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Some Controversial Aspects of the New Brazilian Arbitration Law

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ARTICLE

SOME CONTROVERSIAL ASPECTS OF THE NEW BRAZILIAN ARBITRATION LAW

ARNOLDO WALD,* PATRICK SCHELLENBERG,** AND
KEITH S. ROSENN***

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I. INTRODUCTION

In 1996, Brazil adopted a new Arbitration Law.¹ This statute significantly improves Brazilian law with respect to arbitration. From the perspective of foreign investors or foreign firms doing business with Brazilian firms, three of the most important of the improvements instituted by the new law are: (1) clauses agreeing in advance to arbitrate future disputes are made specifically enforceable,² (2) the requirement that a foreign arbitral award be reduced to judgment in the country where rendered before it may be recognized by the Brazilian Supreme Court is eliminated,³ and (3) arbitration agreements are permitted to provide for effective service of process on a party resident or domiciled in Brazil by methods other than letter rogatory, such as service by registered mail.⁴ The new Arbitration Law has produced a substantial amount of scholarly commentary both in Brazil⁵ and abroad.⁶

1. Law No. 9.307, de 23 de Sept. 1996, 1996 Lex 2199 (translated by the authors in the Appendix to this article).

2. *Id.* art. 7.

3. *Id.* art. 35.

4. *Id.* art. 39, sole par.

5. E.g., PAULO BORBA CASELLA ET AL., *ARBITRAGEM: A NOVA LEI BRASILEIRA (9.307/96) E A PRAXE INTERNACIONAL* (Paulo Borba Casella coordenador 1996); ALEXANDRE FREITAS CÂMARA, *ARBITRAGEM* (1997); PAULO CÉSAR MOREIRA TEIXEIRA & RITA MARIA DE FARIA CORREA ANDREATA, *A NOVA ARBITRAGEM* (1997); BEAT WALTER RECHSTEINER, *ARBITRAGEM PRIVADA INTERNACIONAL NO BRASIL: DEPOIS DA NOVA LEI 9.307, DE 23.09.1996: TEORIA E PRÁTICA* (1997); TARCÍSIO ARAÚJO KROETZ, *ARBITRAGEM: CONCEITO E PRÁTICA* (1997); JOEL DIAS FIGUEIRA JÚNIOR, *ARBITRAGEM, JURISDIÇÃO E EXECUÇÃO* (2d ed. 1999); CARLOS ALBERTO CARMONA, *ARBITRAGEM E PROCESSO: UM COMENTÁRIO A LEI 9.307/96* (1998); IRINEU STRENGER, *COMENTÁRIOS À LEI BRASILEIRA DE ARBITRAGEM* (1998); CLÁUDIO VIANNA DE LIMA, *CURSO DE INTRODUÇÃO À ARBITRAGEM* (1999); PEDRO A. BAPTISTA MARTINS ET AL., *ASPECTOS FUNDAMENTAIS DA LEI DE ARBITRAGEM* (1999); *A ARBITRAGEM NA ERA DA GLOBALIZAÇÃO* (José Maria Rossani Garcez ed., 2d ed. 1999); BELIZÁRIO ANTÔNIO DE LACERDA, *COMENTÁRIOS À LEI DE ARBITRAGEM* (1998); Adriana Noemi Pucci, *A Arbitragem nos Países do Mercosul*, 738 REV. TRIB. 41 (Braz. 1997); Álvaro Villaça Azevedo, *Arbitragem*, 753 REV. TRIB. 11 (Braz. 1998); Caio Tácito, *Arbitragem nos Litígios Administrativos*, 210 REV. DIR. ADMIN. 111 (Braz. 1997); Celso Barbi Filho, *Cumprimento Judicial de Cláusula Compromissória na Lei No. 9.307/96 e Outras Intervenções do Judiciário na Arbitragem Privada*, 343 REV. FOR. 19 (Braz. 1998); Cláudio Armando Couce de Menezes & Leonardo Dias Borges, *Juízo Arbitral*, 342 REV. FOR. 37 (Braz. 1998); Cláudio Vianna de Lima, *A Lei de Arbitragem e o Art. 23, XV, da Lei de Concessões*, 209 REV. DIR. ADMIN. 91 (Braz. 1997); Demócrito Ramos Reinaldo Filho, *Aspectos do Instituto da Arbitragem*, 743 REV. TRIB. 64 (Braz. 1997); Diogo de Figueiredo Moreira Neto, *Arbitragem nos Contratos Administrativos*, 209 REV. DIR. ADMIN. 81 (Braz. 1997); Eduardo Grebler, *Arbitragem nos Contratos Privados*, 745 REV. TRIB. 59 (Braz. 1997); Francisco Wildo Lacerda Dantas, *Arbitragem: Considerações Sobre a Constitucionalidade da Lei 9.307/96*, 743 REV. TRIB. 741 (Braz. 1997); Joel Dias Figueira, Jr., *Da Constitucionalidade dos Arts. 6, 7, 41, e 42 da Lei de Arbitragem (9.307/96). A Questão a Inafastabilidade do Controle Jurisdicional*, 341 REV. FOR. 449 (1998); Leon

Unfortunately, the new law has been under a constitutional cloud for the past several years because of a controversial vote in a case that is still pending before the Brazilian Supreme Court.⁷

Arbitration has thus far been little used in Brazil. Prior to promulgation of the new Arbitration Law, only a few international arbitration cases involving Brazilian firms were submitted to the International Chamber of Commerce (ICC).⁸ Specific legislation was required to enable Brazil's Federal Government to agree to submit agreements involving the financing of its foreign debt to international arbitration.⁹ Certain banking and insurance claims

Frejda Szklarowsky, *Arbitragem e os Contratos Administrativos*, 209 REV. DIR. ADMIN. 105 (Braz. 1997); Paulo Cezar Pinheiro Carneiro, *Aspectos Processuais da Nova Lei de Arbitragem*, 339 REV. FOR. 127 (Braz. 1997); Pedro A. Batista Martins, *Questões que Envolveram a Homologação de Sentença Arbitral Estrangeira*, 344 REV. FOR. 225 (Braz. 1998); Roberto Rosas, *Arbitragem: Importância do seu Aperfeiçoamento. O Papel do Advogado*, 746 REV. TRIB. 78 (Braz. 1997); Sálvio de Figueiredo Teixeira, *A Arbitragem no Sistema Jurídico Brasileiro*, 333 REV. FOR. 181 (Braz. 1997).

6. José Carlos Barbosa Moreira, *La Nuova Legge Brasiliana Sull'arbitrato*, RIVISTA DEL L'ARBITRATO (Italy 1997); Hermes Marcelo Huck, *La Nouvelle Loi de L'arbitrage au Brésil*, BULL. ASSOC. SUISSE ARB. 570 (Switz. 1997); João Bosco Lee, *Le Nouveau Régime de L'arbitrage au Brésil*, REVUE DE L'ARBITRAGE 157 (Fr. 1997); Maruska Guerreiro Lopes, *La Nouvelle Loi Brésilienne sur L'arbitrage*, 37 DALLOZ AFFAIRES (Fr. 1997); Carlos Nehring Netto, *The New Brazilian Arbitration Law*, I.C.C. INT'L CT. ARB. BULL. (Special Supplement: International Commercial Arbitration in Latin America 1997); Horacio Falcão, *Recognition and Enforcement of Foreign Arbitral Awards: A New Chapter in Brazilian Arbitration History*, 8 AM. REV. INT'L ARB. 367 (1997); Alberto De Orleans e Bragança, *Enforcement of Arbitration Agreements in Latin America: Brazil*, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA: PAPERS PRESENTED AT THE 1998 VANCOUVER I.B.A. CONFERENCE 19-27 (Bernardo M. Cremades ed. 1999).

