Foreign Investment in Brazilian Infrastructure

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Brazilian Infrastructure Law

Legal System

Brazil follows the Civil Law system, for which the main source of legal rules are laws in the strict sense. The Federal Constitution, in force since 1988, is the supreme rule and is characterized by its rigid written form.[1] Unlike the common law system prevailing in Anglo-Saxon countries, where court precedents have a core role as source of law, in Brazil, legal precedents (case law) are not formal sources of law, although they play an important part in supporting court decisions and assisting in the construction of the law.

The principle of legality is expressly provided by the Federal Constitution in various forms, and individuals, private and public entities, and the Public Administration itself, are bound to obey it. Article 5, which establishes basic rights, provides that "no one shall be obliged to do or refrain from doing something except by virtue of law". On the other hand, Article 37, which governs the guiding principles for the Public Administration, sets that every action taken by the direct and indirect administration[2] shall necessarily be supported and/or permitted by the law.

1 The Federal Constitution is available in English at http://www.logisticsbrazil.gov.br/constitution-of-the-federative-republic-of-brazil.

2 The so-called "direct administration" encompasses the Government itself, with its employees and departments directly linked to the Executive Branches of the Union, states, and municipalities; and the so-called "indirect administration" comprises the autonomous Government agencies, the foundations, the Government-owned corporations, mixed-capital companies, the public consortia, and all other entities subject to Government control.

In addition to the principle of legality, the Public Administration must obey the principles of impersonality, morality, publicity, and efficiency. Such principles also guide the infrastructure sector to the extent that most infrastructure projects have been conducted by the Brazilian Government through public procurement, which cannot involve subjectivisms and must be grounded on the clear and express command of Brazilian law.

Public Procurement

In General

The regulation on public procurement in Brazil has constitutional basis. As required under Article 37(XXI) of the Federal Constitution, all contracts for public works, services, purchases, and sales must be preceded by a public bidding, which may be dispensed with only in cases specified by law. It applies to the entities of the direct and indirect administration.

Law Number 8,666/93 establishes that the bid process must comply with constitutional principles, namely: legality, impersonality, publicity, equal treatment, both when the call for bids is prepared and when the tender is conducted, morality, compliance with the terms of the call for bids, and confidentiality in the presentation of the proposals. Article 22 describes the types of public bid. The main types of bid used to acquire goods and services are: competitive bidding (*concorrência*), request for quotation (*tomada de preços*), and invitation (*convite*).

Competitive bidding is open to any interested party that proves compliance with the minimum requirements stated in the call for bids during the initial qualification phase. Competitive bidding is used to acquire goods and services worth more than BRL $650,000.

A request for quotation is for interested parties who have already registered with the Government system. Those who have not yet registered but who meet the requirements must register with the system within three days of the receipt of proposals. A request for quotation is used to acquire goods and services worth up to BRL $650,000.

Under an invitation, the Government chooses and invites at least three interested parties, who may have registered in advance or not, whose activities are related to the purpose of the public bid. Other parties registered in the appropriate business area also can state their interest in participating within twenty-four hours of the presentation of bids. An invitation applies for goods and services up to BRL $80,000.

The auction (*pregão*) method, which is governed by Law Number 10,520 of 17 July 2002, also is employed. Auctions are used to acquire common goods and services whose performance and quality standards can be objectively defined in the request for bids using normal market specifications. These auctions are conducted electronically under the regulations, and there are no value limits.

Articles 24 and 25 of Law Number 8,666/93 describe the situations in which bids do not apply or can be dispensed with. The Government can decide not to apply or dispense with bidding only where the law expressly states this as a possibility. Public bids do not apply when competition is not viable. This applies, for example, to a bid for materials or equipment that can only be supplied by an exclusive producer, company, or sales representative/distributor. It also is the case where technical services can only be performed by professionals or a company with a widely-recognized specialization.

The exemption from a public bid involves situations in which a public bid is theoretically required, but there are other more important factors that prevent it from being held. Examples of these factors are: war or serious public disturbances, emergencies, calamities, a possible compromise of national security or Government intervention in the market to regulate prices or normalize supply, as well as other situations described in Article 24.

