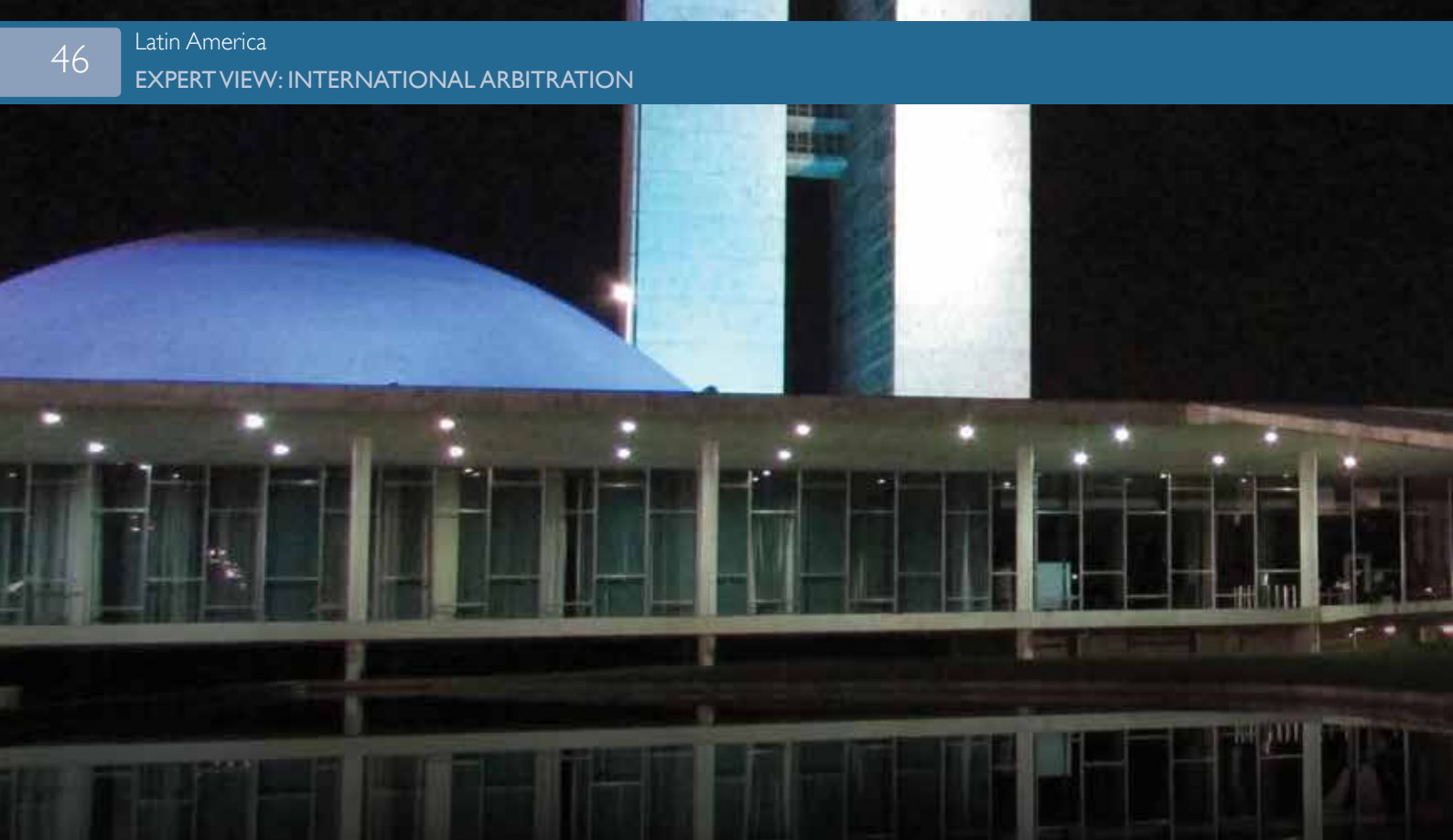

DRAFTING ARBITRATION AGREEMENTS

Duncan Speller and **Victoria Narancio** of **WilmerHale** discuss the most important factors to consider when drafting an effective international arbitration agreement with Brazilian parties or for arbitrations seated in Brazil

In 2010, the World Bank reported that Brazil had the biggest economy in Latin America and the seventh largest in the world. It is likely that Brazil's economy will continue to grow. Analysts foresee that between 2012 and 2020, a total of USD 809.4 billion will be invested in the country's energy and oil and gas infrastructure, and in its telecommunications, health and transport sectors alone. As a result of Brazil's economic expansion, the country has become a major player in international trade, and attracts investors worldwide. Brazil's economic expansion and increase in cross-border commerce has inevitably resulted in an increase of domestic and international arbitrations.