7. STF, Agravo Reg. em Sentença Estrangeira No. 5206-7 Reino da Espanha, Relator: Sepúlveda Pertence, Agravante: MBV Commercial & Export Management Establishment, Agravado: Resil Indústria e Comércio Ltda., 10.10.1996, *reprinted in* CLÁUDIO VIANNA DE LIMA, CURSO DE INTRODUÇÃO À ARBITRAGEM 335 (1999) [hereinafter *MBV Commercial & Export Management*]. This vote is discussed *infra* at Part II.

8. The majority of these cases involved public tenders or international contracts with government-controlled corporations. Typically, the non-Brazilian party resorted to arbitration. For example, construction of the Angra nuclear power station led to an ICC arbitration between Westinghouse (now CBS), an U.S. corporation, and Furnas, a Brazilian government-controlled company. See *Westinghouse v. Furnas*, Case No. 6320, Int'l Comm. Arb. Another ICC arbitration involved Brasoil, a subsidiary of the government-controlled oil company Petrobrás and a number of Libyan government-controlled companies. In addition, there were a number of cases involving Brazilian construction companies and the Iraqi government.

9. Arbitration was utilized in Brazilian National Treasury Bonds, issued pursuant to Decree-Law 1312 of February 15, 1974. Article 11 of this statute permitted the use of arbitration clauses in these bonds. The international agreements involving Brazil's foreign debt in the 1980s also contained clauses providing for arbitration of disputes in accordance with the law of the state of New York. A popular action was filed in the Brazilian courts to annul one of these agreements, known as the *Acordo Dois*, on the ground that it violated the Brazilian Constitution. In a lengthy decision of January 11, 1985, the Court of First Instance

were also resolved or are in the process of being resolved through international arbitration. Moreover, Brazil, like many countries during the late nineteenth and early twentieth centuries, resorted to arbitration to resolve certain border disputes with its neighbors, as well as between the various states of Brazil itself.¹⁰

Arbitration has seldom been used for domestic commercial disputes. This is because commercial arbitration rarely achieved its objective of speedy non-judicial dispute resolution.¹¹ Until recently, the sparse case law generally declared arbitral decisions null and void. Those exceptional cases that sustained arbitral awards required many years of litigation before the Brazilian courts ultimately denied the losing party's claim that the arbitration was unconstitutional or illegal.¹²

By simplifying and clearly defining the rules governing arbitration, the 1996 Brazilian Arbitration Law encourages a substantial increase in utilization of arbitration as a dispute resolution mechanism, both domestically and internationally. Nevertheless, the new statute has led to several theoretical disputes, some of which are still pending in the courts. The most basic dispute concerns the constitutionality of the statute.

II. THE CONSTITUTIONALITY OF THE NEW ARBITRATION LAW

The dispute about the constitutionality of the Arbitration Law has two parts: one general and the other specific. The first is whether the Arbitration Law conflicts with the constitutional guarantee that no law may prevent a person from seeking access to

dismissed the suit and recognized the validity of the arbitration clause. This decision was affirmed by the Federal Appellate Tribunal on October 14, 1998. See 4 REV. DIR. BANCÁRIO — (1999); JACOB DOLINGER, *A DÍVIDA EXTERNA BRASILEIRA: SOLUÇÃO PELA VIA ARBITRAL* 43-46 (1988). The Brazilian Bank of Social and Economic Development also includes an arbitration clause in its international loan contracts.

10. For the utilization of arbitration to delineate the borders of Brazil and its neighbors, see HILDEBRANDO ACCIOLY, *MANUAL DE DIREITO INTERNACIONAL PÚBLICO* 337-39 (1948). The boundaries between the state of Minas Gerais and Espírito Santo were resolved through arbitration, but the state of Espírito Santo appealed the decision to the courts. See 23 REV. FOR. 27 (Braz. 1915).

11. ARNOLDO WALD, *CURSO DE DIREITO CIVIL BRASILEIRO: OBRIGAÇÕES E CONTRATOS* 78 (7th ed. 1987).

12. For example, in the case of Agravo de Instrumento No. 52.181, Relator: Bilac Pinto, Agravante: União Federal, Nov. 14, 1973, 68 R.T.J. 382 (STF 1974), litigation concerning the constitutionality of a 1948 arbitral award was not resolved until the Supreme Court finally handed down its decision in 1973. This meant that the parties had to wait for nearly a quarter of a century for the award to become final.

the courts.¹³ This claim used to be made about arbitration in general. Today, however, it is recognized, both in the case law and in the doctrine, that the parties can freely agree to arbitrate their conflicts, and that the decisions of the arbitral panel will be judicially enforceable without relitigating the merits. Only when specially provided for by law might the courts exercise jurisdiction over arbitral disputes.

The second issue, which is still pending before the Brazilian Supreme Court, involves the constitutionality of Articles 6 and 7 of the new Arbitration Law. These articles permit the courts to compel arbitration, issuing a judgment that operates as a specific arbitral submission if the parties have failed to provide for the applicable procedural or substantive rules, or have failed to agree upon a specific arbitral submission.¹⁴ Where the arbitration clause is *en blanc*,¹⁵ as opposed to an institutional arbitration clause or one containing a detailed set of procedural rules to govern the arbitration, Brazil's Arbitration Law not only permits the judge to

13. See BRAZ. CONST. art. 5 (XXXV) ("No law may exclude from review by the Judiciary any injury or threat to a right.").

14. The relevant provisions of the Arbitration Law are:

Article 6 - If there has been no prior accord about the manner of instituting the arbitration, the interested party shall convey his intent to initiate the arbitration to the other party by mail or any other means of communication through which one can prove receipt, notifying the other party to sign the arbitral submission on a certain day, time, and place.

Paragraph 1 - If the notified party does not appear, or, after appearance refuses to sign the arbitral submission, the other party may move to compel arbitration, as provided in Article 7 of this Law, before the court that originally would have judged the cause.

Article 7 - If an arbitration clause exists and there is resistance to the institution of arbitration, the interested party may request service on the other party to appear in court for the purpose of enforcing the agreement, with the judge setting a special hearing for this purpose.

Paragraph 3. If the parties do not agree on the terms of the submission, the judge, after hearing the defendant, shall decide as to its contents at the hearing itself or in a period of ten days, respecting the provisions of the arbitration clause and taking into account the provisions of Articles 10 and 21, § 2, of this Law.

Paragraph 4. If the arbitration clause says nothing about the selection of arbitrators, the judge shall be responsible for ruling in this regard after hearing the parties. The judge may nominate a sole arbitrator for resolution of the dispute.

Paragraph 7. The judgment granting the request shall be regarded as the arbitral submission.

15. An arbitration clause is *en blanc* if it is silent about the way that the arbitrators are to be designated, whether directly or by reference to the rules of an arbitral institution. See PHILIPPE FOUCHARD ET AL., *TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL* 286 (1996).

determine the rules of arbitration, but also to designate the sole arbitrator or the chair of the arbitral panel if necessary. Thus, the Brazilian Arbitration Law permits the courts to fill in the components of the arbitral process that the parties left blank.

