
La lettre du Brésil



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Outline of Recent Changes in Law
affecting Business in Brazil

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The reader may be aware of the delicate times that Brazil, my home country, has been going through in the past few years amid nation-wide corruption scandals, a significant political crisis and a steep deterioration of the financial and economic conditions that have been hurting the citizens and the markets. The current situation has followed a period that, with the benefit of hindsight, most observers in Brazil and abroad agree, has been marked by a pervading pathos of exaggerated optimism.

In the meantime, we Brazilians have been witnessing on the legal front the approval and entering into force of a number of new laws of importance to business in general in Brazil, laws that have a direct impact on the daily affairs of individuals, corporations and public authorities alike. It is my purpose with this letter to provide an outline of the most relevant among these recent changes in law, and to do so in chronological order, like a diary so to speak. To conclude, I will offer a brief evaluation of the significance of such changes in law in the overall scheme of things with the purpose of assessing whether we Brazilians should see this as an additional cause for concern or, perhaps, as steps in the right direction in a context of challenging circumstances.

30 January 2014

The coming into force of the Brazilian *Clean Company Act*¹ marks the introduction for the first time in Brazil of rules imposing liability for bribery, corruption and other acts of wrongdoing involving either domestic or foreign governmental authorities. The Act applies to companies – that is, no longer to the individual wrongdoers alone. This new piece of legislation comes in addition to the existing provisions contained in the Brazilian criminal laws that apply to punish the conduct of individuals and, at least in part, are seen as a response from Congress and the Federal Government to the (largely peaceful) demonstrations that took the streets of São Paulo, Rio de Janeiro, the capital Brasília and several other major cities in Brazil in mid-2013 demanding increased ethics in politics and business in general.

The standard of liability that the *Clean Company Act* imposes to companies is that of strict liability and it applies whenever an act of bribery,

¹ Law No. 12,846, of 1 August 2013, *Diário Oficial da União*, 2 August 2013.

corruption or other similar wrongdoing is committed in the company's interest or benefit. The range of sanctions may vary from the levy of fines (up to 20% of the company's gross revenues) to compulsory dissolution of the legal entity involved in the wrongdoing. The *Clean Company Act* also regulates the possibility of the competent authorities entering into leniency agreements with the affected companies to the extent that the latter cooperates with the investigations and administrative proceedings.

While in the past most management teams in Brazil would typically acknowledge and consider the potential reputational risks resulting from this kind of wrongdoing, the *Clean Company Act* now presses them to go the extra mile and proactively build and maintain a culture of corporate integrity in their companies. This means not only having a code of ethics and business conduct (to those companies that have not adopted one already), but also making sure that it is applied effectively, as well as establishing appropriate "internal mechanisms and procedures of integrity, audit and incentive to denouncing irregularities" (whistleblowing). With the exception of the local subsidiaries of multinational groups or other few Brazilian companies that were already subject to compliance with the U.S. *Foreign Corrupt Practices Act* (FCPA) or similar foreign laws for whatever reason, this is still uncharted territory for most of the players doing business in Brazil.

Efforts in the right direction are becoming more common as the nation struggles to overcome the widespread corruption scandals that have been affecting the state-controlled oil company Petrobras, some of the largest construction groups in the country, various high-ranking politicians and several other individuals and companies of different sizes and sectors of activity in connection with the so-called "Car Wash Operation" (*Operação Lava-a-Jato*) and in other ongoing investigations. In this momentous context, the business environment in Brazil has been undergoing a significant change apparently – and hopefully – for the best.

27 July 2015

With the coming into force of Law No. 13,129², the Brazilian *Arbitration Law*³ is amended for the first time since its enactment on 23 September 1996.

Inspired by the UNCITRAL Model Law and widely seen as a coherent and comprehensive piece of legislation, the 1996 *Arbitration Law* has opened the door to a gradual but significant growth of commercial arbitration in Brazil as the preferred method of dispute resolution for relevant business transactions, both domestic and cross-border.

Due to this generally positive outcome, various commentators in Brazil used to argue that the 1996 *Arbitration Law* had passed the test of time. According to this view, the fact that the Brazilian courts have been able to apply the 1996 *Arbitration Law* to resolve issues of increasing complexity, taking into account the impact of technology developments, meant that no “update” was necessary at the statutory level. The courts – and, of course, the arbitrators and the arbitral institutions – would take care of that just fine on a case-by-case basis. Moreover, those commentators used to claim that amending the 1996 *Arbitration Law* could risk hindering its inherent characteristics and welcome openness, which had been allowing for its dynamic application in thousands of diverse cases over the years. Be it as it may, the debate was put to rest on 26 May 2015 as the President sanctioned the above-mentioned Law No. 13,129.