In addition, the use of international arbitration has increased because of Brazil's legal framework, which is increasingly arbitration-friendly. Brazil is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"). Moreover, Brazil's current Arbitration Law (Law No. 9,307, enacted on 23 September 1996) was influenced by the 1985 UNCITRAL Model Law on International Commercial Arbitration (a new arbitration law has been sent for approval to the Brazilian Senate, and is expected to be enacted at some point during 2014).

Furthermore, recent judicial decisions from Brazil's higher courts suggest that there is an increased receptiveness to international arbitration, and as a result, Brazil is becoming a popular venue for arbitrations seated in Latin America. For instance, in *Weil Brother Cotton Inc v Clóvis Augustin*, a case decided in 2013, the Superior Court of Justice of Brazil ("STJ") rejected a challenge against the enforcement of an award, recognising that the respondent had been properly served, and further confirming that the court was not entitled to enter into an analysis of the merits during the stage of enforcement (*see Weil Brother Cotton Inc v Clóvis Augustin*, STJ, Sentença Estrangeira Contestada No. 3.891 – GB (2009/0071170-1) (f), dated 2 October 2013).

Also in 2013, the Court of Justice of São Paulo rejected an application for an injunction to compel the Respondent to refrain from breaching the contract. The court held that Brazilian courts could not deal with the merits of a dispute when the contract contains an arbitration clause, and further that Brazilian courts are only competent to grant preliminary injunctions in order to protect the effectiveness of the arbitration (*see NIKE Licenciamentos*

Ltda v SBF Comércio de Produtos Esportivos Ltda, Court of Justice of the State of São Paulo, 0242417-67.2012.8.26.0000 dated 23 April 2013).

Brazil's growing prominence as an arbitral venue means that lawyers may increasingly be called upon to draft arbitration agreements with São Paulo or Rio de Janeiro as the arbitral seat. But failing to tailor the arbitration agreement in accordance with Brazilian law can give rise to significant problems if a dispute arises, leading to inefficiency and increased costs, or even potentially an unenforceable arbitration agreement or award.

This article sets forth a number of key considerations relevant to drafting an arbitration agreement for a cross-border contract with a Brazilian party and/or in an arbitration seated in Brazil.

Scope of the agreement to arbitrate and arbitrability

Pursuant to Article 1 of Brazil's Arbitration Law, only "disposable patrimonial rights" are arbitrable in Brazil. While this covers most commercial matters, employment-related matters are not arbitrable, and special requirements apply in consumer and/or adhesion contracts. Furthermore, there are certain limitations which apply to the Brazilian state itself and/or to Brazilian state entities. We consider each of these issues in turn.

a) Individual employment matters are non-arbitrable

Employment rights are considered inalienable rights, and therefore Brazilian courts have held that mediation and arbitration are *incompatible* with the resolution of individual employment disputes. On 7 May 2010, the Brazilian Superior Labour Court confirmed this position in *Xerox Comércio e Indústria LTDA v Mário de Castro Guimarães Neto*, Appeal No. 79500-61.2006.5.05.0028, were it held that the law governing individual employment matters falls within the "protective principle" afforded to all employees who are not on an equal footing with their employers, and that this situation may only be corrected through judicial recourse.

Notably however, collective labour disputes (i.e. disputes involving a group of employees and an employer or a group of employers) may be submitted to arbitration pursuant to Article 114, Section 1 of the Brazilian Federal Constitution.

The draft version of the new arbitration law (pending approval) will allow for arbitration clauses to be included in employment contracts provided that the employee is a director ("administrador") or a statutory manager ("diretor estatutário"). However, the employee will only be subject to the arbitration proceedings (i) if he/she is the one requesting the arbitration; or (ii) if he/she gives his/her express consent to arbitration once the dispute has arisen.

b) Special requirements for consumer contracts and/or adhesion contracts

Under Brazilian law, arbitration clauses in contracts of adhesion – which are defined as "clauses that have been…established unilaterally by the supplier of the products or services, without being properly discussed or modified by the consumer" (Brazilian Consumer Protection Code (Law No. 8,078, article 47) – are valid only in the following cases: (i) when the arbitration clause is in bold type and is separately initialed or signed; (ii) when the arbitration clause is provided in a separate written agreement, attached to the contract (which must also be separately initialled or signed); or (iii) when the consumer or adhering party initiates the arbitration. Failure to comply with these requirements may lead to annulment of the award by the Brazilian courts.

