Arbitrations with state entities in the port and transportation sectors in Brazil: new developments

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In September 2019, the Brazilian government issued Federal Decree n. 10,025/2019, which regulates arbitrations with state entities in the port and transportation sectors.

The new act is set to govern many arbitral proceedings to come, due to the importance of this market (it grew twice as much as the rest of the Brazilian economy in 2018) and because the country is currently implementing a mass privatisation programme. The Federal Decree contains legal provisions on:

- applicable law;
- arbitration agreements;
- time periods;
- seats of arbitration;
- language;
- confidentiality;
- costs;
- arbitral institutions;
- arbitrators; and
- arbitral awards.

This article briefly explores the main features of this new act. It also discusses the similarities and differences between this Federal Decree (Decree n. 10,025/2019) and the decrees issued by the State of Rio de Janeiro (State Decree n. 46,245/2018) and the State of São Paulo (State Decree n. 64,356/2019) about arbitration and state entities.

Arbitrability

The Federal Decree affirms that conflicts related to negotiable and pecuniary matters can be solved through arbitration (section 2). This is the same criterion set forth in Rio de Janeiro's Decree (section 1) and in São Paulo's Decree (section 1). The new act goes further and expressly lists the following matters as being expressly arbitrable by law, among others:

- re-establishment of the financial equilibrium of contracts;
- assessment of damages due to the termination or the reassignment of partnership contracts; and
- breach of contract, including the imposition of penalties.

The scope of applicability is broad. Generally speaking, all conflicts related to pecuniary claims can be solved through arbitration, except those in connection with the narrow concept of *acta iure imperii*.

Applicable law, seat, language and transparency

Arbitrations regulated by the Decree must be governed by Brazilian law (section 3, (1) and (2)). Neither arbitration *ex aequo et bono* nor the application of foreign law are allowed. Both Rio de Janeiro's Decree (section 4(2)) and São Paulo's Decree (section 4, item 1, (2)) establish the same requirement.

The seat of the arbitration must be established in Brazil (São Paulo, Rio de Janeiro etc.). There is no limitation, however, on where the acts of the arbitration are to be conducted, including the place of the hearing (section 3 (3)). This is the same in the case of Rio de Janeiro (section 4(1)) and São Paulo (section 4, item 1, (1)).

Regarding the language, the act imposes Portuguese as mandatory (section 3 (3)), yet it does not forbid the adoption of a bilingual arbitration (Portuguese and English, for instance).[1] Again, the local level decrees set forth the same language requirement (section 4(3) in Rio de Janeiro; section 4, item 1, (3), in São Paulo).

As one of the parties is a state entity, confidentiality is not applicable and, therefore, the motions and decisions will be publicly available (section 3(4)). The same requirement can be found in Rio de Janeiro's Decree and in São Paulo's Decree.

In this case, the arbitral institution administering the case has a duty to make all relevant information public. This can be done, in our view, by providing the materials online. This does not exclude the possibility that confidential documents be kept secret, upon analysis of the arbitral tribunal.

Arbitration agreement

The new act also has provisions on arbitration agreements (section 5 and 6). The most important of these states that the arbitration clause must be distinguished from the rest of the contract in a way that calls the attention of the parties (section 3(1)(I)).

In our opinion, the legal requirement is fulfilled if the arbitration clause has been written in a

specific clause, perhaps headed as ‘Arbitration’ or ‘Disputes’.

This additional – and unnecessary, from our perspective – formal requirement is exclusive to the Federal Decree. Nothing similar exists in the decrees of Rio de Janeiro and São Paulo.

The Federal Decree makes clear that parties can adopt arbitration even after a conflict arises (section 6). In that case, parties can sign a submission agreement. The same possibility can be found in section 3(2) of Rio de Janeiro’s Decree or in section 4(3) of São Paulo’s Decree.

Time limits

In its section 8, the new federal act establishes minimum time limits for the filing of the statement of defence (60 days) and for the rendering of the arbitral award (24 months from the terms of reference).

According to its sole paragraph, the time limit for the issuance of the arbitral award can be extended once, provided this extension does not exceed 48 months. From our perspective, this time limit can be extended beyond 48 months in exceptional cases, such as where the arbitrator dies in the course of the arbitral proceedings.

Rio de Janeiro’s Decree sets different time limits and covers a broader range of situations. This decree establishes at least 60 days for the statement of claim, statement of defence, statement of crossclaim, statement of defence to cross-claim, claimant’s closing statement and respondent’s closing statement (section 10(1)). The act also mandates 30 days for the statement of reply and the statement of rejoinder (section 10(2)). The time limit for the rendering of the arbitral award is 60 days after the parties file their closing statement (section 10(4)). These time limits, however, can be modified by the parties (section 10(5)).

There is a chance that the time limits will conflict in cases involving both a federal state entity and a Rio de Janeiro state entity. As Rio de Janeiro’s Decree allows parties to modify the time limits by agreement, the best practice should be to adopt the federal act time limits.

