

Developing a culture of arbitration in Brazil

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The Brazilian Arbitration Act (“Arbitration Act”), enacted a little over eight years ago, provided legal certainty for the development of arbitration as a viable means of dispute resolution in Brazil.

Among other innovations, the Arbitration Act made contractual arbitration clauses binding, enabling their specific performance. It also gave domestic arbitration awards the same effects of a court judgment, by removing the need to have them ratified by a judge before being enforced.

Such legislative change represented a significant improvement, especially because under the old system arbitration clauses were not binding. As a result, if one of the parties refused to submit to the arbitration, the only remedy available to the other party was suing for damages. In addition, enforcement of the arbitration award required prior ratification by a court.

Furthermore, another recent and important innovation was Brazil’s ratification in 2002 of the New York Convention, thus fostering the growth of arbitration on a national and international scale.

But the first few years under the Arbitration Act were not easy ones. The constitutionality of the Arbitration Act was challenged before the Federal Supreme Court, whose ruling that there was no violation of the Federal Constitution would not come until December 2001.

This ruling was a big step toward strengthening arbitration in Brazil, since a period of stagnation was replaced by outright development of the area and its related studies.

Since then, discussing and writing about arbitration in Brazil became quite fashionable, which has even attracted the attention of those working in the field throughout the world, since foreign professors and lawyers are becoming increasingly interested in arbitration in Brazil.

Nevertheless, as with all legislative changes, and especially this one that broke with a tradition of court litigation, the legal community needs to go through a process of assimilation and, mainly, creation of a new culture.

Initial steps have certainly been taken in this direction, as the courts have been supporting the discussions involving arbitration by upholding arbitration clauses and preserving the fundamental concepts of arbitration.

Other facts that demonstrate the consolidation of arbitration are the great number of arbitration clauses currently inserted in agreements, as well as the creation of arbitration practice groups and the emergence of specialized attorneys in large law firms.

There has also been a significant growth in the number of cases resolved by arbitration in the past five years in Brazil, and it is possible to identify a gradual increase of thirty percent a year in the use of arbitration, which clearly shows a trend of cultural change.

It is worthwhile to note that there were also important legislative changes passed last year that favored arbitration. One example is Law 10,848 of 15 March 2004, which regulates the trade of electric energy in Brazil—instituting the Electric Energy Trading Chamber to channel it—and provides for arbitration as a way of resolving disputes arising between agents that are chamber members.

Along the same lines, and with much acclaim, Law 11,079 of 30 December 2004 established general rules for the bidding and procurement of private-public partnerships (PPPs) in Brazil and allowed disputes related to the contracts to be resolved by arbitration.

However, these factors alone are not enough to fulfill the expectation of a strong culture of arbitration in Brazil.

It is clear that we are going through a natural period of transition in the formation of a new culture and, as expected, certain challenges will always be found. Nevertheless, such challenges have been successfully managed so far.

This Article points out a number of factors deemed to be important in the creation of a fully developed culture of arbitration in Brazil.

The first hurdle to overcome is the resistance and/or lack of knowledge by attorneys and businesspeople in general in relation to arbitration. Since they are not familiar with the subject, they believe or prefer to believe that it is not appropriate.

Fortunately, however, the experience of large law firms and their respective attorneys has shown that the practice of arbitration is increasingly common, especially in business involving large companies and multinational corporations.

In any event, there are certain aspects of arbitration that still require a better assimilation, and a few misconceptions need to be overcome.

A typical example is the disbelief instilled in those who are used to conventional litigation, where an appeal is allowed for every decision, including those that are not final. As a result, arbitrators are deemed to enjoy a more privileged status than court judges for the simple fact that the arbitration award is unappealable.

However, the very essence of arbitration requires the final decision not to be subject to appeal. This has long been successfully tested and used in many countries and does not represent any setback in relation to the traditional court system.

In addition, nothing prevents the parties from drafting the arbitration clause so as to include the possibility of appealing the final arbitration decision.

It should also be noted that the arbitration award is not entirely free of judicial review. Although the merits of the award are not subject to appeal, the Arbitration Act allows an aggrieved party to request the annulment of the award in a court of law in certain circumstances, provided that there has been a violation of a rule of public order or principles of procedural law.