Minister Sepúlveda Pertence, former President of the Supreme Court, declared precisely these provisions of the Arbitration Law unconstitutional in a case involving a contract that contained no arbitration clause.¹⁶ Nevertheless, the parties agreed to submit this particular dispute to arbitration in Spain.¹⁷ The non-Brazilian party prevailed and requested homologation¹⁸ by the Brazilian Supreme Court of the arbitral award without first reducing the award to judgment in a Spanish court.¹⁹ The case law of the Supreme Court prior to enactment of the new Arbitration Law refused to confirm foreign arbitral awards unless first reduced to judgment.²⁰ This redundant requirement was specifically deleted by Article 35 of the Arbitration Law. Relying on the Supreme Court's long line of precedents, Minister Pertence initially voted to reject the request for homologation.²¹ An appeal was taken to the entire Supreme Court from his decision. On appeal, Minister Pertence reversed his initial decision and voted to homologate the arbitral award. He found no constitutional infirmity in the Arbitration Law's elimination of the requirement that a foreign arbitral award be reduced to judgment before it can be enforced in Brazil.²² Lamentably, Minister Pertence *sua sponte* went on to

16. See *MBV Commercial & Export Management*, *supra* note 7.

17. See *id.*

18. Homologation is a literal translation of the Portuguese legal term *homologação*, used in Brazil for the Supreme Court's order of confirmation or recognition (often referred to as *exequatur* in other civil law countries). Homologation is a prerequisite to enforcement of any foreign judgment, decree or award in Brazil. Since 1977, the Internal Rules of the Supreme Court delegate to the President of the Supreme Court the initial determination of whether to homologate foreign judgments and awards. An appeal may be taken from his decision to the entire Supreme Court. See *Regimento Interno do Supremo Tribunal Federal*, arts. 215 & 222, sole paragraph.

19. See *MBV Commercial & Export Management*, *supra* note 7.

20. SE No. 1.982, Relator: Thompson Flores, Requerente: Northern Int'l Co., Inc., June, 6, 1970, 54 R.T.J. 714 (STF 1970); SE No. 2.006, Relator: Oswaldo Trigueiro, Requerente: Otraco S.A., Nov. 18, 1971, 60 R.T.J. 28 (STF 1972); SE 2.178, Relator: Antonio Neder, Requerente: Centrofin S.A., June 30, 1979, 91 R.T.J. 48 (STF 1980); SE 2.476, Relator: Antonio Neder, Agravante: Société Nouvelle D'Affretement et de Courtage, Apr. 9, 1980, 95 R.T.J. 23 (STF 1981); SE No. 3.236, Relator: Alfredo Buzaid, Requerente: Schubert & Salzer Maschinenfabrik Aktiengesellschaft, May 10, 1984, 111 R.T.J. 157 (STF 1985); SE No. 3.707, Relator: Néri da Silveira, Requerente: N.V. Bunge, Sept. 21, 1988, 137 R.T.J. 132 (STF 1991).

21. See *MBV Commercial & Export Management*, *supra* note 7.

22. See *id.*

declare Articles 6 and 7 of the Arbitration Law unconstitutional because they permitted a judge to enforce *en blanc* arbitration clauses, an issue that was not before the Supreme Court.²³ He found that these provisions violate the Constitution by excluding the Judiciary from reviewing an injury or threat to a right.²⁴ His decision is a curious anachronism, which, if sustained by the full Supreme Court, will assure that arbitration will not be widely used in Brazil. By suggesting that clauses agreeing in advance to arbitrate are unenforceable, Minister Pertence's decision undoes one of the most valuable reforms made by Brazil's new Arbitration Law. It is far more common for parties to agree to arbitrate before a specific dispute arises than after, especially if one party perceives a tactical advantage to litigating the dispute. Moreover, Minister Pertence offers no convincing explanation of why agreeing to arbitrate in advance is not just as much as a waiver of one's right to access to the courts as a specific submission to arbitrate a particular dispute. After Minister Pertence's vote, other members of the Supreme Court requested the opportunity to study the proceedings. Although this occurred almost three years ago, thus far the Supreme Court has not yet decided this case.

In 1999, Minister Maurício Corrêa of the Supreme Court decided to homologate another foreign arbitral award that had not been reduced to judgment.²⁵ Unlike the prior case, this case involved a contract containing a clause agreeing to arbitrate under the rules of the Liverpool Cotton Association Limited. Even though the issue was also not necessary to his decision, he took the occasion to express his disagreement with the reasoning of Minister Pertence and to determine, *incidenter tantum*, that the new Arbitration Law is constitutional.²⁶ Minister Corrêa stated that the arbitration clause always has a determined or determinable objective. Therefore, the parties could agree to

23. *See id.*

24. *See id.* The Procurator General of the Republic, Dr. Geraldo Brindeiro, also raised the constitutionality of these two articles, but his well researched and well reasoned opinion concluded that these articles were constitutional. The complete text of the opinion Dr. Geraldo Brindeiro, Procurator General of the Republic, is reprinted in CLÁUDIO VIANNA DE LIMA, CURSO DE INTRODUÇÃO À ARBITRAGEM 325 (1999)

25. SE No. 5847-1, Relator: Maurício Corrêa, Requerente: Aiglon Dublin Ltd., Requeria: Teka Teelagem Kuenrich S.A., May 20, 1999 (STF) (unpublished decision, copy on file with authors). The case involved the homologation of a foreign arbitral award rendered under the aegis of the Liverpool Cotton Association Limited against a Brazilian company and in favor of an Irish company.

26. *See id.*

submit their disputes to arbitration in advance without violating the constitutional guarantee of access to the courts.²⁷ In practice, arbitration clauses in contracts always refer to potential litigation that can arise as a result of disputes concerning the contract in whole or in part. When a judge requires specific performance of an agreement to arbitrate in advance, he must determine whether the agreement to arbitrate corresponds to the intention of the parties. The judge is not substituting his own intent for that of the parties, but is merely carrying out their intentions as provided in the contractual agreement to arbitrate. To Minister Corrêa, judicial enforcement of an agreement to arbitrate no more deprived the parties of their right of access to the Brazilian courts than judicial enforcement of a forum selection clause invoking a foreign forum.²⁸ Relying on decisions, both before and after the new Arbitration Law, to show that the case law had evolved to permit Brazilian judges to act as a substitute for the parties in order to carry out certain legal acts they obligated themselves to perform, Minister Corrêa concluded that all articles of the new Arbitration Law were constitutional.²⁹

Neither the opinion of Minister Pertence nor that of Minister Corrêa raised any doubt about the constitutionality of Article 5 of the Arbitration Law, which deals with institutional arbitration.³⁰ Even before enactment of the new Arbitration Law, the Brazilian courts had held that because of Brazil's ratification of the Geneva Protocol of 1923, arbitration clauses in international contracts were enforceable without need for a specific arbitral submission.³¹ Therefore, any constitutional limitations upon

27. *See id.*

28. *See id.*

29. *See id.*

30. Article 5 provides:

If the parties refer in the arbitration clause to the rules of any institutional arbitral body or specialized entity, the arbitration shall be instituted and shall proceed in accordance such rules. Alternatively, the parties may establish in the clause itself or in any other document, the form agreed upon for the institution of the arbitration.

31. *See* RESP No. 616-RJ, *Companhia de Navegação Lloyd Brasileiro v. A.S. Ivarans Rederi*, Apr. 24, 1990, 37 R.S.T.J. 263 (1992). The Superior Tribunal of Justice stated, "In international contracts submitted to the Geneva Protocol, the arbitration clause allows for the arbitration agreement and, by itself, allows for the institution of the arbitration proceedings." *Id.* The case is noted by Paulo Borba Casella, *Arbitragem Internacional e Boa-Fé das Partes Contratantes*, 668 REV. TRIB. 239 (1991), and Jürgen Samtleben, *Procedimento Arbitral no Brasil—O Caso "Lloyd Brasileiro Contra Ivarans Rederi" do Superior Tribunal de Justiça*, 704 REV. TRIB. 276 (1994).

arbitration that may eventually be determined by the Brazilian Supreme Court should apply only to domestic arbitration cases where the contract is silent on the objective and form of the arbitration proceedings or the entity whose regulations will be applied.

