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# General Chapter:

1. **Sovereign Immunity in Practice: Caution Prevails** - Greg Lascelles & Mikhail Vishnyakov, SJ Berwin LLP

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I. LITIGATION

1. Preliminaries

1.1 What type of legal system has Brazil got? Are there any rules that govern civil procedure in Brazil?

The Brazilian legal system is based on the codified (Roman) Law. The Judges are bound to follow only the codified laws and, unlike the Common Law systems, the Lower Courts are not obliged to follow the decisions rendered by the Higher Courts, which are used only as mere guidance. The Code of Civil Procedure (Law No. 5,869/1973) contains the main rules of procedures which govern civil court disputes.

1.2 How is the civil court system in Brazil structured? What are the various levels of appeal and are there any specialist courts?

The structure of the judiciary framed in the Brazilian Constitution organises the judiciary branch into Federal – specialised or common – and State Courts, each with different jurisdiction. Unless one of the parties is a federal authority or entity, disputes are tried at the State Courts. The right of appeal to Second Instance is ensured by the Federal Constitution in Federal and State Courts.

In specific cases, determined by Law, the parties can also appeal in a Higher Instance (Federal Supreme Court and Superior Court of Justice, courts responsible for deciding matters of a constitutional and legal nature, respectively, already tried at the Second Instance Courts).

1.3 What are the main stages in civil proceedings in Brazil? What is their underlying timeframe?

The standard civil proceedings at State or Federal Courts start with the filing of the complaint at the Lower Civil Courts. A defendant has the right to file an answer to the complaint. The Judge might establish a conciliatory hearing and if the conciliation is successful, the proceeding is finished. If the parties decide not to conciliate, the case will proceed to a phase of production of evidence (i.e. filing of extra documents, witnesses depositions and production of expert examination).

After the production of evidence and with all the necessary elements in hand, the Judge will finally decide on the case. This court decision, as explained before, can be the subject of an appeal to the Court of Appeals.

The First Instance phase may last from one to five years, depending on the scope and length of the evidence in the production phase.

1.4 What is Brazil’s local judiciary’s approach to exclusive jurisdiction clauses?

According to Decree-Law No. 4657/42 (the Law of Introduction to the Civil Code – “LICC”) and the Code of Civil Procedure, Brazilian courts have jurisdiction when: (i) the defendant, whatever his/her nationality, is domiciled in Brazil; (ii) the obligation is to be performed in Brazil; or (iii) the actions result from a fact occurred or and act performed in Brazil. This jurisdiction, however, is considered as non-exclusive (concurrent) jurisdiction.

Brazilian courts have exclusive jurisdiction to decide on issues related to real property located in Brazil; and to examine and decide on probate proceedings of a deceased person’s Brazilian estate, even if the deceased was a foreigner and resided outside the country. Furthermore, as a general rule, Brazilian courts have exclusive jurisdiction to decide on actions relating to international contracts entered into by Brazilian federal, state and municipal government entities. This rule may not be applicable if the relevant contract is part of international financing projects.

Therefore, if there is exclusive jurisdiction, the parties may not choose a foreign jurisdiction for the contract, because the Brazilian courts do not recognise the validity of a foreign court decision. However, if there is a non-exclusive (concurrent) jurisdiction, the parties may choose a foreign jurisdiction for their contract.

Notwithstanding the choice of a jurisdiction clause being acceptable under Brazilian Law, some court decisions have stated that the Brazilian party has the right of process in Brazil, as an indispensable means to ensure the justice, independently of whether the parties have agreed otherwise, and especially when the main object of the contract is to be performed in Brazil. Therefore, eventually the election of a foreign jurisdiction does not prevent completely the parties’ right to file a suit in Brazil and the right of the Brazilian Judge to accept the claim.

1.5 What are the costs of civil court proceedings in Brazil? Who bears these costs?

The party who initiates proceedings must bear the initiation costs. Also, the party who files an appeal to the Court of Appeals must pay the costs of appeal. Each court has a different method for calculating the court costs, but they usually reflect a percentage of the amount under the discussion (1% to 5%).