Accordingly, parties and attorneys should stop clinging to the excessive system of appeals found in court litigation, where there is a long established practice of filing intermediary and interlocutory appeals against any decision that is contrary to the party's interests. Such practice can and should be replaced by a true assimilation of the culture rooted in arbitration, in which the parties seek a swift and fair decision, especially considering the possibility of choosing qualified arbitrators to each specific dispute.

In light of the growing number of cases resolved by arbitration, arbitration chambers in Brazil have been successful in acquiring solid experience and consolidating their status as entities that are reliable and capable of administering both domestic and international arbitration cases.

As far as receiving international recognition, Brazilian arbitration chambers still have a long way to go. But current structures, resources, and investments show that this goal is definitely attainable.

It is true that small problems with fraudulent chambers were verified in a few regions of the country, but it seems that this situation has been resolved. In addition to the punitive measures effectively imposed, the risk of additional fraudulent action diminishes significantly as knowledge about arbitration spreads throughout the legal community.

It is also expected that the roster of arbitrators in Brazilian arbitration chambers will be improved. Even though the current rosters are composed of highly capable professionals with outstanding credentials, there are only a few arbitrators available in most chambers, and many times the same person is included in more than one roster.

As a result of the consolidation of the arbitration culture and the emergence of a new group of professionals in the area, including those trained in areas other than law, arbitration chambers will have more options when preparing their roster of arbitrators.

At the same time, foreign professionals who specialize in international arbitration in different fields of law may also be called to participate in the roster of arbitrators of Brazilian arbitration chambers.

In any event, one must realize that many professionals who possess the necessary expertise to act as arbitrators could be simply conflicted-out. They are attorneys working with large law firms in Brazil and abroad.

Generally speaking, experienced attorneys who deal with complex transactions, and therefore acquire significant knowledge that could be used in the resolution of disputes, are members of large law firms. Given the client portfolio of such firms, a number of conflicts of interests could arise.

These conflicts appear because, as it is common in Brazil, those professionals that could act as arbitrators work with law firms that have been involved to some degree in the transaction to which the dispute refers.

In another scenario, but now considering prospective clients of the firm, it may not be advisable for a firm member to act as arbitrator in a dispute where he/she could rule against a major group of companies that the firm expects to have as client in the future.

On a related note, it must be recognized that, even though such practice is not generally recommended, the arbitration panel does not need to be comprised solely of legal professionals. Depending on the circumstances of the dispute, it may be wise to select professionals specializing in accounting, economy, engineering, information technology etc.

There is yet another example verified in international arbitration in the past years that illustrates the cultural shock experimented by attorneys involved in arbitration proceedings. This is the case when attorneys trained under a civil law system are faced by attorneys trained under a common law system, or when attorneys simply come from different parts of the world.

In these situations, attorneys are generally accustomed with the court system of their respective jurisdictions, and therefore duplicate during the arbitration proceedings the types of oral and written statements normally used in such jurisdictions.

Cultural differences of this nature can be resolved as the arbitration culture increases throughout the world. In addition, the arbitration tribunal and the attorneys involved in the proceedings should be mature enough to realize that those differences are understandable and

should not have any impact in the final arbitration decision, which should be based solely on the examination of evidence, facts and legal arguments presented by the parties.

As discussed throughout this Article, certain factors should prove to be relevant in the development of a full arbitration culture in Brazil.

The resistance created by those who have grown accustomed to court litigation must be superseded by the recognition that arbitration can indeed provide an efficient means of dispute resolution.

Furthermore, there are a number of characteristics in arbitration proceedings that compare favorably against a traditional court litigation. These include more flexibility and informality in the proceedings, choice of arbitration chambers by the parties, choice of specialized arbitrators, confidentiality and faster decisions.

Along the same lines, the increasing complexity of disputes, which involve very technical matters in the fields of telecommunications, energy, oil and gas etc., together with the presence of legal concepts derived from foreign jurisdictions, render the choice of a specialized arbitrator, something that does not exist in traditional litigation, even more important for an adequate solution of the dispute.

In conclusion, the analysis conducted herein demonstrates that arbitration is expanding vigorously in Brazil. In turn, Brazilian attorneys are capable of contributing to the consolidation of arbitration as an effective means of dispute resolution in both domestic and international cases.

It is expected that the widespread use of arbitration, coupled with a modern law and a large group of specialized attorneys, will shortly turn Brazil into a country with an encompassing arbitration culture and a safe harbor for dispute resolution through arbitration.