In our opinion, there are no constitutional doubts about the validity of arbitration clauses that include all necessary elements to permit their enforcement and thus have no need for a court to fill in critical procedural elements left blank by the parties. Therefore, in the worse case scenario—affirmance of Minister Pertence's vote by a majority of the Supreme Court—the constitutional position taken by Minister Pertence should affect only *en blanc* arbitration clauses, which are relatively rare in domestic contracts. Moreover, the odds are good that a majority of the Supreme Court will disagree with Minister Pertence and uphold the constitutionality of the new Arbitration Law in its entirety.

III. INTERPRETATION OF THE LAW: THE ARBITRATION CLAUSE AND THE ARBTIRATION AGREEMENT

The second question is whether the parties must specifically sign an arbitral submission if the arbitration clause itself, either directly or indirectly, contains all of the elements necessary for the arbitration to take place. In other words, is simply executing a contract that contains an agreement to arbitrate all disputes arising in the future sufficient to require the parties to go to arbitration, or is execution of a specific submission to arbitration required, even if the arbitration clause itself is not *en blanc*. Prior to enactment of the new Arbitration Law, Brazilian law refused to compel specific performance of arbitration clauses in domestic contracts.³² Nevertheless, a few authors argued that such clauses were specifically enforceable.³³ Moreover, Brazilian jurists, who for

32. See RE No. 58.696, Relator: Luiz Gallotti, Recorrente: Bueromaschinen-Export G.m.b.H. Berlin Ltda., June 2, 1967, 42 R.T.J. 212 (STF 1967). See also CLÓVIS BEVILÁQUA, 4 COMENTÁRIOS AO CÓDIGO CIVIL 191 (8th ed. 1950); JOSÉ CARLOS BARBOSA MOREIRA, TEMAS DE DIREITO PROCESSUAL 210 (1980).

33. As early as 1934, Álvaro Mendes Pimentel wrote that if one of the parties refuses to sign the arbitration submission envisaged by the arbitration clause, the other has the choice of specific performance of the agreement to arbitrate or a claim for damages. See ALVARA MENDES PIMENTAL, DA CLÁUSULA COMPROMISSÓRIA NO DIREITO BRASILEIRO 76, n. 5 (1934). See also CARLOS ALBERTO CARMONA, ARBITRAGEM E PROCESSO: UM COMENTÁRIO À LEI 9.307/96, 87 (1998). The question was addressed in an interim ICC arbitral award of November 1984, Case No. 4695, 1 Y.B. COM. ARB. 149 (1986), which recognized that the

the most part were heavily influenced by long-established Italian case law in which arbitration was an institutionalized part of civil procedure, readily accepted judicial intervention in arbitral proceedings. Commercial law specialists and practitioners opposed this group because they were anxious to avoid what Bruno Oppetit has termed "judicialization of arbitration."³⁴ This group sought to have the autonomy of the parties prevail without excessive formalism and judicial intervention. Not surprisingly, they expressed doubts about the new Arbitration Law insofar as it made agreements to arbitrate in advance specifically enforceable without need for the parties to sign a specific submission after the dispute arose. The only exceptions some would permit were for arbitration agreements covered by the Geneva Protocol and those governed by institutional rules.³⁵

This position is no longer tenable under the new Arbitration Law. Article 7 provides that an action to compel arbitration may be brought against a reluctant party. Since it does not expressly exclude its application in cases set out in Article 5, one could argue that arbitration is possible only after an arbitration submission has been signed. This is the traditional, but outdated, position of a number of jurists.³⁶

arbitration clause without a specific arbitral submission was sufficient to justify arbitration in a case involving U.S. and Brazilian parties.

34. Bruno Oppetit, *Philosophie de L'arbitrage Commercial International*, 120 J. DROIT INT'L (CLUNET) 811 (1993). Oppetit writes:

A significant approximation has occurred between national tribunals and international arbitral tribunals. Over the course of continuous evolution, international arbitral tribunals have experienced a marked increase in their jurisdictionalization (*juridictionnalisation*). Their procedural framework has become heavily normative, formalism is increasingly emphasized, and procedural issues have multiplied. They have become increasingly institutionalized. About one hundred permanent arbitration centers have developed institutional capabilities. They have also become increasingly judicialized. The overlap between judicial and arbitral functions has become steadily blurred. There has been increasing use of provisional remedies and discovery in arbitration, as well as judicial review of the arbitrators' findings. Multiplication of these extra-arbitral or quasi-judicial procedures has the effect of reducing the risk of arbitrators deviating from procedure, a challenge to the future of arbitration as a viable institution.

Id. at 818 (authors' translation).

35. For two examples of the latter position, see JOSÉ CARLOS MAGALHÃES & LUIS OLAVO BAPTISTA, *ARBITRAGEM COMERCIAL* 58-68 (1986).

36. See José Carlos Barbosa Moreira, *supra* note 6, at 5; Maruska Guerreiro Lopes, *supra* note 6, at 1207; Celso Barbi Filho, *Cumprimento Judicial de Cláusula Compromissória na Lei 9.307/96 e Outras Intervenções do Judiciário na Arbitragem Privada*, 749 REV. TRIB. 104, 107 (1998).

According to systematic interpretation, however, it is evident that when the parties have utilized Article 5 to submit the dispute to the regulations of a specialized national or international entity, these procedural rules apply even with respect to the effectiveness of the arbitration agreement and serve as the functional equivalent of a specific submission. Therefore, the procedure for compelling submission set out in Article 7 applies only to *en blanc* arbitration clauses rather than institutional arbitration clauses, which are governed by Article 5.

This question is very significant with respect to agreements to arbitrate under the rules of the ICC or similar organizations. In such circumstances, the arbitration clause should be sufficient to compel arbitration even without a specific submission. Unnecessary judicial interference in implementation of arbitration proceedings prejudices the institution of arbitration. For practitioners, arbitration ceases to be a useful means of resolving conflicts if implementation of arbitration clauses requires resort to litigation. Instead of a technique for avoiding litigation, arbitration becomes a means for duplicative litigation in both the courts and arbitral tribunals. This defeats the basic purpose of arbitration, which is to resolve disputes quickly and efficiently without need for litigation.³⁷

Requirement of a specific submission does not mean that an arbitration clause is necessarily ineffective. Specific performance of the arbitration clause is still possible. Nevertheless, the judicial intervention required to formalize the specific submission means that arbitration loses two of its most important advantages: speed and secrecy. If Brazilian law still requires a

37. See Bruno Oppetit, *Justice Étatique et Justice Arbitrale*, in *ETUDES OFFERTES À PIERRE BELLET* 415 (1991).

The frequent recourse from arbitration to litigation that is apparent today could likely alter the fundamental nature of arbitral justice. "Arbitral justice"—and that is the sense of its historical evolution—has long striven to be recognized as a full-fledged and fully autonomous justice, especially in international matters. It was at the moment of such recognition, notably in France and in other countries, that arbitration attained its goal. The public powers (legislator and judge alike) are witnessing the deviation of arbitration towards the courts to the point where a kind "mixed justice" has developed, at least in certain types of arbitration. This deviation, for which the plaintiffs and their counsel are primarily responsible, could compromise the very utility and purpose of arbitration by increasing costs, drawing out the procedures, and by complicating matters in general.