Upon a final decision, in most cases the defeated party is sentenced...
to pay the winning party all court costs paid during proceedings, including an amount up to 20% of the amount under discussion as attorneys’ fees of the winning party.

1.6 Are there any particular rules about funding litigation in Brazil? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Parties must pay for court costs, as indicated in the answer to question 1.5. However, in order to guarantee the access to remedies from court, Brazilian Law authorises that a party with no sufficient funds for payment of court costs may request the benefit of a free legal service status. If the benefit is granted, the beneficiary party is released from his/her obligation to pay for the court costs.

1.7 Are there any constraints to assigning a claim or cause of action in Brazil? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

As indicated in answer to question 4.3, there are mechanisms in Brazilian civil procedure whereby a defendant can pass on the liability, bring in parties to the dispute, or initiate another legal action against a third party. These mechanisms, however, are only applicable when the parties and third parties have a close relationship to the dispute. The non-party to the litigation financing is not provided for by law and its validity, effects and consequences are still under discussion by scholars.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In order to have court proceedings initiated, the claimant must pay initial costs (see question 1.5). According to Article 835 of the Code of Civil Procedure, foreign claimants without real property in Brazil must further post a bond in the amount up to 20% of the amount under dispute. The bond aims at guaranteeing future payment of proceeding’s costs and the other party’s attorney’s fees, in case the foreign claimant becomes the defeated party.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Limitation periods are treated as a substantive law issue and they are mostly provided for in the Brazilian Civil Code. There are cases with different statute of limitation terms, as follows:

I. General rule: a party will have its right to file a lawsuit extinguished after 10 years of the starting date.

II. Specific situations: according to the Civil Code of 2002, there are cases with different statute of limitations terms, which may vary from one to five years.

III. Specific rules for specific situations provided for in specific law (i.e.: a consumer’s right to complain of apparent vices or of vices that are easy to determine, and have smaller statute of limitations; 30 days, when referring to the provision of services or non-durable products; and 90 days when referring to the provision of services or durable products).

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Brazil? What various means of service are there? What is the deemed date of service? How is service effected outside Brazil? Is there a preferred method of service of foreign proceedings in Brazil?

Brazilian courts are very specific as to the way defendants should be summoned in court proceedings and this will further reflect on the recognition process of a foreign court decision in Brazil.

Summons in a Brazilian court case shall be made by court be means of: (i) a letter delivered by court official; or (ii) a registered letter sent by the postal services. A copy of the complaint shall be attached to the court letter of summons in both cases.

As a general rule, the deemed date of service is considered to be the date of return of the letter of summons – duly accomplished – to the respective court case records. In some cases of emergency injunctions, however, the deemed date of service may be considered to be the date of actual receipt of the letter of summons by the defendant.

Service of process of party residents outside Brazil have to be made through diplomatic channels, or letter rogatory (it cannot be made by fax and/or letter sent by lawyers, for example).

Service of process of a Brazilian party in a legal action initiated at a foreign court must also be made in Brazil through diplomatic channels. The documents would have to be translated into Portuguese by an official translator and sent to Brazil through both countries’ embassies. In Brazil, the service will be supervised by a Brazilian court and carried out by a court official.

3.2 Are any pre-action interim remedies available in Brazil? How do you apply for them? What are the main criteria for obtaining these?

There are precautionary measures with urgent orders which could be requested for preservation of rights or maintenance of the status quo before the main court action is initiated. The party has to file the court action within 30 days from the granting of the injunction in the precautionary measure.

3.3 What are the main elements of the claimant’s pleadings?

The main elements of the complaint are, according to Article 282 of the Code of Civil Procedure, the facts, the claims and the law on which the claims are bases. The Brazil Code of Civil Procedure states that it is also necessary to mention: (i) the appropriate court at which the case will be tried; (ii) names and information of the parties; (iii) the total amount under dispute, for determining court costs; (iv) evidence that the claimant intends to produce; and (v) request that the defendant be summoned.