Section II of the Law provides the rules for qualifying companies that want to participate in a bidding process. Non-compliance with any of the qualification requirements results in the company's disqualification. Two types of bid require qualification prior to the bid process: request for a quote and invitation. Qualifying requires the following documents and information, as well as compliance with specific requirements stated in the bid notice:

(1) Legal registration: identity card, the articles of incorporation of the Company and, as regards foreign companies not having a presence in Brazil, an authorization decree and authorization to operate issued by the President of Brazil (Article 28);

(2) Technical qualification: enrollment with the authority with jurisdiction, evidence of aptitude to perform the activities described in the bid, indication of the facilities, equipment, and the technical staff, and evidence from the bidder that it has received the documents (Article 30);

(3) Economic/financial qualification: balance sheet and financial statements for the last fiscal year, certificate showing the company is not in bankruptcy proceedings, and a guarantee limited to one per cent of the value of the bid (Article 31); and

(4) Tax and labor compliance: proof of enrollment with the taxpayer registry, proof of good standing with the Public Treasury and the Social Security Agency, and a certificate showing no debts with labor courts (Article 29).

Article 45 describes the possible methods to decide on the winning bid in the competitive process, request for quotation, and invitation types. The methods are:

(1) The lowest price, which is the most common;
(2) The best method/technology;
(3) The method/technology and price, used exclusively for hiring services of a predominantly intellectual nature; and
(4) The highest bid or offer (used for the sale of goods).

The auction type always uses the criteria of the lowest price that meets the supply deadline, technical specifications, and minimum performance and quality standards established in the call for bids. Chapter III of the Law provides rules for administrative agreements.

When the bid process ends, an agreement is formalized between the winning party and the Government. The main characteristics are: presence of the Government as a party, attainment of public interest, and performance under public law rules.

Administrative agreements differ from private contracts in that they contain the "exorbitant clauses" described in Article 58. These clauses grant privileges to the Administration, such as:

(1) Unilaterally modifying the agreement to best suit the public interest (when there is a change either to the project or the contract value, the party is obliged to accept any additions or deletions made in the services or purchases up to 25 per cent of the contract value (Article 65(I) and (1));
(2) Unilaterally terminating the administrative agreement in the event of breach of contract, public interest, or unforeseeable circumstances and *force majeure* (Article 79);
(3) Supervising the performance of the agreement (Article 58, III);
(4) Applying penalties for total or partial nonperformance of the agreement (Article 58, IV);
(5) In the case of an essential service, occupation by the Public Administration of premises and goods related to the performance of the administrative agreement in order to investigate any contractual breach or in the event of termination of the agreement (Article 58, V); and

(6) Requiring a warranty for construction, service, and purchase contracts (Article 56).

An administrative agreement can be terminated under Article 78 in situations such as: breach of any obligation under the agreement, such as deadlines, projects, and specifications; delay in the performance of work, service, or supply; the contractor's bankruptcy; partial or complete subcontracting not allowed in the agreement or tender; public interest; and annulment when some illegality occurs during the bidding process.

Public-Private Partnership

The Public-Private Partnership (PPP) is considered one of the main instruments used by the Government to attract private investments in infrastructure. The PPP has constitutional basis and the main statutes applicable to PPPs are Law Number 8,987/1995 and Law Number 11,079/2004. Law Number 8,987 (the "PPP Act") can be applied to regular concessions.

The PPP Act establishes general rules for competitive bidding and contracting with a private partner at both the national and sub-national levels. Among its features, the PPP Act allows Public Administration entities to assume long-term commitments, including the payment of subsidies to the private partner, with the overall objective of increasing efficiency. However, the PPP Act establishes that PPPs cannot be used for the single objective of provision of labor, the supply and installation of equipment, or to carry on public works. It also specifies that no PPP contract can be valued at less than BRL 20-million or have a term of less than five years.

The PPP legal framework contains provisions that prevent the Public Administration from adopting projects without proper prioritization studies and assuming future financial commitments for which there would be no assured source of financing. The Act also requires that public hearings be held and economic and financial assessments be carried out for each proposed PPP project.