Id. (authors' translation).

specific submission of every dispute after it is arisen, arbitration will continue to see little use in Brazil. Requiring the courts to intervene to finalize an arbitration agreement reduces the arbitration clause to a simple procedural agreement, whose effectiveness will always be subordinated to judicial intervention. Moreover, if a judge has to compel signing a specific submission, arbitration rules become far less flexible. The intent of the parties to arbitrate loses its significance if a court or the parties must determine the terms of a specific submission before arbitration may begin.

The law governing arbitration is partly public and partly private.³⁸ Since the powers of the arbitrators are derived from a private agreement, and since the arbitrators have only the powers voluntarily granted by the parties, the arbitration agreement sets forth both the arbitrators' jurisdiction and power.

A recent decision by the Tribunal of Justice of the State of São Paulo (the State's Supreme Court) held that a contractual clause agreeing to arbitrate any future disputes before the ICC was judicially enforceable without need for a specific submission.³⁹ After the parties had agreed to an ICC arbitration clause in an international contract, one, pleading the non-existence of the arbitral submission, disputed the jurisdiction of the arbitral tribunal. At the same time it asked a Brazilian judge to compel arbitration on the basis of Article 7 of the new Arbitration Law. The party contended that a judge had to select the president of the arbitral tribunal whenever the parties themselves disagree. The Court of the First Instance, in a preliminary decision, recognized that an arbitration clause did exist, and that the parties were obliged to arbitrate.⁴⁰ It held, however, that the ICC clause did not bind them because they had not signed an arbitral submission.⁴¹ This decision, which transformed an ICC arbitration clause into an *en blanc* clause, was appealed.

The Fifth Chamber of the Tribunal of Justice of the State of São Paulo reversed on the ground that this was an attempt to

38. See RÉNÉ DAVID, *L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL* 109 (1982).

39. See Agravo de Instrumento No. 124.217.4/0, Agravante: Renault do Brasil S.A., Agravados: Carlos Alberto de Oliveira Andrade, 16.09.1999 (unpublished decision, copy on file with authors) [hereinafter *Renault do Brasil S.A.*].

40. 36th Vara Cível do Foro Central da Comarca de São Paulo, No. 000.99.045649-8, June 25, 1999 (unpublished decision, copy on file with authors).

41. See *id.*

litigate in Brazilian courts a matter that should have been resolved by the ICC.⁴² The Tribunal of Justice held that the Brazilian courts lacked jurisdiction to examine preliminary questions about the effects of the arbitration clause.⁴³ Such matters could be heard only by the ICC in accordance with provisions of Article 8 of the Arbitration Law. This was the first pronouncement by a Tribunal of Justice on this matter and should have a significant impact upon interpretation of the new Brazilian Arbitration Law. The Reporter, Justice Rodrigues de Carvalho, pointed to the increasing importance of arbitration in the modern world and its utility in avoiding the delays that frequently occur in the courts.⁴⁴ He also emphasized the importance of internationalization of trade and commerce in accordance with the *lex mercatoria*.⁴⁵ Examining the evolution of arbitration in Brazil starting with the Portuguese Ordenações and the Brazilian Commercial Code of 1850, he pointed out that prior to the new Arbitration Law, arbitration was seldom used successfully in Brazil, as much for legal as for cultural reasons. He also noted the importance of Brazil's ratification of the Geneva Protocol of 1923, which provides that a clause in an international contract agreeing to arbitrate eliminates the requirement of signing a specific arbitral submission, thereby excluding the jurisdiction of the courts.⁴⁶

The Reporter rejected the argument that the new Arbitration Law is unconstitutional. On the contrary, he went out his way to praise the legislation for its respect for due process of law as well as the intent of the parties (*pacta sunt servanda*).⁴⁷ The courts are not totally excluded because the courts may refuse execution at the enforcement stage for reasons of public policy.

The Court's decision differentiated between an arbitration clause and a specific submission to arbitrate, as well as between complete arbitration clauses and those essentially *en blanc*. Where the arbitration clause provides for arbitration before an institution like the ICC, arbitration may take place independently of a specific submission of the dispute to arbitration. The Reporter relied upon comparative law to support his conclusion, particularly Italian Law

42. See *Renault do Brasil S.A.*, *supra* note 39.

43. See *id.*

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.*

No. 25 of January 5, 1994, and Articles 1442 through 1446 of the new French Code of Civil Procedure. He differentiated between complete arbitration clauses, which permit immediate arbitration without need for a preliminary specific submission, and *en blanc* arbitration clauses, which require a specific submission. Since the parties chose the rules of the ICC, the ICC is the only institution with jurisdiction to resolve the conflict. Therefore, no litigation can be brought before the Brazilian courts in this case.

Justice Silveiro Neto's comprehensive concurring opinion started with the proposition that the arbitration clause must be interpreted in good faith, in accordance with Article 85 of the Brazilian Civil Code.⁴⁸ Because the intent of the parties was clear, the dispute should be submitted to the ICC. In international arbitration, the parties can freely choose the applicable rules. Since the parties decided that the dispute should be submitted to the ICC, its rules establish the organization and operation of the arbitral tribunal.

This decision resolves several controversial issues of Brazilian international arbitration. First it recognizes that Article 7 of the Arbitration Law does not apply to cases covered by Article 5. Second it holds that arbitration can take place without need for a specific submission where the arbitration clause is complete. Third, the courts have a responsibility to make sure that the principle of the autonomy of the parties prevails in arbitral matters.

IV. RETROSPECTIVE APPLICATION OF THE NEW ARBITRATION LAW

Another question recently brought before the Brazilian courts is whether the new Arbitration Law applies to contracts signed prior to the Law's entry into force. A decision of the Tribunal of Alçada (an appellate court with limited jurisdiction) of the State of Minas Gerais decided this question in a dispute based upon an arbitration clause in an exportation contract signed in 1994.⁴⁹ The creditor resorted to the courts rather than

48. This Article, which corresponds to Article 1156 of the French Civil Code, states: "In the declaration of intention, it is necessary to determine what were the intentions of the parties rather than the literal meaning of the terms." C.C. art. 85 (Braz.).

49. Decision of the Third Civil Chamber of the Court of Alçada, the State of Minas Gerais, dated June 3, 1998, in the *Apelação Civil* No. 254.852-9, published in excerpt form in

arbitration, invoking legislation in force at the time of the signing of the contract that did not allow for specific performance of the arbitration clause. The Court of the First Instance permitted the lawsuit to proceed, thereby contravening the new Arbitration Law. In a decision rendered on June 3, 1998, the Third Chamber of the Tribunal de Alçada de Minas Gerais modified the decision below, recognizing that the arbitration clause prevented a party from resorting to the courts prior to arbitration.⁵⁰ Only causes for annulment of arbitration or judicial interference set out in the Law could prevent this result. The Court's decision stated:

The simple existence of any form of arbitration agreement established by Law No. 9.307 - the arbitration clause or specific submission - results in the judge, from the moment it was alleged by the other party, deeming resort to the courts as non-available. Neither of the contracting parties, without the consent of the other party, can turn his back on an agreement previously made that requires potential conflicts to be submitted to arbitration.

With respect to strictly procedural matters of arbitration, that the arbitration clause was drafted prior to the entry into force of Law No. 9.3407 of 1996 has no importance. Under the terms of Art. 1211 of the Code of Civil Procedure, a rule of procedure applies immediately and therefore, must be applied to litigation in progress after the entry into force of the new law.⁵¹

Thus, the decision stands for the proposition that the new Arbitration Law will be applied retrospectively when problems with respect to arbitration are raised after its entry into force.

