The Brazilian Arbitration Act 2015—what’s changed?

Arbitration analysis: Felipe Sperandio, associate at Clyde & Co, analyses the key changes introduced by Brazil's Arbitration Act 2015 (the 2015 Act) and assesses the revised Act’s impact both at home and abroad.

As discussed further below, the 2015 Act, which comes into force on 27 July 2015, has four notable characteristics. The 2015 Act:

- reflects the pro-arbitration jurisprudence developed by the Brazilian Superior Court of Justice over the past decade
- includes articles that state explicitly what has been the best arbitration practice in Brazil
- polishes a few rough edges of the Brazilian Arbitration Act 1996 (1996 Act), and
- expressly authorizes the Brazilian Government to enter into arbitration agreements

Note: the 2015 Act is a new piece of federal legislation that alters the 1996 Act. It was approved by the Brazilian Congress and by the President of Brazil, and it should not be seen as a statutory instrument, such as it might be in the UK.

What is the background to this legislative change?

The Brazilian Congress pushed for a revised Arbitration Act back in 2013. According to the Senate, which is the legislative upper-house, Brazil needs to promote alternative dispute resolution mechanisms to unclog its national courts.

In April 2013, the Senate created a Commission to draft an arbitration bill, which was comprised by renowned academics and practitioners. Luis Felipe Salomão, who is a Justice of the Superior Court of Justice, chaired the Commission.

In October 2013, the Commission submitted the bill to the Congress. The bill went back and forth between the House of Representatives (lower-house) and the Senate, and it was finally sanctioned by the President on 27 May 2015.

There is no substantial departure from the 1996 Act. Instead, the Commission made a conscious effort to preserve the essence and structure of 1996 Act, which has been tested by the courts and has been approved by users for the past 18 years. The final product is not a new arbitration Act, but rather a refined arbitration Act, which will come into force on 27 July 2015.
What the key changes introduced under the 2015 Act?

Art 1, para 1--Public Administration and arbitration

Art 1, para 1 expressly provides that either the direct or indirect Public Administration may submit its disputes to arbitration. Arbitration involving the Public Administration must be decided based on law (not *ex aequo et bono*). It will also be subject to the principle of publicity, as any other act involving the Public Administration (art 37, caput, of the Brazilian Federal Constitution).

The distinction between direct Public Administration and indirect Public Administration is not straightforward under Brazilian Administrative Law, and cannot be properly addressed in a couple of paragraphs, but it is important to highlight that the Superior Court of Justice's jurisprudence decided that the indirect Public Administration may arbitrate its disputes (Fn 1). The National Oil and Gas Agency, for example, is part of the indirect Public Administration.

By establishing that the direct Public Administration may also arbitrate its disputes, the 2015 Act represents a big leap forward. More importantly, art 1, para 1 now expressly allows the Brazilian Government to enter into arbitration agreements.

Brazil is neither signatory of the ICSID Convention nor has ratified any Bilateral Investment Treaty (BIT). Therefore, if the Brazilian Government (in fact) consents to arbitrate its disputes in the future, this would be a paradigm shift. By consenting to arbitrate with foreign entities, the Brazilian Government may encourage the international flow of investment into the country. The 2015 Act, therefore, may slightly offset the lack of guarantees that would be provided had Brazil ratified the ICSID Convention, ECT or BITs.

Finally, it is worth noting that arbitrable disputes, whether involving the Public Administration, private companies, or individuals must cover ‘freely transferable patrimonial rights’ (aka disposable rights), ie rights of commercial, economic or financial nature.

Art 13, para 4--appointment of arbitrators

Some Brazilian institutional rules restrict the selection of arbitrators to those names included in the institution's roster. The parties to an arbitration may now agree to disregard such restriction, and are free to select arbitrators who are not on the roster.

A few institutions have publicly criticized the amendment in art 13, para 4. These institutions argued that the legislator cannot interfere with the activities of a private entity (arbitral institution), and that the roster with pre-approved arbitrators was conceived as a means to guarantee the quality of the service provided by the institution.