Among other changes, the amended *Arbitration Law* now regulates the participation of state-owned and governmental entities in arbitration – a topic that had been controversial due to the lack of regulation in the 1996 *Arbitration Law*. It does so, however, by providing specific rules aimed at ensuring an appropriate level of transparency in this particular kind of arbitration, in observance of the general principles that govern public affairs under the 1988 Brazilian Constitution. In this context, arbitration clauses are expected to become more common in public concession agreements, public-private partnerships (PPP) and other arrangements involving public entities in Brazil especially in the energy and infrastructure sectors. In accordance with the *Arbitration Law*,

² Law No. 13,129, of 26 May 2015, *Diário Oficial da União* of 27 May 2015.

³ Law No. 9,307, of 23 September 1996, *Diário Oficial da União* of 24 September 1996.

however, the scope of arbitrability of potential disputes is understood to be limited to the “disposable rights” of the parties, meaning that matters of *ordre public* should remain within the exclusive deliberative purview of the Brazilian courts.

The possibility of extending arbitration to labour and consumer disputes was also the subject of a heated debate during the discussions on the bill that resulted in the amended *Arbitration Law*. When the time came for sanctioning the law, the President decided to veto the relevant provisions of the bill passed by Congress on the grounds that increasing the use of arbitration in such a way would risk harming two groups that are typically considered to deserve special protection under Brazilian law due to their perceived vulnerability – the employees and the consumers.⁴ This view prevailed even in the face of the counter-argument that the bill allowed each employee or consumer (as applicable) to opt out of arbitration before its establishment in a given dispute, arguably eliminating the risk of the stronger party attempting to drag the weaker party unwillingly into arbitration.

Another matter that the amended *Arbitration Law* regulates is the possibility that a company’s by-laws provide for (and therefore impose) arbitration as the method for resolution of shareholder disputes involving the company. In contrast to what is typically seen in other jurisdictions such as in the U.S., having an arbitration clause in a company’s bylaws and, therefore, excluding access to courts in case of shareholder litigation was not uncommon practice in Brazil for some time. As a matter of fact, even in the absence of specific regulation such as what the amended *Arbitration Law* now introduces, providing for an arbitration clause in the company’s by-laws was and still is a requirement for companies pursuing a listing of

⁴ As part of the system of checks and balances set forth in the Brazilian Constitution, the President of the Republic has the power to veto provisions of bills passed by Congress on the grounds of either unconstitutionality or contrariety to the public interest (article 66). In either case, the President of the Republic has fifteen business days to exercise his or her veto from the date of receipt of the bill and then forty-eight hours to notify Congress of the justification of the presidential veto. Congress then has thirty days to review the presidential veto in a joint session of both houses (the Chamber of Deputies and the Federal Senate), in which occasion the presidential veto can be overruled by a vote of the absolute majority of the members of both houses. In practical terms, it is not uncommon for the President of the Republic to veto specific provisions of bills of law passed by Congress with appropriate justification; in such cases, Congress seldom exercises its power to overrule the presidential veto.

their stock in the segment of the highest level of corporate governance of the BM&FBovespa Stock Exchange (the so-called *Novo Mercado* segment). What the amended *Arbitration Law* does is clarify that an arbitration clause in a company's by-laws is not only legitimate, but also binding on all shareholders – including those that voted against the inclusion of the clause (and, therefore, against arbitration as the applicable method for resolution of shareholder disputes). In general, however, shareholders that oppose the inclusion of the clause in the relevant shareholders' meeting will have the right to withdraw from the company by causing the latter to redeem their shares at a value to be calculated in accordance with the by-laws and the *Brazilian Corporations Law*⁵.