In general, a PPP is employed in three forms of awarding: regular, administrative, and sponsored. The regular PPP award is regulated by Award Acts (Law Number 8,987/1995 and Law Number 9,074/1995), and administrative and sponsored awards are regulated by the PPP Act (Law Number 11,079/2004). The term PPP only applies where it refers to administrative and sponsored awarding, according to Law Number 11,079/2004.

In a sponsored award, the private partner revenues come from fees charged to the users and financial subsidies paid by the contracting public entity as the services are delivered. In the case of an administrative award, the contracting state entity pays in full for the services provided; there are no user fees.

Under administrative and sponsored awarding, PPPs in the infrastructure sector can assume several forms and models, with different levels of responsibility and risk for the private and public partners. The levels of responsibility, risk, and compensations are previously defined by the contract, after being discussed and negotiated.

Regulatory Agencies

In General

The Constitution (Article 170) protects free enterprise as one of the fundamentals of the economic order. However, it also allows the Government to regulate certain sectors of the economy and public utilities. The regulation is performed by independent regulatory agencies, under the rule-making power defined by statute law.

Regulatory agencies work in vital sectors of the economy and have various legal statuses, ranging from subordination to direct public administration to being independent bodies. As a general rule, they are in place to address market failures, such as ensuring competitiveness of economic sectors, lowering transaction costs associated with the provision of public goods, reducing information asymmetries among economic agents, combating negative externalities arising from the economic interactions, universalizing services, and promoting consumer interests.

In the exercise of their duties, regulatory agencies carry on functions typical of the Executive Branch, such as the concession and oversight of economic activities and rights; of the Legislative Branch, such as establishing standards, rules, and procedures with legal force in the various sectors; and of the Judiciary in judging, imposing penalties, and interpreting contracts and obligations among economic agents. In view of the principle of legality, the regulation activity performed by regulatory agencies must respect the general guidelines drawn by the law that regulates each sector, being forbidden to create obligations that do not exist within the statute on which such sector regulation is based.

The following agencies are in operation in the infrastructure sector: National Telecommunications Agency (ANATEL), National Agency for Oil, Natural Gas and Biofuels (ANP), Electricity Regulatory Agency

(ANEEL), Health Surveillance Agency (ANVISA), National Water Agency (ANA), National Agency for Waterway Transportation (ANTAQ), National Road Transportation Agency (ANTT), and National Civil Aviation Agency (ANAC).

National Telecommunications Agency

ANATEL is linked with the Ministry of Communications and plays the role of the telecommunications regulator in Brazil. The Agency was established in 1997 by Law Number 9,472, known as the Telecommunications Act. Among its duties are those to implement the national telecommunications policy; manage radio-frequency spectrums and the use of orbit resources, issuing their standards; issue norms and standards to be followed by telecommunication service providers regarding equipment utilization; issue or recognize product certification, in accordance with norms and standards established by the Agency; and repress violations of user rights.

National Agency for Oil, Natural Gas, and Biofuels

ANP is subordinated to the Ministry of Mines and Energy and is responsible for regulation, contracting, and inspection of petroleum, natural gas, and biofuel industry economic activities, as provided by Law Number 9,478/97, as regulated by Decree Number 2,455/98, by the Directives from the National Council of Energy Policy (CNPE) and in conformity with national interests.

National Electric Energy Agency

ANEEL was created by Law Number 9,427/1996 and is linked to the Ministry of Mines and Energy. ANEEL is in charge of regulating and supervising the generation, transmission, distribution, and commercialization of electric power; mediating conflicting interests among agents of the electrical sector and between these agents and consumers; granting, permitting, and authorizing electric-power facilities and services; and promoting fair electricity rates.

National Health Surveillance Agency

ANVISA is linked to the Ministry of Health, with the purpose to foster protection of health by exercising sanitary control over the production and marketing of products and services. The latter embraces premises

and manufacturing processes, as well as the range of inputs and technologies concerned with the same. In addition, ANVISA exercises control over ports, airports, and borders and liaises with the Ministry of Foreign Affairs and foreign institutions over matters concerning international aspects of sanitary surveillance.

National Water Agency

ANA is subordinated to the Ministry of the Environment. It is in charge of regulating the use of water according to the mechanisms established by Law Number 9,433/1997, such as granting of rights to the use of water resources; conducting inspections to assure that licenses are respected; and supporting conservations of rivers and lakes.