V. CONCLUSIONS

Jean Cruet claimed that society often changes the law, but rarely does the law change society. Nevertheless, enactment of Brazil's new Arbitration Law signifies a true cultural revolution whose significance is only now being recognized by the judiciary. In developing countries like Brazil, facilitation of alternative

the Journal da Associação dos Advogados de São Paulo, No. 2088.

50. *See id.*

51. *Id.*

methods of conflict resolution is an important cultural and social victory that promotes national economic development.⁵² In the past, commentators have noted that Brazil tended not to apply innovative laws because they were not accepted by society, particularly in the transitional phase. Significantly, the Brazilian government's decision to modernize arbitration law, which was due to the personal efforts of the Vice-President of the Republic, Professor Marco Maciel, were approved relatively quickly by the Brazilian Congress. Under the pressures of huge caseloads, Brazilian courts are abandoning their traditional hostility to arbitration and recognizing its increasing importance. They are thereby contributing to modernization of law in a country that has become the land of the present rather than "the land of the future," as Stefan Zweig described Brazil sixty years ago.⁵³

Today Brazil is a full member of the international community and the leader of economic integration in South America. After successfully curbing chronic and severe inflation in the past five years, Brazil is now attempting to rationalize its legal system to ensure that both Brazilian and foreign parties are assured legal security and access to speedy dispute resolution mechanisms. This presupposes, among other things, the facilitation of arbitration as an efficient method of resolving conflicts. From an economic perspective, legal stability and a well-functioning legal system constitute conditions for attracting and maintaining investment. From a human rights perspective, legal stability and judicial efficiency constitute the premises of individual liberty and equality of citizens and companies. In this real revolution occurring through the legal world, Brazil's new Arbitration Law and recent case law have an important role to play.

52. One of the elements of development is the reform of legal institutions. RAYMOND ARON, DIX-HUIT LEÇONS SUR LA SOCIÉTÉ INDUSTRIELLE 204 (1962); Edmundo Jarquín & Fernando Carrillo Florez, *Introduction*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA v-xii (Edmundo Jarquín & Fernando Carrillo Florez eds. 1998).

53. STEFAN ZWEIG, BRAZIL: LAND OF THE FUTURE (1943).

APPENDIX

**BRAZIL'S NEW ARBITRATION LAW
LAW NO. 9.307 OF SEPTEMBER 23, 1996****CHAPTER I
GENERAL PROVISIONS**

Article 1. Persons capable of contracting can utilize arbitration to resolve disputes relating to arbitrable patrimonial rights.

Article 2. At the discretion of the parties, arbitration may be by law or by equity.

§ 1. The parties are free to choose the rules of law that will be applied in the arbitration, so long as there is no violation of good customs and public policy.

§ 2. The parties may also agree that arbitration shall take place on the basis of general principles of law, uses and customs, and international rules of commerce.

**CHAPTER II
OF THE AGREEMENT OF ARBITRATION AND ITS
EFFECTS**

Article 3. The interested parties may submit resolution of their disputes to the arbitrator through an arbitration agreement (*convenção de arbitragem*), thus understood as an arbitration clause (*cláusula compromissória*) and a specific arbitral submission (*compromisso arbitral*).

Article 4. The arbitration clause is an agreement through which the parties to a contract obligate themselves to submit to arbitration the disputes that may arise with respect to such contract.

§ 1. The arbitration clause must be stipulated in writing and may be inserted in the contract itself or in a separate document to which it refers.

§ 2. In contracts of adhesion, an arbitration clause will only be effective if the adhering party takes the initiative in instituting the arbitration or expressly agrees to its institution, provided that this is in writing in an attached document or in bold-faced type, with a signature or special endorsement for this clause.

Article 5. If the parties refer in the arbitration clause to the rules of any institutional arbitral body or specialized entity, the arbitration shall be instituted and shall proceed in accordance such rules. Alternatively, the parties may establish in the clause itself or in any other document, the form agreed upon for the institution of the arbitration.

Article 6. If there has been no prior accord about the manner of instituting the arbitration, the interested party shall convey his intent to initiate the arbitration to the other party by mail or any other means of communication through which one can prove receipt, notifying the other party to sign the arbitral submission on a certain day, time, and place.

Sole paragraph. If the notified party does not appear, or, after appearance refuses to sign the arbitral submission, the other party may move to compel arbitration, as provided in Article 7 of this Law, before the court that originally would have judged the cause.

Article 7. If an arbitration clause exists and there is resistance to the institution of arbitration, the interested party may request service on the other party to appear in court for the purpose of enforcing the agreement, with the judge setting a special hearing for this purpose.

§ 1. The plaintiff shall indicate with precision the purpose of the arbitration, backing up his request with the document containing the arbitration clause.

§ 2. When the parties appear at the hearing, the judge shall first attempt to conciliate the dispute. If unsuccessful, the judge shall try to induce the parties to enter into an arbitral submission by mutual accord.

§ 3. If the parties do not agree on the terms of the submission, the judge, after hearing the defendant, shall decide as to its contents at the hearing itself or in a period of ten days, respecting the provisions of the arbitration clause and taking into account the provisions of Articles 10 & 21, § 2, of this Law.

§ 4. If the arbitration clause says nothing about the selection of arbitrators, the judge shall be responsible for ruling in this regard after hearing the parties. The judge may nominate a sole arbitrator for resolution of the dispute.

§ 5. The plaintiff's absence, without a good and just reason, at the hearing designated for the signing of the arbitral submission implies the extinction of the proceeding without judgment on the merits.

§ 6. If the defendant fails to appear at the hearing, the judge, after hearing the plaintiff, shall rule with respect to the contents of the submission and shall nominate a sole arbitrator.

§ 7. The judgment granting the request shall be regarded as the arbitral submission.

Article 8. An arbitration clause is autonomous in relation to the contract in which it is inserted, so that the nullity of the latter does not necessarily imply the nullity of the arbitration clause. Sole Paragraph. It shall be up to the arbitrator to decide, *ex officio* or by request of the parties, questions with respect to the existence, validity and efficacy of the agreement to arbitrate and the contract that contains the arbitration clause.

Article 9. The arbitral submission is a contract by which the party submit a dispute to arbitration before one or more persons. The submission may be judicial or extra-judicial.

§ 1. The judicial arbitral submission shall be celebrated in accordance with the pleadings before the judge or tribunal where the demand has been brought.

§ 2. The extra-judicial arbitral submission shall be celebrated in a private written document signed by two witnesses, or by public instrument.

Article 10. The arbitral submission must contain:

I - the name, profession, civil status and domicile of the parties;

II - the name, profession, and domicile of the arbitrator or arbitrators, or if the case, the identification of the entity to which the parties have delegated selection of the arbitrators; III - the subject matter that will be the purpose of the arbitration; and

IV - the place where the arbitral "judgment" shall be rendered.

Article 11. The arbitral submission may also contain:

I - the place or places where the arbitration will take place;

II - the authorization to the arbitrator or arbitrators to decide in accordance with equity, if that has been agreed upon by the parties;

III - the period for rendering of the arbitral "judgment";

IV - the indication of the national law or the corporate rules applicable to the arbitration, when the parties have agreed thereon;

V - the declaration of liability for payment of the fees and the expenses of the arbitration;

VI - the fixing of the fees of the arbitrator or arbitrators.

Sole Paragraph. If the parties determine the fees of the arbitrator or arbitrators in the arbitral submission, this shall constitute an extra-judicial executory instrument; if there is no such stipulation, the arbitrator may request the court that originally had jurisdiction to judge the case to fix his fee by judgment.

