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STEPS IN THE RIGHT DIRECTION

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Advances are being made in Brazil's arbitration and mediation legislation, but has sufficient progress been made for the country's legal framework to handle the ongoing construction boom, ask Jones Day partner Stephen O'Neal and associate James Egerton-Vernon, and Carmen Tiburcio, professor of private international law at the University of the state of Rio de Janeiro

Brazil, despite recent social unrest and an economic slowdown, is currently in the midst of a construction boom. Between 2012 and 2020 a total of US$809.4 billion is expected to be invested in the country's energy and oil and gas infrastructure and its telecommunications, sanitation and transport sectors (particularly its highways, railways, ports and airports). Until recently Brazil's judicial system was, however, arguably improperly equipped to deal with the concomitant increase in the amount of construction-related disputes that will, inevitably, accompany this construction boom. Brazil's courts, while generally considered free from the scourge of corruption, are subject to an administrative gridlock that can result in cases taking many years to resolve. In addition the country has yet to pass any kind of mediation law and the advances in international commercial arbitration brought about by Brazil's 1996 law on arbitration (Law No. 9307) have yet to be wholeheartedly accepted by the Brazilian judiciary. October 2013 saw notable new developments aimed at addressing these issues. First, on 1 October, a committee formed by the country's Ministry of Justice submitted to the Senate for its consideration and approval a draft mediation law covering court-based, non court-based and public entity-related mediation (the Judicial Mediation Bill). Second, only a day later, a special Brazilian Senate commission submitted to the Senate for its consideration and approval revisions to the 1996 Arbitration Law (Proposed Arbitration Law) as well as a new draft non court-based mediation law (Senate Commission Mediation Bill). Will this proposed legislation equip Brazil's legal community with the tools necessary for the country to cope with the wave of construction-related litigation it is likely to face over the coming years?

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Arbitration in Brazil: 17 years of steady progress

The seventeen years since the adoption of the Arbitration Law have been generally positive for the development of commercial arbitration, and therefore construction arbitration, in Brazil. The introduction of the Arbitration Law brought about a sea-change in the country's traditional wariness towards alternative dispute resolution. Brazilian courts began to recognise that properly issued arbitration awards were final and binding; all that remained for a foreign arbitral award to be enforced in Brazil was for it to be subject to "homologation" by a competent Brazilian court - a judicial procedure where only formal aspects of the award are reviewed. The Arbitration Law also permitted parties to agree to adopt the arbitration rules of an institutional arbitration body, whether Brazilian or foreign, while the place of arbitration could be outside of Brazil and the language of the arbitration could be a language other than Portuguese. Further positive developments include:

- In 2001 Brazil's Supreme Constitutional Court specifically acknowledged the constitutionality of the Arbitration Law, confirming the enforceability of arbitration clauses in commercial contacts.
- In 2002, the country ratified the New York Convention (which requires the courts of contracting states to give effect to private agreements to arbitrate and recognise and enforce arbitration awards made in other states).
- Initial concerns caused by delays in the recognition of foreign arbitral awards due to Brazil's ratification requirement were addressed in 2004 when the Superior Court of Justice (STJ) was granted sole competence to complete such reviews, a change that is reflected in the Proposed Arbitration Law.
- Brazil's 2004 Public-Private Partnership Law and the 2005 amendment to its Concessions Law specifically authorised the arbitration of disputes between public and private parties arising from transactions executed with the federal government, albeit subject to the unhelpful proviso that such arbitrations still had to be conducted in Portuguese and in Brazil.
- In 2012 Brazil's leading arbitral institution, the Brazil-Canada Chamber of Commerce adopted a new set of up-to-date arbitration rules while 2012 also saw the increased adoption of the Court of Arbitration for Sport's specialised dispute resolution clauses by commercial parties concluding commercial and infrastructure contracts related to the 2016 Olympics.
- The STJ has, to date, rendered four decisions permitting public entities to participate in arbitral proceedings, even where no express legal authorisation to do so had been granted.

These consistently positive developments have had tangible results. To name but one, the 2012 ICC Arbitration Bulletin confirmed that São Paulo is now ranked in the top 10 global cities for ICC arbitrations (the ICC is one of the world's leading commercial arbitration institutions).

The outlook for commercial arbitration in Brazil is not, however, uniformly rosy. Less positive developments include continued concerns surrounding administrative delays (sometimes of up to two years) caused by the foreign arbitration award ratification process and a 2012 decision by the São Paulo Court of Appeal to stay a London-based insurance arbitration on the grounds that the insurance contracts under which the dispute had arisen were not capable of resolution through arbitration.

Proposed arbitration reforms: evolution not revolution

The explanatory document submitted with the Proposed Arbitration Law confirms the intention of the drafters to preserve the main structure of the Arbitration Law while seeking simply to improve its text and extend the scope of its application. The Proposed Arbitration Law is thus evolutionary rather than revolutionary. The reforms touted in the Proposed Arbitration Law include, most notably for foreign construction companies, a provision specifically authorising public bodies to engage in the arbitration of disputes pertaining to "disposable rights" (ie purely

economic disputes, a definition which would encompass almost all construction arbitration disputes). Crucially, no mention is made of the PPP and Concession Law provisions limiting any public-private arbitration proceedings to being conducted in Portuguese and in Brazil. It is unclear whether the Proposed Arbitration Law would repeal these requirements or whether the proposed law would need to be read in conjunction therewith. If the former, this would be a particularly positive step for foreign companies engaging in construction projects in Brazil.