National Agency for Waterway Transportation

ANTAQ is subordinated to the Ministry of Transportation. It is in charge of regulating, supervising, and inspecting the activities of waterway transportation services and the exploitation of port and waterways infrastructure carried on by third parties.

ANTAQ implements policies formulated by the Ministry of Transportation and the National Council of Integration of Transportation Policies (CONIT), according to Law Number 10,233/2001.

National Transportation Agency

Linked to the Ministry of Transportation, ANTT is responsible for concessions and supervising rail and road transport related to the use of infrastructure and public and private transportation of passengers on roads and railways.

Moreover, ANTT authorizes chartered passenger transportation by tour companies, international cargo transportation, terminal operation, and multimodal transport (integrated transport that uses various means).

National Civil Aviation Agency

ANAC regulates and oversees the activities of the aviation sector. Under the Ministry of Defense, it is in charge of implementing the Brazilian civil aviation policy; regulating and inspecting services performed by national and foreign airlines in Brazil; and establishing security rules

for aircraft and airports, including those related to the transportation of dangerous goods.[3]

Restrictions on Foreign Capital

Since the 1990s, Brazil has gone through a process of economic liberalization. This has opened various activities to foreign investment, i.e., coastal shipping, electric power, inland navigation, mining, and telecommunications.

However, certain Brazilian industries continue to be regulated by the Government to restrict or prohibit foreign capital. Foreign capital is prohibited in activities related to nuclear power, mail and telegraph services, and the aerospace industry. Additionally, foreign capital has restrictions in the following activities:

(1) Mineral resource prospecting and mining in border areas (a band stretching 150 km from Brazil's international borders);
(2) Telecommunications and broadcasting companies (radio and free-to-air television);
(3) Commercial air transportation; and
(4) Rural land, especially when the land is located in border areas.

Infrastructure Sectors

Logistics

Brazil is at the onset of a new investment cycle, based on concessions, private financing, and the participation of banks and investment funds.

Brazil's demand for logistic infrastructure has increased sharply. As an example, the demand in the airline traffic grew 182.5 per cent from 2002 to 2012 (in millions passengers per year). In the same period, vehicles sales grew 153.5 per cent.

In 2012, the Government launched the Logistics Investment Program (*Programa de Investimento em Logística*, PIL), a concession program that aims to build up and modernize infrastructure through the integration of roads, railways, ports, and airports in articulation with supply chains. The Government has been launching auctions to grant concessions to the private sector and to attract foreign investors.

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3 See http://www2.anac.gov.br/ingles/legalRegulatory.asp.

At present, 52 per cent of transportation is concentrated in roads, but only 18 per cent in railways and 32 per cent in watercourses, pipelines and air. Such inefficiency represents 10.6 per cent of the Brazilian GPD.

Oil, Gas, and Mining

Under Article 177 of the Constitution, Brazil holds the monopoly of activities related to the oil industry. However, the Government may contract with companies in the public or the private sector, with regard to conditions established by Law Number 9,478/1997 (the "Oil Act"). Oil and natural gas exploitation, development, and production activities are assigned to private companies upon competitive bidding or concession (*concessão*).

The exploitation of mineral resources is reserved to the Government, but research and mining can be assigned by authorization or concession to native Brazilians or companies organized under Brazilian law. There are specific federal and state tax and environmental laws that apply to the activities to be performed.

Electric Power

According to the Ministry of Mines and Energy, in 2014, Brazil had an installed generating capacity of 134 gigawatts (GW). Hydroelectricity accounted for 89.2 GW of generating capacity, fossil fuel sources 25.5 GW, and biomass 12.3 GW, with small amounts from wind, nuclear, and solar. Brazil also had 5.9 GW of contracted imports, bringing the total power supply to 139.8 GW.

In 2004, the Government implemented a new model for the electricity sector. This hybrid approach to Government involvement splits the sector into regulated and unregulated markets for producers and consumers. This approach allows for both public and private investment in new generation and distribution projects.

Telecommunications

The telecommunications sector has as its basis Law Number 9,472/1997 (the "Telecommunications Act"), which provides that the executive branch is responsible for establishing the telecommunications policy, whereas ANATEL is in charge of implementing such policy by regulating and supervising the sector.