3.4 Can the pleadings be amended? If so, are there any restrictions?

According to Article 294 of the Code of Civil Procedure, the pleading can only be amended without the defendant’s consent before the defendant is duly summoned.
Defending a Claim

What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

Based on Article 300 of the Code of Civil Procedure, the defendant must raise all his/her arguments of defence at the first opportunity to participate in the case. The defendant must make a full exposition of his/her version of the facts and considerations of the Law, otherwise the claimant’s allegations will be considered as true. According to the Brazilian Law, the defendant may file a counterclaim, but that must be done simultaneously with his/her defence.

What is the time limit within which the statement of defence has to be served?

As a general rule, the statement of defence should be filed within 15 days from the date that the official information on the service of process is attached to the court records. However, in specific cases (i.e. precautionary measures), the time-limit is shortened to five days.

Also, there are special situations where, due to rules of law, the time-limits could be doubled (when there are two or more claimants or defendants which are being represented by different attorneys) or quadrupled when the party is being represented by the public prosecutor office.

Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

There are mechanisms in Brazilian civil procedure whereby a defendant can pass on liability (nomeação à autoria) when there are other parties liable and they should also be considered defendants (chamamento ao processo), or even initiate in the same proceedings another legal action against a third party when both actions involve the same subject matter (denunciação da lide).

What happens if the defendant does not defend the claim?

According to the Brazilian Law, if the defendant does not present his/her defence within the terms established by Law, he/she will not be able to file his/her defence. The proceedings will continue and the final decision will be rendered on judgment “in absentia” (revelia), which in Brazilian Law means that the defendant could be defeated in the action based on all the claimant’s allegations.

Can the defendant dispute the court’s jurisdiction?

The Brazilian Code of Civil Procedure states that the court’s jurisdiction is one of the preliminary arguments that the defendant should bring into discussion in his/her defence.

Joinder & Consolidation

Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Please refer to question 4.3 above. The joiner must be requested by the defendant in his/her answer to the complaint.

The third party can also request participation in ongoing proceedings. According to Brazilian Law, if the third party is related to the bond, the fact or the rights discussed in the proceeding, he/she has the right (and in some cases, the obligation) to join the proceedings as the claimant or defendant, as the case maybe.

Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The Code of Civil Procedure provides for consolidation of actions when two or more actions are considered related - when they have a common object or a common cause of action. If there is a relation or connection, the Judge, on his/her own initiative or at the request of either of the parties, may order that actions filed separately be consolidated, for a simultaneous decision, provided that both actions are at the same level of jurisdiction. Finally, when related actions proceed separately before Judges under the same territorial jurisdiction, the one who was the first to order is considered to have prevention.

Do you have split trials/bifurcation of proceedings?

The courts tend to decide the case in one final decision at the end of proceedings. In some cases, the merits of the case may be decided in one final decision that should be followed by a liquidation (appraisal) proceeding.

Duties & Powers of the Courts

Is there any particular case allocation system before the civil courts in Brazil? How are cases allocated?

The Code of Civil Procedure sets out the rules which determine the jurisdiction of each court. Jurisdiction within Brazil may depend on various criteria, including the amount involved and the subject matter of the claim. Jurisdiction for insolvency proceedings and actions concerning the civil status and legal capacity of persons does not depend on the amount involved.

The code also provides, in relation to territorial jurisdiction, that actions involving personal rights and rights in rem over movable property must be brought into the courts of the place where the defendant is domiciled. In actions involving rights in rem over immovable property, jurisdiction lies with the courts of the place where property is located. However, there are a number of exceptions to these rules in the code.

Within the same jurisdiction, the cases can be allocated by means of a specific matter, and within the same type and level of courts, in a lottery system.
6.2 Do the courts in Brazil have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Under Brazilian Civil Procedure Law, the courts only have those powers pre-established in the Code of Civil Procedure. Case management powers are mainly related to the possibility of early dismissal of cases based on procedural issues, summary judgments and rejection of evidence, in favour of a more expeditious decision on the case.