This amendment is, however, invaluable for at least two reasons. First, it is in line with the principle of party autonomy. Second, Brazil still has a small pool of experienced arbitrators; so it is necessary to encourage the practice of new arbitrators to avoid issues of conflict of interests.

Art 19, para 2--limitation

Art 19, para 2 establishes that the limitation ‘clock’ stops running once the arbitration has started. The 1996 Act was silent in respect to the statute of limitation. But the 1996 Act already determined that the arbitration starts when the single arbitrator, or the chairman (in the event of three arbitrators), accepts his or her nomination to sit as arbitrator in the particular dispute (art 19 of the 1996 Act).

The 2015 Act simplifies the issue of limitation in arbitration, which had not been addressed by any statute, but only by academic commentary. The 2015 Act clarifies that the constitution of the tribunal is the procedur-
al moment that interrupts the limitation. The analysis of art 19, para may lead to interesting practical outcomes. For example, if a party submits a request for arbitration before the claim is time barred, but the constitution of the tribunal drags for months, or if the tribunal's constitution is found to be invalid, the limitation period is not interrupted and the claim may become time barred even after the claimant submitted their request for arbitration.

Art 22-A & B--interim measures

- *Art 22-A*--the parties may request interim measures to the national courts before the constitution of the arbitral tribunal
- *Art 22-A sole*--the interim measure becomes ineffective if the interested party does not file a request for arbitration within 30 days of the national court's decision that granted the interim measure
- *Art 22-B*--the arbitral tribunal shall uphold, amend or revoke an interim measure granted by the national courts
- *Art 22-B sole*--once the arbitration has started, the request for interim measure shall be made to the arbitral tribunal

Arts 22-A and 22-B incorporate the Superior Court of Justice's jurisprudence into the 2015 Act (*Itarumã Participações S.A. v Participações em Complexos Bioenergéticos S.A. - PCBIOS, Resp no. 1,297,974-RJ*). More importantly, the 2015 Act makes clear that there is no concurrent jurisdiction between national courts and arbitral tribunals for interim and conservatory measures. Once the tribunal is constituted, it has exclusive jurisdiction to grant interim measures. The UNCITRAL Model Law, for example, allows the parties to request interim measures either to the tribunal or national courts (UNCITRAL Model Law, art 9). Note: it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Also, the national courts' jurisdiction shall not be extended over the tribunal's jurisdiction, because the tribunal has to re-examine the prior national court's decision before deciding whether to uphold, amend, or revoke the interim measure.

The ICC Rules (Article 28.2) and the LCIA Rules (LCIA, art 25.3) allow the parties to apply to national courts for interim or conservatory measures after the constitution of the tribunal, in exceptional circumstances. The Brazilian courts will be in charge of solving this potential conflict between the 2015 Act and some institutional rules.

Art 22-C--arbitral letters

- *Art 22-C*--provides that the arbitral tribunal may issue an 'arbitral letter' to the national courts
- *Art 22-C sole*--the national courts will guarantee the confidentiality of the 'arbitral letter', if the arbitration is also confidential

The 'arbitral letter' is a formal document issued by the tribunal to the national court. The 'arbitral letter' formalizes the dialogue between tribunals and national courts in order that the court will cooperate with the arbitration and enforce a decision or order of the tribunal. It also determines, although impliedly, that the national court should not question or otherwise revise the tribunal's decision. Instead, the national court should use its innate coercive power to support the arbitration, by enforcing decisions granted by a tribunal. For example, the national court is empowered to order a bank (third party) to freeze the bank account of a party to the arbitration; or to compel a witness to be present in an arbitration hearing.
Art 23, paras 1 and 2--awards

Art 23, para 1 provides that the tribunal may render partial awards. Art 23, para 2 provides that parties and arbitrators may agree to postpone the deadline in which the final award will be rendered.

These changes simply formalize what has been common practice in arbitrations seated in Brazil. But, inserting the new paragraphs is a useful didactic initiative, because it helps educate non-experienced parties and arbitrators on how to conduct the arbitral proceedings.