Article 12. The arbitral submission is extinguished if:

I - any of the arbitrators, before accepting the nomination, excuses himself so long as the parties expressly declare that they will not accept a substitute;

II - any of the arbitrators dies or finds it impossible to vote, so long as the parties expressly declare they will not accept a substitute; or

III - the period referred to in Article 11, §3 has expired, provided the interested party has notified the arbitrator, or the president of the arbitral tribunal, giving him a period of ten days to prepare and present the arbitral "judgment."

CHAPTER III OF THE ARBITRATORS

Article 13. The arbitrator may be any capable person who has the confidence of the parties.

§ 1. The parties shall select one or more arbitrators (always an odd number), and they may also nominate the respective alternates.

§ 2. When the parties select an equal number of arbitrators, the arbitrators shall then be authorized to select one more arbitrator. If there is no agreement, the parties shall request a court that could have decided the cause originally to nominate the arbitrator. When proper, the procedure provided for in Article 7 of this Law shall apply.

§ 3. The parties may, by common accord, establish the procedure for the choice of arbitrators or adopt the rules of an institutional arbitral body or specialized entity.

§ 4. After the various arbitrators have been selected, they shall, by majority vote, elect the president of the arbitral tribunal. If there is no consensus, the oldest shall be designated president.

§ 5. If deemed convenient, the arbitrator or president of the tribunal shall designate a secretary, who may be one of the arbitrators.

§ 6. In the discharge of his functions, the arbitrator shall proceed with impartiality, independence, competence, diligence and discretion.

§ 7. The arbitrator or arbitral tribunal may determine that the parties shall advance sums for the expenses and procedures that are judged necessary.

Article 14. Persons are prevented from functioning as arbitrators if they have any of the relationships with the parties or with the dispute submitted to them that are characterized as causes for disqualification or suspicion of judges. When suitable, the same duties and responsibilities provided for in the Code of Civil Procedure shall be applied to arbitrators.

§ 1. Persons selected to act as arbitrators, prior to accepting that function, have the duty to reveal any facts that suggest a justifiable doubt as to their impartiality and independence.

§ 2. An arbitrator may only be recused for a motive occurring after his selection. He may, however, be recused for a motive occurring prior to his selection when:

- a) he was not nominated directly by a party; or
- b) the motive for recusing the arbitrator became known after his selection.

Article 15. A party who wants to argue for recusal of an arbitrator shall present, in the terms of Article 20, the respective exception⁵⁴ directly to the arbitrator or to the president of the arbitral tribunal, setting forth his reasons and presenting the pertinent proof.

Sole paragraph. If the exception has been accepted, the suspect arbitrator shall be dismissed or disqualified, and shall be substituted in the form of Article 16 of this Law.

Article 16. If the arbitrator excuses himself prior to acceptance of the nomination, or dies after acceptance, making it impossible to exercise his functions, or is recused, his alternate indicated in the submission, if there is one, shall assume his place.

§ 1. If no alternate has been indicated for the arbitrator, one shall apply the rules of the international arbitral body or specialized entity, if invoked by the parties in the agreement to arbitrate.

§ 2. If the agreement to arbitrate says nothing and the parties have not reached an agreement on the selection of the arbitrator to be substituted, the interested party shall proceed in the form provided for in Article 7 of this Law, so long as the parties have expressly declared in the agreement to arbitrate they will accept no substitute.

Article 17. When exercising their functions or because of them, the arbitrators shall be deemed equivalent to public functionaries for the purposes of the criminal law.

54. In Brazilian law, an exception is a motion used to assert lack of jurisdiction or to seek removal of the judge because of actual or perceived bias. It can be filed at any stage of the proceedings.

Article 18. The arbitrator is the judge of the facts and the law, and the "judgment" that he renders shall not be subject to recourse or homologation by the Judiciary.

CHAPTER IV OF ARBITRAL PROCEDURE

Article 19. The arbitration shall be deemed to have been instituted when the arbitrator accepts his selection, if he is the sole arbitrator, or by all, if there are several.

Sole Paragraph. Once the arbitration has been instituted and it is understood that the arbitrator or the arbitral tribunal must explicate a question provided in the arbitration agreement, there shall be elaborated, jointly by the parties, an addendum, signed by all, which shall become an integral part of the arbitration agreement.

Article 20. The party who intends to argue a question relating to the competence, bias or disqualification of the arbitrator or arbitrators, as well as nullity, invalidity or inefficacy of the arbitration agreement, must do so at the first opportunity that he has to present it after institution of the arbitration.

§ 1. If the argument of bias or disqualification is accepted, the arbitrator shall be substituted in the terms of Article 16 of this Law. If the [argument as to] incompetence of the arbitrator or the arbitral tribunal, as well as [a contention as to] nullity, invalidity or inefficacy of the arbitration agreement is recognized, the parties shall be remitted to the court competent to judge the cause.

§ 2. If the argument is not accepted, the arbitration will proceed normally, without prejudice to the examination of the decision by the competent court if a subsequent demand dealt with in Article 33 of this Law is brought.

Article 21. Arbitration shall obey the procedures established by the parties in the arbitration agreement, which may incorporate the rules of an institutional arbitral body or specialized entity. The parties, however, may delegate regulation of the procedure to the arbitrator himself or to the arbitral tribunal.

§ 1. If there has been no stipulation with respect to procedure, it shall be up to the arbitrator or arbitral tribunal to discipline the matter.

§ 2. The principles of the adversary system, equality of the parties, impartiality of the arbitrator and of his free conviction shall always be respected in the arbitral proceeding.

§ 3. The parties may take positions through intermediation of a lawyer, always respecting the power to designate who represents them or assist them in the arbitral proceeding.

§ 4. It shall be up to the arbitrator or arbitral tribunal, at the beginning of the procedure, to try to conciliate the parties, applying if applicable, Article 28 of this Law.

Article 22. As requested by the parties or *ex officio*, the arbitrator or the arbitral tribunal may depose the parties, hear witnesses and determine the carrying out of expert investigations or other proof that he judges necessary.

§ 1. Depositions of the parties and witnesses shall be taken at a place, day and hour previously communicated in writing and shall be recorded and signed by the deponent or his attorney and by the arbitrators.

§ 2. If a party fails to appear as notified for taking of one's personal deposition without just cause, the arbitrator or the arbitral tribunal shall take into account the behavior of the party at fault in rendering "judgment". If a witness fails to appear, in such circumstances the arbitrator or the president of the arbitral tribunal shall request the judicial authority to call in the reluctant witness, upon proof of the existence of the arbitration agreement.

§ 3. The default of a party does not prevent rendering of the arbitral "judgment."

§ 4. Except for the provision of § 2, if there is a need for coercive or provisional measures, the arbitrators may request them from the court that would originally be competent to judge the cause.

§ 5. If during the arbitral procedure, an arbitrator is substituted, the alternate shall have discretion to repeat the evidence already produced.

CHAPTER V OF THE ARBITRAL “JUDGMENT”

Article 23. The arbitral “judgment” shall be rendered in the period stipulated by the parties. If this has not been agreed to, the period for presentation of the judgment is six months, starting from the institution of the arbitration or the substitution of the arbitrator.

Sole paragraph. The parties and the arbitrators may extend the stipulated period by mutual agreement.

Article 24. The decision of the arbitrator or arbitrators shall be expressed in a written document.

§ 1. When there are several arbitrators, the decision shall be taken by majority. If there is no majority agreement, the vote of the president of the arbitral tribunal shall prevail.

§ 2. The arbitrator who differs with the majority may declare his vote separately if he wishes.