6.3 What sanctions are the courts in Brazil empowered to impose on a party that disobeys the court’s orders or directions?

Brazilian Law sets forth that courts may order the necessary measures to put into effect specific court protection (Article 461, § 5º of the Code of Civil Procedure), either voluntarily or upon the parties’ request. These measures may consist of establishing fines (proportional to the delays caused by disobedience), search and seizures, removal of assets, or restraints to harmful activities. However, these measures do not intend to punish delays in complying with court orders, but rather to stimulate the parties’ obedience to specific court orders. Orders disobeyed by the parties can also give rise to criminal charges (Brazilian Penal Code - Article 330). The penalties for a crime of disobedience can be imposed on those who disobey orders given by public officials (15 days to six months of imprisonment and the payment of fines).

Orders disobeyed by the parties can also give rise to criminal charges (Brazilian Penal Code - Article 330). The penalties for a crime of disobedience can be imposed on those who disobey orders given by public officials (15 days to six months of imprisonment and the payment of fines).

6.4 Do the courts in Brazil have the power to strike out part of a statement of case? If so, in what circumstances?

The courts, within their decision powers, can strike out part of arguments presented by the claimant, especially if they are matters of procedural requirements to sue. Arguments on the merits are hardly decided in spited decisions. Courts tend to decide the case in one final decision at the end of proceedings.

6.5 Can the civil courts in Brazil enter summary judgment?

Civil Courts in Brazil can enter summary judgments when the merits of the case are exclusively related to matters of Law, or if the merits relate to Law and factual elements, but there is no need for any production of evidence in hearings. Another possibility of entering summary judgments occurs in case of default judgment, defective pleadings or dismissal of proceedings without judgment on the merits.

6.6 Do the courts in Brazil have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Courts can judge a defective pleading or dismissal of proceedings without a judgment on the merits when: (i) a Judge dismisses a plea, in case core requirements of the procedure are missing; (ii) any of the legal suit conditions are not present; (iii) arbitration agreements have been inserted in the relevant contract; (iv) the claimant does not want to continue the suit; and (v) when confusion of legal personalities occurs among the claimant and defendant. Courts can stay the proceedings when: (i) parties agree to do so; (ii) when one of the parties dies or loses procedural capacity; (iii) in cases of plea of lack of jurisdiction, or the refusal of a Judge; and (iv) in events of force majeure.

Proceedings can also be stayed when the judgment on the merits depend on another plea, or on the declaration of (in)existence of juridical relation that constitutes the core object of another pending claim, or when it cannot be rendered before verification of a specific fact or producing certain evidence.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Brazil? Are there any classes of documents that do not require disclosure?

Full disclosure is not allowed in Brazilian civil proceedings. There is, however, a proceeding in which the party can request to the court the disclosure of documents. The party should specify in details the document and its purpose, indicating the facts that relate to the document and the circumstances and grounds in which the party bases itself to affirm that such document exists and is in the possession of the other party. The Judge will not admit any denial of the other party in disclosing evidence when: (i) the party has the legal obligation to disclose; (ii) the party made reference to such document in order to constitute it as evidence; and (iii) the document, by its content, is common to both parties.

7.2 What are the rules on privilege in civil proceedings in Brazil?

Based on Articles 347 and 363 of the Code of Civil Procedure, the party or the third party may refuse to give deposition on privileged information or to exhibit a document or asset if the exhibition causes the publicity of facts which are under legal protection, or, in other words, which are confidential.

7.3 What are the rules in Brazil with respect to disclosure by third parties?

The third party is legally bound to present any document demanded by the court which is under his/her possession (Article 360 of the Code of Civil Procedure). However, the restrictions explained in question 7.5 must be considered.

7.4 What is the court’s role in disclosure in civil proceedings in Brazil?

Specific disclosure may only be made upon authorisation from the court (see question 7.1).

