth in article 7 of this law, save when the parties have expressly stated in the arbitration agreement that they will not accept a substitute arbitrator.

Article 17 - The arbitrators, when in the exercise of their duties, or in support of these, shall be considered comparable to public officials for the purpose of criminal legislation.

Article 18 - The arbitrator acts as judge of fact and law and the award rendered is not subject to judicial review, appeal or ratification.

CHAPTER IV

THE ARBITRAL PROCEEDINGS

Article 19 - The arbitration shall be deemed to be initiated when the nomination is accepted by the arbitrator, in the case that there is only one, or by all, if there are several.

Sole paragraph - Once the arbitration is initiated and should the arbitrator or the arbitral tribunal feel that there is the need to clarify some issues presented in the arbitration agreement, an addendum shall be formed, in conjunction with the parties and signed by all, which will then be a part of the arbitration agreement.

Article 20 - The party which intends to argue questions related to competence, suspicion or disqualification of the arbitrator or arbitrators, as well as the nullity, invalidity or inefficacy of the arbitration agreement, must do so at the first opportunity, after the initiation of the arbitration.

§ 1 - When the challenge is accepted the arbitrator shall be substituted under the terms of article 16 of this law; once is declared that the arbitrator does not have jurisdiction or when is recognised the nullity, invalidity or inefficacy of the arbitration agreement, the parties shall be sent to the competent judicial body to rule on the matter.

§ 2 - When the arguments are not accepted, the arbitration shall proceed normally, subject however to review of that decision by the competent judicial body, at the time a petition for setting aside the award is filed, as provided by article 33 of this law.

Article 21 - The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings which may follow the rules of an arbitral institution centre or specialised entity, still permitting the parties to delegate to the arbitrator himself or the arbitral tribunal the power to regulate the proceedings.

§ 1 - Failing such agreement, the arbitral tribunal shall conduct the arbitration in such a manner it considers appropriate.

§ 2 - During the arbitration proceedings, there shall always be respect for the principles due process of law, equality of the parties, impartiality of the arbitrator and that of his judicial discretion.

§ 3 - The parties are free to postulate before the arbitral tribunal in person or by way of an attorney and the right to designate who shall represent or assist them in the arbitral proceedings shall always be respected.

§ 4 - It shall be up to the arbitrator and the arbitral tribunal, at the commencement of the proceedings, to attempt the reconciliation of the parties, applying, where pertinent, article 28 of this law.

Article 22 - The arbitrator or the arbitral tribunal, at the request of the parties or on its own motion, may take depositions of the parties, hear witnesses, determine the carrying out of expert examinations and any other evidence it may deem appropriate.

§ 1 - The deposition of the parties and of the witnesses shall be taken at the time, place and date previously communicated in writing, and shall be reduced to a written transcript, signed by the deponent or at his request, and by the arbitrators.

§ 2 - In case of absence without just cause from the personal deposition session the arbitrator or the arbitral tribunal shall take into consideration the behavior of the party at fault on rendering its award; if the absence is on the part of a witness, the arbitrator or the arbitral tribunal may, under the same circumstances, with proof of the existence of the arbitration agreement, request a judiciary authority to subpoena the reluctant witness.

§ 3 - Default by a party shall not prevent the arbitral award from being made.

§ 4 - Subject to paragraph 2, the arbitrators may request to the judicial body that would have originally been competent to hear the case, to grant interim measures of protection.

§ 5 - If, during the course of the arbitral proceedings, an arbitrator is replaced, the repetition of evidence already presented will be at the discretion of the substitute.

CHAPTER V

THE AWARD

Article 23 - The award shall be made during the time frame stipulated by the parties. If no agreement is stated, the time period for the rendering of the award shall be six months beginning with the commencement of the arbitration or the substitution of the arbitrator.

Sole paragraph - The parties and the arbitrator or the arbitrators, by mutual agreement, may extend the stipulated time period.

Article 24 - The award shall be expressed in a written document.

§ 1 - When there are several arbitrators, the decision shall be by majority of vote. Should there be no majority agreement, the vote of the chairman of the arbitral tribunal shall prevail.

§ 2 - The arbitrator who dissents from the majority may, if he so wishes, state his vote separately.

Article 25 - If during the course of the proceedings, a controversy arises regarding rights not freely transferable and once is verified that the award shall depend on whether they exist, the arbitrator or the arbitral tribunal shall stay the proceedings and shall send the parties to the competent authority of the judiciary branch.

Sole paragraph - Once the prejudicial question is resolved and the judgment is placed on the record, the arbitration will continue normally.

Article 26 - The mandatory requirements of the arbitral award are:

I - a report containing the names of the parties and a summary of the dispute;

II - the grounds for the decision where questions of fact and law shall be analysed, mentioning expressly whether or not the arbitrators are deciding the case on equity basis;

III - the opinion wherein the arbitrators shall resolve questions that are submitted to them and shall establish the time frame for the compliance with the decision, if applicable; and

IV - date and place where it was rendered.

Sole paragraph - The arbitral award shall be signed by the arbitrator or all arbitrators. It shall fall on the chairman of the arbitral tribunal, if one or more arbitrators cannot or do not wish to sign the award, to certify this fact.

Article 27 - The arbitral award shall decide the responsibility of the parties regarding costs and expenses for the arbitration, as well as fees due to bad-faith conduct, if this be the case, following the provisions of the arbitration agreement, if existent.

Article 28 - If during the course of arbitral proceedings, the parties arrive at an agreement about their dispute, the arbitrator or arbitral tribunal may, at the requested of the parties, state such a fact by means of the arbitral award, which shall comply with the requirements of article 26 of this law.