Article 25. If in the course of the arbitration a controversy about non-arbitrable rights arises, and if, depending upon the decision, their existence is verified, the arbitrator or the arbitral tribunal shall remit the parties to the competent authority of the judiciary, suspending the arbitral proceeding.

Sole paragraph. Once the prejudicial question has been resolved and the final non-appealable judgment has been added to the record, the arbitration will proceed normally.

Article 26. The mandatory requirements of an arbitral “judgment” are:

- I - the report, which shall contain the names of the parties and a summary of the dispute;
- II - the basis of the decision, which shall analyze the questions of fact and law, expressly mentioning if the arbitrators are judging in accordance with equity;
- III - the disposition in which the arbitrators resolve the questions submitted to them and establish a period for compliance with the decision, if this is the case; and
- IV - the date and the place where it was rendered.

Sole paragraph. The arbitral "judgment" shall be signed by the arbitrator or all the arbitrators. It shall be up to the president of the arbitral tribunal, in the case in which one or more of the arbitrators is unable or does not wish to sign the judgment, to certify such fact.

Article 27. The arbitral "judgment" shall decide on the liability of the parties as to the cost and expenses of the arbitration, as well as the money stemming from litigation in bad faith, if this was the case, respecting the provisions of the arbitration agreement, if there is one.

Article 28. If, in the course of arbitration, the parties reach an agreement as to the dispute, the arbitrator or the arbitral tribunal shall, at the request of the parties, declare such facts through an arbitral "judgment," which contains the requisites of Article 26 of this Law.

Article 29. Once the arbitral "judgment" has been rendered, it shall put an end to the arbitration. The arbitrator or the president of the arbitral tribunal should send a copy of the decision to the parties by mail or any other means of communication, with a receipt to prove it, or even deliver it directly to the parties upon receipt.

Article 30. In a period of five days, starting from the receipt of notification or personal knowledge of the arbitral "judgment," an interested party, via communication to the other party, may request the arbitrator or arbitral tribunal to:

I - correct any material error in the arbitral "judgment";

II - clarify any obscurity, doubt or contradiction in the arbitral "judgment," or make a pronouncement on a point omitted that should be manifested in the decision.

Sole paragraph. The arbitrator or the arbitral tribunal shall decide, in a period of ten days, amending the arbitral "judgment" and notifying the parties in the form of Article 29.

Article 31. The arbitral "judgment" produces the same effects as a judgment rendered by the courts between the parties and their successors. If it condemns one of the parties, it shall constitute an executory instrument.

Article 32. The arbitral judgment is null if:

- I - the submission was null;
- II - it was issued by someone who could not be an arbitrator;
- III - it does not contain the requirements of Article 26 of this Law;
- IV - it is rendered outside the limits of the arbitration agreement;
- V - it does not decide the dispute submitted to arbitration;
- VI - it is proven that it was rendered by prevarication, graft, or passive corruption;
- VII - it is rendered outside of the period, respecting the provision of Article 12 (III) of this Law; or
- VIII - the principles dealt with in Article 21, section 2 of this Law were disrespected.

Article 33. An interested party shall plead to the competent court to decree the nullity of the arbitral judgment in cases provided for by law.

§ 1. The complaint for decreeing the nullity of the arbitral judgment shall follow common procedures provided for in the Code of Civil Procedure and should be filed within a period of up to ninety days after receipt of notification of the arbitral “judgment” or its amendment.

§ 2. The judgment that grants the request shall:

- I - decree the nullity of the arbitral “judgment,” in the cases provided for in Article 32 subparagraphs I, II, VI, VII and VIII;
- II - shall determine that the arbitrator or the arbitral tribunal render a new award in other circumstances.

§ 3. If there has been judicial execution, decreeing the nullity of the arbitral “judgment” may also be argued through the action of embargo of the debtor in conformity with Articles 741 et seq. of the Code of Civil Procedure.

CHAPTER VI

RECOGNITION AND EXECUTION OF FOREIGN ARBITRAL JUDGMENTS

Article 34. The foreign arbitral "judgment" shall be recognized or executed in Brazil with efficacy in the domestic law in conformity with international treaties and in the absence thereof, strictly in accordance with the terms of this Law.

Sole paragraph. A foreign arbitral "judgment" shall be considered to be that which has been rendered outside of the National Territory.

Article 35. To be recognized or executed in Brazil, the foreign arbitral "judgment" is subject solely to homologation by the Supreme Federal Tribunal.

Article 36. The provisions of Article 483 and 484 of the Code of Civil Procedure shall apply to homologation for recognition or execution of a foreign arbitral "judgment" when suitable.

Article 37. The homologation of a foreign arbitral "judgment" shall be requested by the interested party. The initial complaint should contain the requirements of procedural law in conformity with Article 282 of the Code of Civil Procedure and shall necessarily be accompanied by:

I - the original of the arbitral "judgment" or a duly certified copy, authenticated by the Brazilian Consulate and accompanied by an official translation;

II - the original of the arbitration agreement or a duly certified copy, accompanied by an official translation.

Article 38. Homologation may only be denied for recognition or execution of a foreign arbitral "judgment" when the defendant shows that:

I - the parties lacked capacity in the arbitration agreement;

II - the arbitration agreement was invalid according to the law to which the parties submitted themselves, or, in default of such showing, by virtue of the law of the country where the arbitral "judgment" was rendered;

III - there was no notification of the designation of the arbitrator or of the arbitration proceeding, or the principle of the adversary system was violated, making an ample defense impossible;

IV - the arbitral "judgment" exceeded the limits of the arbitration agreement, or it was not possible to separate the part that exceeded it from that which was submitted to arbitration;

V - the institution of the arbitration was not in accordance with the arbitral submission or the arbitration clause;

VI - the arbitral judgment has not yet become obligatory for the parties, has been annulled, or, it has been suspended by a court of the country where the arbitral judgment was rendered.

Article 39. Homologation shall also be denied for recognition or enforcement of the foreign arbitral "judgment" if the Supreme Federal Tribunal determines that:

I - according to Brazilian law, the object of the dispute was not susceptible to being resolved by arbitration;

II - the decision offends national public policy.

Sole paragraph. Effective service on a party resident or domiciled in Brazil, in the form of the agreement to arbitrate or the procedural law of the country where the arbitration was carried out (including allowance of service by mail with unequivocal proof of receipt), shall not be considered offensive to national public policy, so long as the Brazilian party is assured ample time for the exercise of the right of defense.

Article 40. Denial of homologation for recognition or execution of the foreign arbitral "judgment" for formal defects does not prevent the interested party from renewing the request once the presented defects have been cured.

CHAPTER VII
FINAL PROVISIONS

Article 41. Articles 267, subparagraph VII; 301, subparagraph IX; and 584, subparagraph III, of the Code of Civil Procedure shall have the following wording:

“Article 267(VII) - by the agreement of arbitration.”

“Article 30(IX) - “agreement of arbitration.”

“Article 584(III) - the arbitral “judgment” and the judgment homologating the settlement or conciliation.”

Article 42. Article 520 of the Code of Civil Procedure shall have another subparagraph with the following wording:

“Article 520(VI) - to grant the request for the institution of arbitration.”

Article 43. This Law shall enter into force sixty days after the date of its publication.

Article 44. The following provisions and any other provisions to the contrary are revoked: Articles 1037 to 1048 of Law No. 3.071 of January 1, 1916, the Brazilian Civil Code; Articles 101 and 1072-1102 of Law No. 5.869 of January 11, 1973, the Code of Civil Procedure.

Fernando Henrique Cardoso - President of the Republic
Nelson A. Jobim