7.5 Are there any restrictions on the use of documents obtained by disclosure in Brazil?

Based on Article 363 of the Code of Civil Procedure, the party or the third party may refuse to exhibit a document or asset if: (i) it relates to his/her private life; (ii) the exhibition violates his/her duty of honour; (iii) the exhibition originates dishonour to the party or to third party; (iv) the exhibition causes the publicity of facts which are confidential; and (v) if there are any other justified reasons, pursuant to the court’s opinion.
8 Evidence

8.1 What are the basic rules of evidence in Brazil?

The general rule of evidence in Brazilian civil procedure is set forth in Article 333 of the Code of Civil Procedure, according to which the party who alleges one fact or argument is obliged to prove it, by all evidence-finding procedures admitted in Law.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Among the evidence admissible are: (i) personal deposition of the party, where the court is free to determine the presence of a person in court, in order to proceed examination; (ii) confession, where a party admits the truth of certain fact, contrary to his/her interest and favourable to the opponent; (iii) disclosure of specific documents, where a court determines a party to disclose specific documents in the other party’s possession; (iv) deposition of witness, which is always admissible, but courts may reject the questioning of witnesses when facts have already been proved by documents or confession and when the fact can only be proven by documents; and (v) documentary evidence, where parties are free to present documents they deem necessary to complement and prove their allegations.

With regard to expert evidence, it is admissible and in Brazil it consists in the examination, inspection or evaluation. As a general rule, this type of evidence is produced by means of a court appointed expert who will give his/her opinion to the court.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Brazilian Civil Procedure does not provide specifically for witness statements. Instead, oral depositions are very common and need to observe some rules.

Any person can be a factual witness, with the exception of the disabled, the legally-impeded or suspects.

A witness is not obliged to testify about facts that can cause him/her damage, as well as related to relatives, and when the witness must keep confidential information in relation to his/her profession.

Each party is allowed to call up to ten witnesses and should list their names and contact details in a deadline established by the courts.

According to the code, the court will question the witness and no direct questions are made by the attorneys of the parties. Attorneys can prepare questions and request, during the hearing, that they are directed to the witness by the Judge.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

In court proceedings, the experts are appointed by the Judge. The parties have the right to appoint an assistant expert who will follow up on the expert examination works, interact with the court appointed expert providing the necessary evidence, and present comments to the Official report prepared by the court appointed expert.

8.5 What is the court’s role in the parties’ provision of evidence in civil proceedings in Brazil?

The court can, on its own initiative or by the requirement of a party, determine the production of the necessary evidence. The court can also reject a request made by a party of production of evidence when court deems unnecessary.

The Judge is free to analyse evidence, attaining himself to the case record, and must indicate in the decision his/her reasoning as to acceptance of the evidence produced.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Brazil empowered to issue and in what circumstances?

Brazilian courts are empowered to issue basically any type of judgments and orders, as long as the claimant files the right type of action and as long as the claimant makes express requests to the court on the specifics of the orders requested.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

According to Brazilian Law, local courts can only rule on matters strictly related to parties’ claims. Thus, if a party presents a claim concerning damages/interests/costs, local courts may rule on these matters.

9.3 How can a domestic/foreign judgment be enforced?

Domestic final judgments are automatically enforced in Brazilian courts.

Foreign final judgments, however, must firstly be recognised by the Superior Court of Justice (“STJ”, in Portuguese) in order to be considered enforceable in Brazil. The same rule is applicable to foreign arbitral awards.

In order to be recognised by the STJ, a foreign decision shall, based on the Brazilian Federal Constitution and STJ’s Resolution No. 9/2005: (i) be in compliance with Brazilian public policy, sovereignty and good moral principles; (ii) be rendered by a competent authority; (iii) have had valid service of process on the parties or duly certified default of the defendant party, in the country where each party needs to be summoned; (iv) be final and unappealable, complying with the necessary formalities in the country where the award was rendered; and (v) be certified by the Brazilian consul residing in the country where the decision was issued, together with a sworn translation of the decision or award into Portuguese.