Article 29 - The rendering of the arbitral award marks the end of the arbitration; the arbitrator or the chairman of the arbitral tribunal must send a copy of the decision to the parties by mail or other means of communication, with a certificate of receipt, or if delivered personally, with an actual receipt.

Article 30 - Within a period of five days as from the receipt of the notification or personal knowledge of the arbitral award, the interested party, having communicated the other party, may request the arbitrator or the arbitral tribunal to:

I - rectify clerical errors which may affect it;

II - clarify any obscurity, doubt or contradiction in the award or to pronounce it regarding any omitted point that should have been dealt with in the decision.

Sole paragraph - The arbitrator or the arbitral tribunal shall decide within 10 days, amending the arbitral award and notifying the parties pursuant to article 29.

Article 31 - The arbitral award shall produce as to the parties and their successors, the same effects as a judgment rendered by the court and, should it be condemnatory, it will constitute a valid document to commence an execution process.

Article 32 - An arbitral award is null and void if:

I - the *compromis* is null and void;

II - it was made by someone who could not have served as an arbitrator;

III - it does not contain the requirements stated on article 26 of this law;

IV - it was rendered outside the limits established in the arbitration agreement;

V - it does not resolve the entire dispute submitted to arbitration;

VI - it is proved that it was delivered in such a way that constitutes a breach of duty, passive corruption or graft;

VII - it is rendered after its time limit has expired, with respect to article 12, section III of this law; and

VIII - the principles covered by article 21, paragraph 2 of this law are not respected.

Article 33 - The interested party may plead to the competent judiciary body that the arbitral award be declared null, according to the cases foreseen in this law.

§ 1 - The claim for nullity shall follow the requirements provided by the Code of Civil Procedure and shall be filed within ninety days after the receipt of the notification of the award or of its amendment.

§ 2 - The judgement which considers the claim valid:

I - shall decree that the award is null and void in cases covered by article 32, I, II, VI, VII, VIII;

II - shall determine that the arbitrator or the arbitral tribunal shall render another award, in all other cases.

§ 3 - The ruling of the nullity of the arbitral award may also be challenged by way of an action to stay the execution on the part of the debtor, according to article 741 and subsequent of the Code of Civil Procedure, if there is a judicial writ of execution on the judgment thereon.

CHAPTER VI

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article 34 - A foreign award shall be recognised and enforced in Brazil in accordance with the international treaties with validity in the internal legal system and, in the absence of that, strictly according to the terms of this law.

Sole paragraph - A foreign award is considered to be one which has been rendered outside of the national territory.

Article 35 - To be recognised or enforced in Brazil, the foreign award is only subject to ratification ("homologation") by the Federal Supreme Court.

Article 36 - That which is set forth in articles 483 and 484 of the Code Civil Procedure shall be applied to the homologation of foreign arbitration judgments, where pertinent.

Article 37 - The homologation of a foreign award shall be requested by the interested party, and requires the initial petition to contain the indications of the procedural law, according to article 282 of the Code of Civil Procedure, and must be prepared with:

I - the original of the arbitral award or duly certified copy authenticated by the Brazilian consulate accompanied by the official translation;

II - the original arbitration agreement or a duly certified copy, accompanied by an official translation.

Article 38 - Recognition or enforcement of an arbitral award may only be refused when the defendant furnishes proof that:

I - the parties to the arbitration agreement were under some incapacity;

II - the arbitration agreement was not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

III - it was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case;

IV - the arbitral award was rendered beyond the limits of the arbitration agreement and it was not possible to separate the exceeding part from that which was submitted to arbitration;

V - the institution of the arbitration proceedings was not in accordance with the *compromis* or the arbitration clause;

VI - the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the country where the arbitral award was rendered.

Article 39 - The homologation for the recognition or the enforcement of a foreign award will also be denied if the Federal Supreme Court finds that:

I - according to Brazilian law, the subject-matter of the dispute is not capable of settlement by arbitration;

II - the recognition or enforcement of the award would be contrary to the national public policy.

Sole paragraph - The effective citation of a party whose domicile is in Brazil, within the framework of the arbitration agreement or of the procedural law of the country where the arbitration was held, shall not be considered an offence against national public policy, including the admittance of a postal citation with unequivocal proof of receipt, as long as it assures the Brazilian party reasonable time to exercise its right of defence.

Article 40 - The denial of homologation for recognition or enforcement of a foreign arbitral award due to formal defects does not prevent the interested party from renewing his request once the defects presented to court are cured.

CHAPTER VII

FINAL PROVISIONS

Article 41 - Articles 267, section VII; 301, section IX; and 584, section III of the Code of Civil Procedure shall now contain the following text:

Art. 267.....

VII - by arbitration agreement.

Art. 301.....

IX - arbitration agreement

Art. 584....

III - the arbitral award and the homologation decree for settlement or conciliation.

Article 42 - Article 520 of the Civil Procedure Code shall now contain one more section, with the following text:

Art. 520...

VI - judicial granting of a request to institute arbitration

Article 43 - This law will come into force sixty days after the date of its publication.

Article 44 - The following articles are hereby revoked: articles 1.037 to 1048 of Law nº 3071 of January 1st, 1916, Brazilian Civil Code; articles 101 and 1072 to 1102 of Law nº 5869 of 11 January 1973, Code of Civil Procedure; and other provisions to the contrary.

Brasilia, September 23, 1996; 175th of independence and 108th of the Republic.

Fernando Henrique Cardoso

Nelson Jobim

(Published in the Official Gazette - DOU - 24 September 1996)

www.unb.br/fd/gt/conteudo/Lei_9307_ing.doc