Art 33, para 4--jurisdiction

If the arbitral tribunal does not decide all claims submitted by the parties in the arbitral proceedings, art 33, para 4 provides that the parties may resort to the national courts. In such cases, the national court would order the tribunal to hear and decide the remaining claims or counterclaims.

This new para avoids any doubts as whether the tribunal would be functus officio after rendering the final award. In other words, the tribunal's jurisdiction only comes to an end after it decides all claims made by the parties.

Art 35--recognition and enforcement

This art provides that recognition and enforcement of a foreign award in Brazil is only subject to homologation of the Superior Court of Justice. It simply formalizes what has been the practice in Brazil since 2004, but it is worth noticing that this practice makes Brazil friendlier to the recognition and enforcement of foreign awards than many jurisdictions, for two reasons.

First, the procedure is more expedient, because it allows one to skip the first and second instance courts, filing the request for homologation directly with the highest competent court in the country. Second, it concentrates the homologation procedure in a specialized court. The Superior Court of Justice has been trained in the interpretation of the New York Convention and developed a pro-enforcement stance over the past decade.

Art 3 includes art 136-A of the Company Law No. 6,404/1976

All shareholders are bound to an arbitration agreement contained in the company's by-laws, even the shareholders that voted against the inclusion of the arbitration agreement. The shareholders that opposed the arbitration agreement have the right to withdraw from the company, and they will be reimbursed for the amount of their shares.

This art solves the issue of consent to arbitrate in shareholders' disputes. Now, if a shareholder remains as a shareholder after the company decided to insert an arbitration agreement in its by-laws, or if a shareholder joins a company that provides for an arbitration agreement in its by-laws, such shareholder is deemed to have consented by conduct (impliedly) to arbitration.

How will the 2015 Act compare to other arbitration legislative regimes in the region and globally?

Brazil is already a commercial arbitration powerhouse. Brazilian parties, for example, are the third biggest users of the ICC Rules.

The 1996 Act was a key driver for turning Brazil into a successful arbitration case. The 1996 Act already ensured fundamental arbitration principles such as, amongst others: (i) kompetenz-kompetenz; (ii) separability; (ii) final and binding nature of awards; (iv) equal treatment between court judgements and awards when it
comes to enforcement; (v) party autonomy to select the laws applicable to the arbitration; (vi) objective arbitrability; and (vii) enforcement of foreign awards according to the New York Convention.

Accordingly, there was no big gap (if any) between the 1996 Act and most of the developed arbitration legislations, such as the UNCITRAL Arbitration Model Law.

**At this stage, do you foresee any difficulties with the changes?**

The 2015 Act has not provided for any radical amendment or any article contrary to the Brazilian arbitration jurisprudence.

The adjustments in the 2015 Act facilitate the use and practice of arbitration. Reinventing arbitration was never the Commission's goal. Actually, the Commission played the important role of a 'retaining wall' because the Commission successfully deflected political interests, and avoided unnecessary amendments that could endanger the successful structure of the 1996 Act.

Therefore, difficulties in implementing the changes introduced by the 2015 Act should not be foreseen.

**Are there any missed opportunities?**

Undoubtedly, there are many reasons why the 2015 Act should be praised. But the Brazilian President vetoed three articles, at the last minute, and left the feeling that the 2015 Act should have gone further in respect to arbitrability.

The Commission correctly intended to clarify the use of arbitration in respect to: (i) contracts of adhesion; (ii) consumer contractual relationships; and (iii) labour contracts. As such, the arbitration bill contained the following articles:

- **art 4, para 2**--in contracts of adhesion, the arbitration agreement will be enforceable only if written in bold or in a separate document
- **art 4, para 3**--in consumer relationship established by contracts of adhesion, the arbitration agreement will be enforceable only if the adhering party (ie the party who did not propose the terms of standard form contract) submits a request for arbitration or expressly consents with a request for arbitration
- **art 4, para 4**--individual labour contracts of employees acting as managers or statutory directors may provide for an arbitration agreement. This will be enforceable only if the employee submits a request for arbitration or expressly consents with a request for arbitration

These three areas are sensitive. The jurisprudence and academics have exhaustively discussed whether such disputes may be submitted to arbitration.