In case of a foreign arbitral award, it is also necessary to demonstrate the existence of a valid arbitration agreement and its sworn translation into Portuguese.

STJ has been analysing only formal aspects of the foreign judgments or awards. The merits of the decision have not been the object of examination by the STJ.

9.4 What are the rules of appeal against a judgment of a civil court of Brazil?

The basic rules are that against any interlocutory decision rendered
by the court during the First Instance proceedings, the parties may file interlocutory appeals (agravo de instrumento) and, against the First Instance final decision, the defeated party may file an appeal (apelação), both to the Court of Appeals and to request the reform of the First Instance decision.

At last, it is also possible to appeal against decisions of the Court of Appeals to the Superior Court of Justice (special appeal, for subjects concerning federal Law discussions) and the Federal Supreme Court (extraordinary appeal, for cases related to constitutional issues). The requirements for filing those appeals are listed in the Federal Constitution, the Code of Civil Procedure and the Rules of Procedure of the Higher Courts.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Brazil?

Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration and other alternative methods for dispute resolution are fairly recent in Brazil – the Brazilian Arbitration Law was enacted in 1996, but only since 2001 has arbitration started to become a real choice in contracts. Today, arbitration is a reality and it is widely used, especially in complex cases and contracts. The other methods which are becoming more frequently used are dispute resolution boards and mediation prior to arbitration.

The Brazilian Arbitration Law (Law No. 9,307 of September 23, 1996) provides that the arbitral procedure shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitral institution or specialised entity. If there is no provision on the arbitration procedure, the arbitrators shall regulate it. During the arbitration proceeding, the principles of due process of Law, equality of treatment between the parties and the arbitrator’s impartiality and free convincement must always be observed.

There is no Brazilian mediation Law and mediation will always depend upon an express provision for mediation in the agreement. Most of the important agreements provide for multi-tiered clauses (mediation and arbitration), but the enforcement of a mediation clause will certainly depend on the parties’ intention to start mediation proceedings prior to arbitration.

Although the majority of the Brazilian Arbitration institutions maintain a centre for mediation, the number of mediations taking place in Brazil is inexpressive.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration proceedings are governed by the Brazilian Arbitration Law (Law No. 9,307 of September 23, 1999) and Decree No. 4,311, of 2002, which ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. There are no specific Brazilian laws or rules governing mediation, negotiation or dispute boards.

1.3 Are there any areas of law in Brazil that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

The Brazilian Arbitration Law establishes in its Article 1 that those who are competent to enter into agreements are free to use arbitration in the resolution of disputes, in relation to disposable rights. There are some areas of Law in Brazil in which, based on the arbitrability requirements indicated in Article 1 of the Arbitration Law, arbitration cannot be used, such as family-related disputes, some environmental law disputes, and compliance with competition requirements, etc.

There are still questions in relation to the use of arbitration in labour matters (although there are explicit provisions in Law allowing the resolution of disputes arising from strike rights, as well as the participation of employees in the profits and revenues sharing), consumer’s protection, bankruptcy related cases, etc.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution?

For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Brazil in this context?

Brazilian local courts play an important role in guaranteeing the enforceability and efficiency of arbitration in Brazil. Should one of the parties resort to the State Court to resolve a dispute arising out of an agreement, irrespective of the provisions of the arbitration clause, the other party may argue the existence of such clause as an impediment for the judicial action. According to the express provisions of the Code of Civil Procedure, courts have to dismiss the action when parties have agreed to arbitrate. The place of arbitration, nationality of parties or applicable law does not influence court’s decision when determining the dismissal of the action based on an arbitration clause.

Brazilian courts will issue interim or provisional measures in support to arbitration when the arbitral tribunal is not yet constituted, if the proper requirements are met. Also, if necessary, arbitration tribunals can request local courts to enforce an interim or a provisional measure rendered in the arbitration by just formally asking the court to compel the party to comply with the decision (Article 22, paragraph 4 of the Brazilian Arbitration Law).