Telecommunications sector regulations have been stable since 1997. Brazilian regulation policies in telecommunications have increasingly

turned to the promotion of new technologies involving broadband Internet and mobile telephony, which are services provided under a private regime without obligations of continuity and universal coverage supported by the government. Fixed switched telephony services are the only communication services delivered under a public regime (i.e., awarding with duration of 20 years), although the interest of telecommunications companies in developing this service has been decreasing.

Under Decree Number 7,175/2010, the Government has been implementing the National Broadband Plan (*Plano Nacional de Banda Larga*) with intent to expand broadband Internet access using fiber optic infrastructure.

In 2015, the *Banda Larga para Todos* (Broadband for All) Program was introduced. It aims at implementing fiber optic cable in 90 per cent of Brazilian cities by means of subsidies granted to the private sector in reverse auctions. In addition, the Ministry of Defense is in charge of implementing the *Amazônia Conectada* (Amazonia Connected) Program to install 7.8 kilometers of fiber optic cables through Amazonian rivers and offer opportunities for a series of data network services such as the Internet, telemedicine, university at distance, interconnection among health, public security, traffic and tourism.

Finally, the *Cidades Digitais* (Digital Cities) Program, which aims at increasing modernization of local management through construction of fiber optic cable linking public entities, development of e-government applications, and implementation of free wi-fi zones in public areas.

Information Technology

Law Number 13,243 of 2016 aims at promoting a series of actions to encourage research and scientific and technological development, as well as to reduce bureaucracy regarding investments in the relevant sectors.

One of the advances of the Law is the possibility of exemption from the bidding process for hiring innovative services or products provided by micro, small, and medium-sized companies. Institutions of science, technology, and innovation development can be hired through a simplified process.

In addition, such Law amends Law 8,666/93 (Brazilian Bidding Act) in order to establish new hypotheses of exemption from bidding process for hiring the supply of goods and services intended to research and development activities. With the new legal framework one expects an increase in the number of technology poles (four at present) and new players interested in investing in innovation.

Urban Mobility

Eighty-five per cent of the population lives in urban areas. Since 2011, the Government has been offering resources to state and local governments to support urban mobility solutions through concessions or PPPs. However, the largest Brazilian cities still have serious problems with traffic due to the predominance of individual vehicles and the lack of an efficient, safe, good-quality collective transportation system.

Under Law Number 12,587, in 2012, the National Policy of Urban Mobility was launched aiming at establishing principles, guidelines, and tools to guide municipalities in developing urban mobility plans. The Law requires that all Brazilian cities with a population over 20,000 must draft and present an urban mobility plan to the Ministry of Cities to receive funding from the Growth Acceleration Program (*Programa de Aceleração de Crescimento*). The Law applies to 1,663 Brazilian cities, 79 of which have more than 300,000 inhabitants.

Sanitation

Despite having almost 20 per cent of the world's freshwater, Brazil suffers from unequal access and increasing natural disasters linked to extreme weather, flooding, or drought, with growing social and economic impact.[4]

In 2008, the National Plan of Sanitation was launched under Law Number 11,445/2007, which established the action required and a forecast of investment needed to solve sanitation problems by 2030.

Environmental Aspects

Environmental Licenses

Law Number 6,938/1981 determines the environmental licensing requirement for potentially polluting activities. The Constitution establishes that installation of works or activities with the potential of causing significant degradation to the environment must be preceded by an environmental impact study. Environmental impact studies are part of the first phase of the procedure to obtain an environmental license.

4 See http://www.worldbank.org/en/news/press-release/2011/07/12/brazil-more-efficient-water-management-towards-universal-water-supply-sanitation.

Environmental Liability Regime

Article 225 of the Constitution establishes civil, criminal, and administrative liability for environmental damage. According to Law Number 6,938/81, strict civil liability for environmental damages prevails in Brazil. It is sufficient that the damage exists and that there is a chain of causation between the damage and the polluter or the degradation source for an obligation to compensate to exist.