Under the new arbitration law (pending approval), adhesion contracts will only be valid if the arbitration clause is in bold type or contained in a separate written agreement. The draft law separately addresses adhesion contracts in a consumer context, and provides that the arbitration agreement will only be valid if the consumer initiates the arbitration, or expressly agrees to the commencement of the arbitration.

c) Limitations with regards to the state or state-owned entities

Despite much debate, Brazilian authorities endorse the view that state or state-owned entities are in principle able to enter into ▸

binding arbitration agreements, as long as they relate to "disposable patrimonial rights." Furthermore, arbitration is expressly permitted in the Private-Public Partnership ("PPP") Law (Brazilian Law 11,079, Article 11, dated 30 December 2004), and in the Concessions Law (Brazilian Law 8,98, Article 23-A, dated 13 February 1995), provided that the seat of the arbitration is Brazil and the language of the proceedings is Portuguese.

The draft version of the new arbitration law (pending approval) reaffirms that state entities or state-owned companies are able to enter into binding arbitration agreements as long as they relate to "disposable patrimonial rights". However, under the draft version, arbitrations involving state entities or state-owned companies cannot be decided *ex aequo et bono*, and are subject to public disclosure rules, including Brazil's Fiscal Responsibility Law (Law No. 101, dated 4 May 2000), which requires the state and state entities to disclose all instruments of fiscal management such as plans, budgets and Budgetary Directive Law. Furthermore, the requirements of the PPP Law and the Concessions Law mentioned above will continue to apply.

Failure to take into account the above mentioned requirements or limitations may result in the denial of enforcement or the setting aside of the award.

Confidentiality

Parties often assume that arbitration is confidential. However, most arbitral institutional rules (such as the 2012 ICC Rules) do not expressly confirm the confidential character of arbitral proceedings. In the absence of an express confidentiality agreement or confidentiality provisions arising from the institutional rules, parties may look to the law of the seat of the arbitration.

Brazil's Arbitration Law is silent on issues of confidentiality, and contains no express duty of confidentiality. Foreign parties contracting with Brazilian parties, and/or foreign parties agreeing to arbitrate their disputes in Brazil should, where they do not select a set of arbitration rules that contains a duty of confidentiality, expressly stipulate in their agreement to arbitrate that the arbitral proceeding shall be confidential.

Evidence gathering

Brazil's Arbitration Law confers broad discretion upon the tribunal regarding the gathering of evidence. However, in Brazilian court proceedings, parties are rarely required to provide documents in their possession to their counterparties in the dispute. Given that the procedural rules of each country may have an impact on the parties' expectations and on their understanding of the arbitral process, it may be sensible for foreign parties to incorporate the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") in their agreement to arbitrate in order to overcome the potentially different assumptions of parties regarding discovery.

Multi-party arbitration

When a contract may create disputes involving more than one party, it is often advisable to draft an arbitration clause seeking to ensure that all parties can be included within a single arbitration. This is particularly the case when foreign parties agree to have their disputes settled by arbitrations seated in Brazil, or with Brazilian parties, as Brazil's arbitration law does not address joinder and consolidation. Furthermore, it is worth noting that Brazilian courts generally dismiss motions to compel non-signatory parties to join an arbitration without consent. Drafting a carefully tailor-made arbitration clause may reduce ambiguity and scope to disrupt the efficient conduct of the arbitral proceeding.

Governing law clauses

Under Brazil's Arbitration Law, the parties have considerable autonomy in their choice of the applicable law, as long as they do not violate *ordre public*. However, in circumstances in which the choice of law is not clear, pursuant to the Introductory Law to the Brazilian Civil Regulations ("Lei de Introdução às normas do Direito Brasileiro," Decreto lei 4657) the conflicts of law rule of the Brazilian Civil Code will apply. In this scenario, the applicable law will be the law of the country where the agreement was signed, unless the parties have signed the agreement in different places in which case the applicable law will be the place of residence of the claimant.

Thus, Brazilian conflict of law rules differ materially from conflict of law rules in many other jurisdictions that focus on, for example, the place of performance or the legal system with which the contract has its closest or most real connection. In order to avoid a potentially complex dispute over choice of law, it is crucial for parties to expressly stipulate the governing law of their contract. It is further advisable for the governing law provision to be incorporated in a separate clause to the arbitration provision to avoid any ambiguity as to its scope.

As the use of domestic and international arbitration in Brazil continues to grow, parties entering into arbitration agreements with Brazilian parties and/or with Brazil as the seat of the arbitration should take into account these key considerations as they may have a bearing on the procedure and outcome of the arbitration, and also on the validity and/or enforceability of the arbitration agreement under Brazilian law. Merely inserting a clause borrowed from another contract may lead to unforeseen and undesirable consequences. ■

ABOUT THE AUTHORS

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