Regarding procedural rules, the main change introduced by the amended *Arbitration Law* is the addition of new provisions regulating conservatory and urgent measures (*tutelas cautelares e de urgência*), on which the 1996 *Arbitration Law* was silent. In this regard, the amended *Arbitration Law* sets forth succinctly the right of each party to appear before competent courts in Brazil to request conservatory or urgent measures before the commencement of arbitration, provided that the effects of those measures shall expire if the interested party does not file a request for arbitration within thirty days from the date of the execution of the relevant court decision. Once the arbitration has commenced, the competence shall pass automatically to the arbitrators to decide on whether or not to maintain, modify or revoke any conservatory or urgency measure already granted by a competent court, as well as to grant any new conservatory or urgency measure as the parties may request in the course of the arbitral proceeding. The prevailing view is that these rules are in line with generally accepted principles of arbitration and, therefore, are welcome.

To ensure the enforceability of any such measure granted by the arbitrators, the amended *Arbitration Law* introduces the novel concept of an "arbitral letter" (*carta arbitral*), whereby the sole arbitrator or the arbitral tribunal, as the case may be, notifies a court in Brazil to execute or order the execution, within its respective sphere of competence, of a given act requested by the arbitrator or the arbitral tribunal. The competent court is then required to process the arbitral letter and undertake its execution under seal (*segredo de justiça*), provided that evidence is given of the confidential

⁵ Law No. 6,404, of 15 December 1976, *Diário Oficial da União* of 17 December 1976, as amended.

nature of the arbitration as agreed upon by the parties. (In the absence of a confidentiality provision covering the arbitration, therefore, the rule suggested in the amended *Arbitration Law* is that there is no implied obligation of confidentiality – at least, not one enforceable against a court in Brazil, which is in line with the general principle under Brazilian law of publicity of court proceedings.)

All in all, the amended *Arbitration Law* maintains the spirit of the 1996 *Arbitration Law* and its harmony with the generally accepted principles of arbitration as reflected in the UNCITRAL Model Law while taking into account the developments that arbitration has experienced in the Brazilian law and practice in the past couple of decades. In this context, Brazil is expected to continue to act and be perceived as an arbitration-friendly jurisdiction, perhaps with further expansion to disputes that at least in some jurisdictions worldwide are not traditionally seen as belonging in the realm of arbitration, such as regulatory disputes involving public entities and shareholder disputes involving listed corporations.

27 December 2015

A brand new *Mediation Law*⁶ comes into force in Brazil with the purpose of incentivizing recourse to mediation as the preferred method of dispute resolution both among private parties and in the context of the public administration, either in or out of court. This is the first time that mediation is regulated in the country.

The *Mediation Law* defines mediation as “the technical activity undertaken by an impartial third party that has no decision-making power and that, chosen or accepted by the parties, assists and incentives them to identify or develop consensual solutions for their dispute” (article 1, sole paragraph). Eight principles are established to guide the practice of mediation: impartiality of the mediator, equality between the parties, orality, informality, party autonomy, search for the consensus, confidentiality, and good faith (article 2).

Mediation is recognized as a legitimate method of dispute resolution primarily when the dispute deals with disposable rights. The *Mediation Law* also allows its adoption, however, in disputes involving non-disposable

⁶ Law No. 13,140, of 26 June 2015, *Diário Oficial da União* of 29 June 2015.

but negotiable rights,⁷ provided that the agreement of the parties in this regard is homologated in court with the participation of the Public Attorney's Office (*Ministério Público*).

The *Mediation Law* also regulates the election of mediators and, in particular, the exercise of their function in court. Namely, a judicial mediator shall hold a university degree for at least two years and have concluded a mediation training with an accredited institution in accordance with certain minimum requirements set forth by the National Council of Justice (*Conselho Nacional de Justiça*). To act out of court, in contrast, a mediator's appointment is dictated solely by the trust of the parties responsible for the appointment and on being "capable to mediate".

The facts that a mediator has no decision-making power and that mediation cannot be forced upon any party, the party being free to walk away at any time and seek other methods of dispute resolution in accordance with the relevant agreement (if any), cause a number of practitioners and scholars alike to be sceptical. The prevailing view in Brazil, however, is that of openness to mediation. It is a method that certainly has its limits, but that should be welcome as a complementary tool aimed at avoiding or at least minimizing the parties' need to recur to courts or arbitrators in cases where a consensual approach is (still) possible. For mediation to be successful and widely used in Brazil, however, a gradual change in culture is necessary as individuals and legal entities acknowledge and