Further, a specific provision is proposed to preserve the parties' autonomy to appoint the arbitrators of their choice (rather than those arbitrators included on a particular institution's list), as well as a further provision permitting parties to request interim relief from the courts prior to the institution of arbitral proceedings (with the proviso that the power to amend any such interim relief would transfer to the arbitral tribunal once the arbitration proceedings have commenced).

Mediation in Brazil: starting from scratch

In contrast to the Proposed Arbitration Law, the Judicial and Senate Commission Mediation Bills are, given the absence of prior Brazilian mediation legislation, more revolutionary. The Senate Commission Mediation Bill, focusing on non court-based "extra-judicial" mediation, is intended to have a wide scope of application. It contains a provision subjecting all disputes to mediation. An initial mediation agreement is envisaged, which should be in writing, contain certain details about the parties, the mediator and the dispute, and which would be required even if a specific contractual provision for mediation proceedings were made. If the agreement contained a commitment not to commence court or arbitration proceedings for a minimum period, any court or arbitral tribunal would have to respect such provision. The overriding considerations during the mediation proceedings must be the autonomy of the parties and confidentiality. A duty of confidentiality will apply to the parties, their lawyers, their experts and any others who participate in the proceedings. This duty would extend to preventing the mediator from testifying in any subsequent court or arbitration proceedings and apply strictly to the parties in any subsequent such proceedings. Statements and admissions made during the mediation and documents prepared especially for the mediation will be deemed inadmissible in any arbitral or judicial proceedings. Crucially, the Senate Commission Bill includes a provision allowing the mediator to meet privately with each of the parties and confirming that any information gleaned through such meetings may not be revealed to the other party except with the express permission of the original party. A provision for online mediation is also proposed. Any agreement reached through mediation would have to be signed by all the parties and their lawyers. The parties could seek judicial ratification of any mediation agreement. Finally, a specific provision is included in the Senate Commission Bill permitting mediation between public entities and between a public and private entity.

The Judicial Mediation Bill, in contrast, addresses all forms of mediation. It contains separate sections for court-based, non court-based, public and online mediation. Similarly to the Senate Commission Bill it confirms that all disputes may be submitted to mediation. Any Judicial Mediation Bill mediator would be subject to the additional regulation of both institutional and statutory ethics codes as well as the same conflict of interest duties as public judges. The Judicial Bill also contains a further stipulation prohibiting mediators, for a period of two years following conclusion of any mediation proceedings, from representing or patronising any of the parties involved in the proceedings in which he or she has acted as mediator. The Judicial Mediation Bill also contains a general confidentiality requirement, except that it will not apply to public entities, or if the mediator learns of the execution, or imminent commission of, a crime. It also requires a written mediation agreement, with a notable extra stipulation permitting the courts to reduce the costs (presumably for both parties) of any court proceedings where mediation was previously (unsuccessfully) attempted.

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Helpful tools for construction arbitration

The three pieces of draft legislation discussed above would, in their current form, all assist Brazil in addressing the surge it is set to face in construction disputes. First, the Proposed Arbitration Law makes an important clarification for international construction firms: any uncertainty surrounding the ability of Brazilian public entities to enter into arbitration agreements for the resolution of purely economic disputes is definitively removed. Given the pervasive involvement of the state not only in preparations for Brazil's World Cup and Olympics, but also in many facets of the myriad infrastructure investment programmes currently underway in the country, this is crucial. Further, such is the complexity of many construction disputes that the pool of qualified arbitrators capable adequately of comprehending and assessing a particular controversy is necessarily limited. In such a context, including a provision confirming the parties' ability to appoint the specialist construction arbitrator of their choice is helpful. The only omission of note from the Proposed Arbitration Law is a provision stipulating a firm timetable within which the STJ must complete its ratification of foreign arbitral awards. While improvements to the ratification process have been made, the current process can still delay enforcement in Brazil of a validly granted foreign arbitration award for a period of up to two years; a delay that could be prohibitively costly for a major construction firm.

Second, the Senate Commission and Judicial Mediation bills amount, cumulatively, to a promising start in establishing mediation as a viable option for the resolution of construction disputes in Brazil. The single most important rule in mediation is that the proceedings be confidential – nothing said or done in the course of the mediation should be capable of being relied on as evidence in any subsequent court or arbitration hearing. Both draft mediation bills contain such provisions. The second most important rule in mediation proceedings is that what is said by one side to the mediator in confidence must not be passed on to the other party without consent. While the Senate Commission Bill contains specific language addressing this issue, it is unclear whether the confidentiality provisions contained in the Judicial Bill adequately address this concern. It is hoped that this issue will be clarified before some form of the bill becomes law. The significant savings, in both money and time, that would undoubtedly be made by construction firms working in Brazil if a mediation bill similar to the Senate and Judicial drafts is adopted are inestimable.

Not a panacea but further steps in the right direction

Overall therefore, the submission of these draft arbitration and mediation bills to the Senate is highly promising for foreign construction firms operating in Brazil; while not representing a panacea for Brazil's litigation ills, their adoption would certainly better equip Brazil's judiciary for the significant volume of construction disputes that is likely on the horizon.

Jones Day is licensed as a foreign legal consultancy in Brazil. All Brazilian legal analysis contained in this article was provided by Professor Tiburcio.

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