São Paulo’s Decree adopts a more liberal approach and does not set forth any time limits. The act refers the timetable to the arbitral institution’s rules of arbitration or, in case of *ad hoc* arbitration, to the United Nations Commission on International Trade Law(UNCITRAL) Arbitration Rules.

Costs of arbitration

The Federal Decree makes the private party responsible for paying the costs of the arbitration in advance (arbitrators’ fees and expenses of arbitral institutions), regardless of which party brought the arbitration (section 9). At the end, the winning party can be refunded.

The general rule is that the private party will also pay for experts’ fees in advance, even when the private party does not bear the burden of proving the technical issues. However, in this specific case, parties are allowed to change the general rule by agreement.

These provisions can be tricky when the private party has no incentive to pay such costs in advance. This happens, for example, when the private party is the respondent and the contract has already been terminated, or when the private party does not want to present the experts' evidence.

Conversely, according toRio de Janeiro's Decree (section 9), the private party will only pay the costs of the arbitration in advance if the private party acts as a claimant. In its turn, São Paulo's Decree ((section 4(1)(5) and section 8)) establishes that the responsibility for the costs follows the arbitral institution's rules of arbitration. In both cases, the state entity can be required to pay the costs of the arbitration.

Arbitral institutions

As set forth in section 3(5), arbitrations regulated by the Federal Decree should be preferably institutional (but *ad hoc* arbitrations are also permitted).

There is no need for a public bid to choose the arbitral institution, which removes significant bureaucracy. However, the arbitral institution must be registered with the General Attorney's Office (section 10). To be accepted in this registration system, the arbitral institution should be well-regarded, must have at least five years of continuous existence and must provide its arbitral rules in Portuguese. Presumably all renowned domestic and international institutions will be able to obtain their registration, if desired.

The Decree, however, does not require the arbitral institution to have an office in Brazil, which makes the participation of international institutions more likely.

According to Rio de Janeiro's Decree (section 14(1)) and São Paulo's Decree (section 15(1)), the prospective arbitral institution must have or must be able to provide, at no extra cost, a conference room in those cities. For now, the only domestic arbitral institutions are registered in Rio de Janeiro (CAM-CCBC, Camarb, CBMA, FGV and CAESP) and in São Paulo (CAM-CCBC, Camarb and Amcham).

The arbitration agreement may authorise the private party to choose the arbitral institution among those registered with the General Attorney's Office (section 11).

Arbitrators

The Decree establishes that the arbitrators will be chosen according to the arbitration agreement (section 12). Hence, parties are free to select Brazilian or foreign arbitrators, whether or not they are legally qualified in Brazil.[2] The same flexibility is presented in both Rio de Janeiro's Decree (section 11-12) and São Paulo's Decree (section 10-11).

It is worth noting, however, that the Decree imposes Portuguese as mandatory (section 3 (3)), which naturally reduces the chances of foreign arbitrators being appointed.[3]

Arbitral awards

According to section 9, the arbitral award is final and binding, including on the state entity. There are no appellate proceedings and judicial courts cannot review the arbitral award on the merits, even when the state entity is the losing party. The same system is adopted in Rio de Janeiro's Decree (section 15-16) and São Paulo's Decree (section 9).

Conclusion

In conclusion, it is fair to say that Decree n. 10,025/2019 is another example of how Brazil is an arbitration-friendly jurisdiction.[4] even when state entities are involved in the conflict.

In the next few years, Brazil expects to receive substantial foreign investment as a result of the free market approach adopted by its current government. This new act guarantees the level of flexibility required by the international community in terms of methods of dispute resolution.

[1] Lauro Gama, *Sinal verde para a arbitragem nas parcerias público-privadas (a construção de um novo paradigma para os contratos entre o estado e o investidor privado). Revista brasileira de arbitragem,* The Hague, Kluwer, a. 2, v. 8, 2005, p. 32.

[2] José Antonio Fichtner, Sergio Nelson Mannheimer and André Luís Monteiro, *Teoria geral da arbitragem*, Rio de Janeiro, Forense, 2019, p. 590.

[3] Carlos Alberto Carmona, *Arbitragem e administração pública – primeiras reflexões sobre a arbitragem envolvendo a administração pública. Revista Brasileira de Arbitragem*, The Hague, Kluwer, a. 13, n. 51, 2016, p. 12-13.

[4] José Antonio Fichtner, Sergio Nelson Mannheimer and André Luís Monteiro, 'Is Brazil an Arbitration-Friendly Jurisdiction?' (Kluwer Arbitration Blog, 6 January 2019). **http://arbitrationblog.kluwerarbitration.com/2019/01/06/is-brazil-an-arbitration-friendly-jurisdiction/ (http://arbitrationblog.kluwerarbitration.com/2019/01/06/is-brazil-an-arbitration-friendly-jurisdiction/)**, accessed 18 February 2020

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