Civil liability is joint and several in environmental law. Liability for the recovery of environmental damages is imputed to all those persons who, directly or indirectly, have contributed to the occurrence. Federal Law Number 6,938/81 defines a polluter as a private or public individual or legal entity that is directly or indirectly responsible for an activity that causes environmental degradation. There is no definition in law for the concept of environmental damage, although Federal Law Number 6,938/81 defines "environmental degradation" as the adverse alteration of the characteristics of the environment and "pollution" as the degradation of the environmental quality resulting from activities that directly or indirectly:

(1) Cause detriment to the health, safety, and well-being of the population;
(2) Create adverse conditions for social and economic activities;
(3) Adversely affect the biota (flora and fauna of a region);
(4) Affect the aesthetic or sanitary conditions of the environment; and
(5) Release materials or energy in contravention of established environmental standards.

Criminal liability is established by Law Number 9,605/98, which prescribes the crimes and sanctions therefore. The Government is exclusively responsible for legislating on criminal law matters. Penalties may be applied to individuals and to legal entities alike. The criminal liability of legal entities does not exclude the liability of individual offenders, co-offenders, or accessories and covers all those who have contributed, either through acts or by omissions to the crime, be they officers, administrators, members of a board of directors or technical bodies, auditors, managers, employees, or agents. Administrative liability results from the violation of administrative rules, submitting the wrongdoer to sanctions of an administrative nature, such as admonishment, fine, interdiction of activity, and suspension of benefits.

Compliance

Anticorruption legislation (Law Number 12,846/2013 and Decree Number 8,420/2015) provide for the administrative liability of legal entities for acts committed against the national or a foreign public administration.

The Law is applied to business companies and simple companies, regardless of the form of organization or corporate model adopted, as well as to foundations, class associations, or foreign companies with branches or representatives in Brazil, and extends, jointly and severally, to companies belonging to economic groups, *de facto* or *de jure*, to subsidiaries or parent companies, affiliates and, under a relevant agreement, to consortium members.

Liability of a legal entity may not exclude the individual liability of managers and officers or of persons participating in the illegal act and, accordingly, the legal entity shall be held liable regardless of the individual liability of individuals. According to the Law, a legal entity is subject to strict liability for illegal acts committed in its benefit, even if such acts will have been performed without power of representation or in the absence of authorization, advantage, or benefit to the company.

In addition to defining acts that may cause damage, the Law imposes strict administrative sanctions to legal entities held liable that range from the application of a penalty of 30 per cent of the legal entity's gross revenues in the most recent financial year to a statement of ineligibility, the obligation to fully redress for the damage caused, and prohibition of contracting with or receiving incentives, subsidies, grants, donations, or loans from Governmental agencies or bodies controlled by the Government, as well as termination of any agreement entered into with such entities.

Decree Number 8,420/2015 sets forth the stages and parameters for the Administrative Proceedings for Determination of Liability (*Processo Administrativo de Responsabilização*), governs leniency agreements, creates criteria for the companies' integrity programs, and regulates the National Roll of Companies Suspended and Not in Good Standing (*Cadastro Nacional de Empresas Inidôneas e Suspensas*) and the National Roll of Punished Companies (*Cadastro Nacional das Empresas Punidas*).

According to the regulations, those acts that are deemed administrative infringements against Law Number 8,666/1993 (Bidding Act), or against other bidding rules and public administration contracts, which also are described as offensive acts under the Anticorruption Act, will be

jointly ascertained and judged and will follow the legal procedure for determination of liability.

In addition to establishing the exclusive jurisdiction of the Ministry of Transparency, Supervision, and Control for the execution of leniency agreements within the Federal Executive Branch, the regulatory text institutes the parameters that are taken into consideration by the authorities at the moment of applying the administrative sanctions provided for by the Law Number (fine and extraordinary publication of the sanctioning administrative decision).

As regards the effectiveness of the integrity programs (compliance programs), the regulatory norm sets forth that an "effective" program must demonstrate: commitment by the upper echelon; implementation of ethic and conduct codes, and employee and third-party periodic training; conducting audits and monitoring programs; and the existence of a communication channel for guidance and denunciation, as well as an investigation policy with the inclusion of corrective actions and out-sourcing policies, among others. Additionally, should effectiveness of the program be demonstrated, this will be an important extenuatory factor for imposition of the fine provided for by the Law.