⁷ Brazilian law provides that a person cannot dispose of certain rights deemed worthy of fundamental protection, such as every person's right to life, a child's right to parental support, a former spouse or partner's right to alimony, etc. In any dispute involving a non-disposable right, the participation of the Public Attorney's Office (*Ministério Público*) is mandatory in Brazil as a condition for the validity of the procedure and of any decision resulting thereof. While most non-disposable rights cannot be the subject of negotiation as a matter of public order (*ordem pública*), some of them are not subject to restrictions in relation to their effects, at least to a certain extent in appropriate circumstances. Agreements on family law matters such as the delineation of a divorced parent's right to visit regularly his or her children living with the other parent, for instance, are acceptable under Brazilian law subject to homologation in court following due process with the participation of the Public Attorney's Office. Similar examples exist in certain labor law disputes in Brazil, such as in connection with a worker's right to compensation for work-related injuries. All these rights are non-disposable under Brazilian law (the holder cannot dispose of them), but still can be the subject of valid negotiation between the parties to the extent that the applicable legal and procedural requirements are satisfied.

value the time and cost efficiencies that tend to be associated with the method in comparison with the typically lengthier and costlier litigation route.

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A new Code of *Civil Procedure*⁸ comes into force in Brazil after more than four decades, revoking its predecessor⁹. The new Code, which results from six years of intense discussions both in Congress and in the local legal community, applies to all new lawsuits and also to any new procedural events arising in ongoing lawsuits.

The main objective of the new Code is to enhance the overall efficiency of dispute resolution in Brazil. All judges, lawyers, public attorneys and prosecutors in civil procedures are required to encourage the parties to consider the amicable resolution of disputes by settlement or mediation whenever possible. Unless otherwise agreed, the judge is required to schedule a preliminary hearing led by a mediator with a view to attempting a settlement at the outset of the case.

In the same spirit of promoting efficiency, the new Code opens room for the parties to agree on changes in the general rules of the proceeding to customize them to the specific circumstances of a given case, subject to judicial control so as to avoid abuse, including by establishing together with the judge an agreed upon timeline with relevant deadlines. Furthermore, the judge is now authorized to render partial decisions on the merits of the case in relation to any issues that do not demand the production and review of further evidence – a significant innovation in civil procedure that is expected to allow more flexibility and, at least in some cases, offer the parties an additional opportunity for settlement in the course of the proceeding.

Another area that the new Code regulates in more detail in contrast to its 1973 predecessor is the limits of the national jurisdiction by clarifying whether or not a Brazilian court has competence to adjudicate on certain matters in cross-border disputes. One example is the rule that sets forth that Brazilian courts have jurisdiction to adjudicate on cross-border

⁸ Law No. 13,105, of 16 March 2015, *Diário Oficial da União* of 17 March 2015.

⁹ Law No. 5,869, of 11 January 1973, *Diário Oficial da União* of 17 January 1973.

consumer disputes even when the seller or provider is not established in Brazil. Another example is the rule that recognizes the validity and enforceability of clauses that select a foreign jurisdiction in international contracts: the Brazilian judge is now expressly required to recognize his or her lack of competence to adjudicate on such cases whenever the defendant is able to prove the existence of a valid clause in this regard. The new Code also contains a new chapter on international judicial cooperation in relation to service of process, assistance on evidence matters and other relevant topics – a welcome set of provisions that are also in line with the search for greater efficiency here in relation to disputes that contain an international element, ever more common in our globalized world.

Concluding Remarks

As noted in the introduction of this letter, Brazil, my home country, has been going through difficult times with significant challenges in the political, financial and economical realms, in addition to the ongoing need of tackling a number of historically acute social issues.

Considering the legal framework of private life and business, however, it is fair to say that Brazil's position has not only remained relatively stable in the past years, but actually improved on a number of important fronts, as exemplified in this letter. The new *Brazilian Clean Company Act* is a positive step towards the development of a healthier, more ethical culture both in the corporate and in the public government spheres. The recent amendment to the 1996 *Arbitration Law*, the introduction of a new *Mediation Law* and the new *Code of Civil Procedure*, when collectively considered, signal a response to grave inefficiencies that historically have barred access to justice in Brazil or made it a much costlier and lengthier enterprise than what would be reasonably acceptable when compared to international standards. I should also add that more often than not the courts in Brazil – especially, at the top of the pyramid, the Superior Court of Justice (STJ) and the Supreme Federal Court (STF) – have been playing an important role in applying statutory law with independence and concern for the rule of law.

There is still much work to be done, of course, and much room for further improvement. But the key takeaway in my view is that fortunately we Brazilians have reasons to consider the current legal framework available in our country not as a problem, but as part of the solution.