The arbitration bill, however, provided that arbitration over those areas would have restrictive application, and would be enforceable only under particular circumstances. The Commission made clear that consumers and high level employees would have a second bite of the cherry, ie they could still choose between arbitration and the courts after the dispute had arisen, despite the fact that they had previously entered into an arbitration agreement. There was no way to provide more assurances and jurisdictional benefits to consumers and high level employees.

Moreover, the Congress approved these proposed articles. And no one challenged these articles during the legislative proceedings in the Senate and the House of Representatives. But the Brazilian President vetoed three articles in the arbitration bill that intended to create incentives for (and clarify!) arbitration in the areas of: (i) contracts of adhesion; (ii) consumer contracts; and (iii) labour contracts.
These three areas are back in the twilight zone. For example, the 2015 Act remains silent as to whether labour disputes are arbitrable. The majority jurisprudence states that labour disputes are nonarbitrable; but the Superior Labour Court has already concluded that such disputes may be arbitrable (TST, 7a Turma, AIRR 1475/2000-193-05-00.7, Rel. Min. Pedro Paulo Manus, DJ 17.10.2008).

**What do you think the impact of the changes will be in the short and longer terms?**

The Commission fine-tuned the 1996 Act by including in the 2015 Act the pro-arbitration jurisprudence. It also made the 2015 Act more user friendly, by inserting details about some best arbitration practice, eg the possibility of parties requesting partial awards.

If the 2015 Act provides for any game changer, in my opinion, this would be the subjective arbitrability of disputes relating to the Public Administration. The 2015 Act expressly authorizes every public body, including the Brazilian Government, to enter into arbitration agreements. It will be interesting to see whether the Brazilian Government will make use of such prerogative.

The 2015 Act is more didactic and easier to follow, which makes non-users of arbitration comfortable to start arbitrating their disputes. Even though the 1996 Act was already in line with most of the developed arbitration's legislations, the 2015 Act has the potential to: (i) bring new players to the table (eg Brazilian Government); and, (ii) increase the use of arbitration by companies that are not familiar with this dispute resolution mechanism.

**Is the international arbitration market developing in Brazil? Can Brazil attract global arbitration?**

The international arbitration market is definitely developing in Brazil. Globalization is a natural force in favour of arbitration. Arbitration has become the common practice for dispute resolution between Brazilian companies and foreign parties. We have seen an increase in the number of arbitration proceedings seated in Brazil, either involving foreign parties, conducted in English, or governed by a foreign substantive law.

The Brazilian Arbitration Committee (Comitê Brasileiro de Arbitragem--CBAr) is also a driving force behind such development. The CBAr constantly holds events to educate judges and practitioners about the best practice of domestic and international arbitration. For instance, in 2012, the CBAr brought Albert Jan van den Berg to lecture to the Superior Court of Justice’s judges about the interpretation of the New York Convention. The CBAr also compiles domestic and international jurisprudence, publishes international academic commentary, and promotes conferences and online forums for discussing arbitration’s best practice. As a result, practitioners and Brazilian courts have been trained to deal with international arbitration.

The 1996 Act rapidly closed the gap between arbitration in Brazil and arbitration in the developed jurisdictions. The 2015 Act now aims to safeguard the predictability and consistency built by the Superior Court of Justice, which can certainly be seen as a pro-arbitration stance. The 2015 Act also expects to increase use of arbitration as an alternative to the clogged national court system. In my opinion, the 2015 Act seems to be the ideal instrument to reach these goals.

*Fn 1--AES Uruguaiana Empreendimentos Ltda v Companhia estadual de Energia Elétrica CEEE, Resp no. 612,439-RS; TMC Terminal Multimodal S/A v Ministério do Estado da Ciência e Tecnologia, MS no. 11,308-DF; AES Uruguaiana Empreendimentos Ltda v Companhia Estadual de Energia Elétrica CEEE, Resp no. 606,345-RS; Companhia Paranaense de Gás Natural - Compagas v Consórcio Carioca Passarelli, Resp. no. 904,813-PR.*