A leniency agreement may be entered into to exempt or to lessen the respective sanctions applicable to the infringing legal entity, provided that such legal entity actually collaborates with the investigation, and in administrative proceedings. The rule defines collaboration as that resulting in the identification of the others involved in the infringement, pursuant to the timely disclosure of information and delivery of documents that prove the infringement.

To enter into a leniency agreement, the infringing legal entity must be the first to demonstrate its interest in cooperating with the investigation of the infringement; have completely ceased its involvement in the action as of the date on which the agreement was proposed; admit its participation in the illicit action; fully cooperate with the investigations; and provide information and documentation that prove the infringement.

Dispute Resolution

In General

The various laws and executive regulations provide specific references to the proceedings related to dispute resolution. In general, regulatory agencies' hearings are intended to resolve disputes between regulated agents or between regulated agents and consumers. In certain cases,

dispute resolutions can be produced by the use of arbitration. This is the case with ANATEL (Resolution Number 612/2013, Articles 95–101) and ANP (Decree Number 2,445/1198, Article 19).

Arbitration

In General

Arbitration is regulated by Law Number 9,307/1996 (the "Arbitration Act"), which was updated in 2015 to expand the scope of arbitration and cover the choice of arbitrator; tolling of the statute of limitations (prescription) on filing arbitration proceedings; preliminary injunctions; and arbitral letters and awards.

Article 1 of the Arbitration Act provides that persons capable of contracting may refer disputes related to disposable equity rights to arbitration. However, the arbitrator must stay the proceedings if an issue arises that relates to non-disposable property rights (non-arbitrable subject matter). The arbitrator must refer the decision of such issues to the courts and abide by their decision once it is rendered (Article 25).

Congress has enacted legislation that ensures the legality of arbitration clauses in contracts involving state entities. For example, Article 23(XV) of Law Number 8,987/1995 (the "Public Concessions Act") provides for an amicable dispute settlement method as mandatory for every contract. Since the updating of the Arbitration Act in 2015, it has been recognized that the Government may use arbitration for resolving its property disputes, it being required that the proceedings be open to the public.

Arbitration Agreements

The Arbitration Act recognizes arbitration clauses in contracts (*cláusula compromissória*) and submission agreements (*compromisso arbitral*). Both are required to be in writing. An arbitration clause is an agreement between contracting parties to settle future disputes through arbitration. To be valid under Brazilian law, an arbitration clause must be in writing, either in the contract itself or in a separate document (Article 4). Correspondence (for example, e-mail, telefax, or letter) is valid for these purposes.

A submission agreement is an agreement to submit a given dispute to arbitration once a dispute arises (Article 9). Submission agreements can be executed in court, under the supervision of a judge, or through an ordinary contract and have more stringent requirements than those

applicable to arbitration agreements. A submission agreement must contain the name, profession, marital status, and domicile of the parties; the name, profession, and domicile of the arbitrator(s); the subject matter of the arbitral proceedings; and the place where the arbitral award must be made.

Commencing Arbitration Proceedings

A party can commence arbitration proceedings without court intervention if the arbitration agreement stipulates the procedural rules allowing for the appointment of arbitrators and the constitution of the arbitral tribunal or refers to the rules of an arbitral institution. Even if the responding party fails to appear, the arbitration may proceed.

If an arbitration agreement does not provide the relevant rules for the nomination of the arbitrators, the Arbitration Act requires the parties to supplement the arbitration agreement by entering a submission agreement. If a party refuses to execute the submission agreement, the court may intervene at the request of one of the parties, rendering a decision replacing the submission agreement.

Arbitration Tribunal

The Arbitration Act provides that any legally capable individual trusted by the parties can act as an arbitrator. The parties have the autonomy to define the rules for the appointment of arbitrators or to adopt rules of an arbitral institution or other specialized body (Article 13). If the parties fail to specify the rules, the provisions of Article 13 govern the appointment. The parties, by mutual agreement, may not apply the rules of an arbitral institution that limits the choice of arbitrator(s).

Moreover, if one of the parties fails to appear at the hearing convened in order to execute the submission agreement, the judge has the authority to appoint a sole arbitrator (Article 7(VI)). Similarly, a judge also may appoint a substitute arbitrator where the agreement is silent on the rules for substituting an arbitrator (Article 16(II)).