In certain cases, Brazilian courts will indicate to the parties a solution of the case through mediation or conciliation, but courts will not order parties to mediate or conciliate.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Brazil in this context?

Arbitral awards in Brazil are as binding as court decisions and are enforced accordingly. Awards could only be challenged by means of court actions for nullification of such awards. In order to request nullification of an arbitral award, parties should demonstrate the
existence of one of the requirements provided for in Article 32 of the Arbitration Law all related to procedural issues (i.e. non-existence of arbitration commitment, violation to due process, award rendered beyond the limits of the arbitration agreement, and decision which fails to address the entire dispute referred to arbitration, etc.). There are no appeals against awards issued in arbitration proceedings and the merits of the arbitration cannot be re-examined by courts.

As mentioned in question 1.4, parties cannot be forced to mediate. Settlement agreements in the course of legal proceedings may be sanctioned by courts. Expert determination decisions are not levelled as court decisions and therefore will not be binding upon the parties as a decision rendered by an arbitration tribunal.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Brazil?

These are some domestic dispute resolution institutions which are reliable and handle the biggest number of proceedings in Brazil: the Centre for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (“CAM-CCBC”); and the Chamber of Mediation, Conciliation and Arbitration of the Centre of Industries of the State of São Paulo – CIESP/FIESP.

The CAM-CCBC is the oldest arbitration centre in Brazil (it was created in 1979). It is traditional and extremely reliable. The proceedings are quite standard – parties have equal participation throughout the proceedings and impartiality, and independence of the arbitrators is guaranteed.

The CIESP/FIESP Chamber is also very reliable and was created in 1998.

Other important arbitration institutions in Brazil are: (i) CAMARB (Business Chamber of Arbitration); (ii) FGV (Arbitration Chamber of the Getulio Vargas Foundation); (iii) ARBITAC – Câmara de Mediação e Arbitragem (Paraná); and (iv) AMCHAM (Arbitration Centre of the American Chamber of Commerce).

There are no obstacles in having an ICC, ICDR/AAA, and/or LCIA arbitrations carried out in Brazil. Arbitrations with a seat in Brazil and administered and ruled by international institutions are common and quite efficient.

2.2 Do any of the mentioned alternative dispute resolution mechanisms provide binding and enforceable solutions?

According to Article 31 of the Brazilian Arbitration Law, arbitration awards have the same binding effects as court decisions and shall also be viewed as a court decision. The difference being that foreign arbitration awards must be recognised by the STJ, as explained in question 9.3.

Brazil has been a signatory to the New York Convention since June 7, 2002, without any reservations. The applicable legislation in Brazil for the recognition and enforcement of foreign arbitral awards are the New York Convention, the Brazilian Arbitration Law, the Constitutional Amendment No. 45/2004 and the Superior Court of Justice’s Resolution No. 9, of May 4, 2005.

Mediation, negotiation and conciliation will only be binding if the parties enter into an agreement to this effect by the end of such proceedings.

3 Trends & Developments

3.1 Are there any trends in the use of the different alternative dispute resolution methods?

As mentioned in question 1.1 of section II above, the other methods which are becoming more frequently used are dispute resolution boards and mediation prior to arbitration, especially in construction-related cases.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those alternative dispute resolution methods in Brazil?

Arbitration in Brazil is developing quickly and strongly and it is becoming one of the most important methods for dispute resolution in the country. One of the main reasons for such strong and steady development is the unquestionable support of Brazilian courts, in particular, the Superior Court of Justice in Brasilia, responsible for deciding the last appeals on court cases and for recognising foreign arbitral awards for future enforcement in Brazil.

The strong support arbitration is receiving from the courts makes Brazil a convenient place of arbitration and provides foreign and Brazilian parties with a reliable, binding and faster court method for dispute resolution, mainly for complex contracts.
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