Powers of Arbitration Tribunal

An arbitration tribunal has the power to order:

(1) Interim measures — An arbitration tribunal may grant interim measures and has the power to request a court to enforce interim measures it has ordered. For example, a court can compel a person to appear at arbitration, or it can order a party to pay costs in advance (Article 22).

(2) Urgent measures and power to confirm or overturn injunctive relief — Where urgent measures are required (for example, urgent injunctive relief), the parties may apply to a court to obtain relief if the arbitration proceedings have not commenced. Once the arbitration proceedings begin, an arbitrator has the power to confirm or overturn the relief granted by the court.
(3) Possibility of asking a state tribunal for injunctive relief — The relief would be invalid if the arbitral tribunal is not constituted within thirty days. Once the arbitral tribunal is constituted, it can modify the injunctive relief ordered by the state tribunal (Article 22-A/22-B).
(4) Production of evidence — A tribunal has the power to compel the production of such evidence (documentary or testimonial) as it deems necessary for resolving a dispute (Article 22).

Arbitrators must proceed with "impartiality", "independence", "competence", "diligence", and "discretion" (Article 13(VI)).

Intervention or Judicial Review

As a general rule, arbitrators are not subject to judicial review by the courts after a tribunal is duly constituted. A court may intervene when a party: refuses to submit to an arbitration agreement, makes a request for production of evidence, files for the annulment of an award, or files for the enforcement of an arbitral award.

Furthermore, Article 485(VII) of the Code of Civil Procedure provides that a court must dismiss a lawsuit without prejudice where the dispute in question falls within a valid arbitration agreement. The courts, however, are expected to carry out a *prima facie* assessment of the validity and existence of an arbitration agreement before dismissing a case. The Arbitration Act does not elaborate on the extent of this scrutiny. In practice, courts dismiss a case after the exchange of initial briefs though, in some instances, courts may further examine evidence or summon witnesses before dismissing a case.

The Arbitration Act recognizes the possibility of making use of the *carta arbitral*, which is a judicial cooperation institution for the arbitrator or arbitral tribunal to ask a state court to perform judicial acts within the territory under its jurisdiction. (Article 22-C). However, the "Arbitration Letter" is restricted to the act determined by the arbitrator.

Awards

Various rules govern the formation, issuance, and execution of arbitral awards, including time periods for making an award, rules for voting on an award, rules governing the rendering of dissenting opinions, and the mandatory contents of an award. Not every violation of these provisions will render an award null and void. Moreover, the updated Law recognizes the possibility of issuing partial arbitral awards (Article 23(1)).

Correction

The parties to arbitration may petition to correct an award for any material errors, obscurities, or contradictions within five days of receiving it (Article 30). According to the majority of Brazilian scholars, the right to request correction or clarification cannot be waived by parties' agreement or reference to institutional rules. If the arbitrators agree that correction or clarification is required, they can amend the award through a separate *erratum* within the time limit established by the Arbitration Act (ten days).

Challenging Award

The Arbitration Act provides two modes for challenging an award. The party challenging the award may file an application for setting aside the award under the procedure set out in Article 33 or claim the nullity of the award during the enforcement proceedings (Article 32). An award is null and void if:

(1) The submission to arbitration is null and void;
(2) It is rendered by a person that could not sit as an arbitrator;
(3) It does not comply with the requirements of Article 26;
(4) It does not fall within the terms of the arbitration agreement;
(5) It is proved that the decision was tainted by deceit, extortion, or passive corruption;
(6) It is rendered after the time limit, except as provided in Article 12(III) of the Arbitration Act (parties must give previous notice of the expiration of the time limit and grant ten additional days to the arbitrators for rendering the award);
(7) It disregards the principles listed in the second paragraph of Article 21, which are the right to be heard, equal treatment of the parties, impartiality of the arbitrator, and freedom of decision.

Enforcement of Award

The Arbitration Act provides various systems for the enforcement of domestic and international awards. Since the Arbitration Act abolished the requirement of judicial recognition for domestic awards, a party seeking enforcement of a domestic award is only required to submit the award to a court of original jurisdiction. The court then initiates the proceedings for enforcement of the award, which is similar to that of a final court decision.