



▶ **ARBITRATION IN REGULATED
INFRASTRUCTURE SECTORS
IN BRAZIL**



Introduction

Arbitration is a key issue in the context of attracting investments to the country. It is regarded as a means of building investors' confidence, by providing an agile, impartial, confidential and highly specialized mechanism for dispute resolution. In this sense, the Brazilian Government is attempting to increase the role of arbitration in the country as part of a strategy to attract investments to the infrastructure sectors.

However, from the investors' perspective there are relevant risks that need to be addressed. Such risks can be divided into two main issues: (i) uncertainty about what matters may be settled by arbitration; and (ii) uncertainty regarding if investors will ultimately benefit from an agile and highly specialized forum, often threatened by judicialization.

Especially in heavily regulated sectors, such as infrastructure, the perception of such risks is enhanced. Firstly because some disputes will involve the participation¹ of a public (or quasi-public) entity as a party. Secondly, because the dispute will normally involve challenging rules approved by regulatory agencies. This last aspect creates a measure of uncertainty around the possibility of using arbitration for such issues.

The aim of this paper is to provide an overview of how arbitration² works in Brazil as a means of settling disputes in the regulated infrastructure sector and to outline the key risks to be considered when using arbitration.

¹ Expressly allowed by Law 13.129/15.

² For the purpose of this paper, arbitration is defined as "the process through which parties, by means of a private agreement (arbitration clause or similar), delegate to an arbitrator the power to render a final binding decision in disputes, that has the same effects – Art. 515, VII, Civil Procedure Code – of a judicial decision, within previously established limits".

1. Why arbitration?

Arbitration in Brazil, regulated by Law 9.307/96, is increasingly being used and is recognized as a successful way to settle disputes not only between private parties but also with the public sector. In regard to the public sector, there is no legal rule obliging a public entity to enter into arbitration and it can only be used to settle disputes relating to strictly alienable interests or property rights.

In 2015, 13.1% of the cases arbitrated by the International Chamber of Commerce (ICC) involved a State or a public entity. From 2005 to 2015, the ICC Latin America Team alone dealt with 136 cases involving 145 public entities and 23 States. Considering all arbitration institutions acting in Brazil, 4% of the arbitration cases had a governmental entity as a party (2015). That number is expected to rise in light of the recent amendment³ to the Arbitration Law, which made clear that arbitration can be used to resolve disputes with the Public Administration.

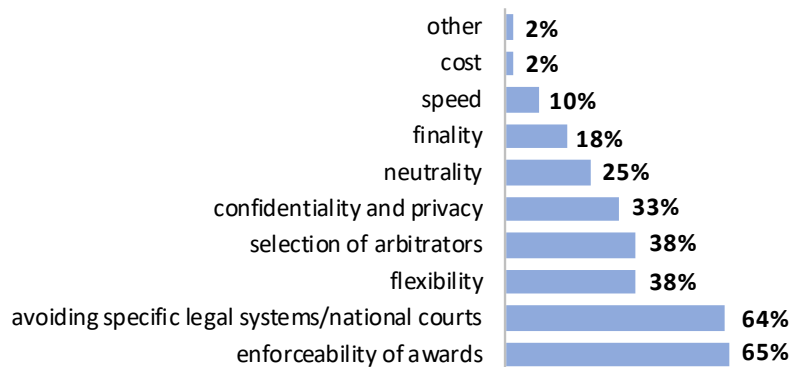
Several reasons can be put forward for the success of arbitration in Brazil. The slow decision-making process of the courts is often mentioned as a barrier to the enforcement of rights, which further limits the certainty and predictability provided to investors. On the other hand, the fact that arbitration is a system with its own methods and specific procedures is regarded as paramount, since the availability of impartial arbitration contributes to lower the risk perception and, therefore, the required rate of return on investments.

Generally speaking, three advantages of arbitration are often mentioned: (i)

procedural swiftness; (ii) confidentiality; and (iii) high degree of specialization, because the arbitrators are chosen by the parties (reliability). A survey conducted by Queen Mary University of London (2015) pointed out that the enforceability of awards, followed by “avoiding specific legal systems” and “selection of arbitrators”, were the most valuable characteristics of arbitration.

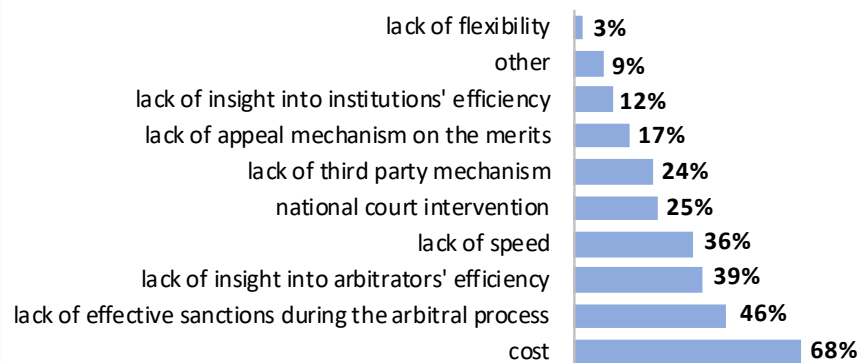
Regarding procedural swiftness, an arbitral award should be issued within six months⁴, unless the parties agree otherwise⁵. The same survey showed that speed is not among the most valuable characteristics of international arbitration. In-

»» **FIGURE 1. THE MOST VALUABLE CHARACTERISTICS OF INTERNATIONAL ARBITRATION**



Source and Elaboration: FGV CERI and The World Bank.

»» **FIGURE 2. THE WORST CHARACTERISTICS OF INTERNATIONAL ARBITRATION**



Source and Elaboration: FGV CERI and The World Bank.

³ Law n. 13.129/2015.

⁴ The average time of arbitration in the context of the Chamber for Trading Electric Energy (CCEE) is about 1.5 years. Depending on the complexity of the dispute, though, the arbitration process can last for years. Even prior to arbitration, preliminary matters can also hamper the expected swiftness. For exam-

ple, the arbitration between Libra Terminais and the São Paulo State Port Authority (CODESP) took more than a year to start, because the legal representatives were being chosen.

⁵ Art. 23, Arbitration Law.

deed, lack of speed is among the worst problems in international arbitration, although some arbitration courts are trying to speed up their arbitration procedures. Speed represents an important aspect of arbitration.

The second advantage regarding arbitration is confidentiality⁶, inferred from the Arbitration Law, which states that the **arbitrator** has to act with **discretion**⁷. Discretion can be understood as the prohibition of publicizing or making any comments about arbitral proceedings. This is the case, except where the parties explicitly agree otherwise or when one of the parties is a public entity, for which procedural disclosure becomes an obligation⁸. It is fairly common for arbitral conventions to state that the contents of arbitral proceeding are confidential⁹.

The third claimed advantage relates to the expertise of arbitrators, who can be chosen by the parties – a contributing factor to the overall acceptance of the arbitral award. The arbitrators generally possess highly specialized and technical knowledge of the disputed or controversial matter.

2. Can it be used in Brazil? The legal framework

The Brazilian Congress, following international trends, passed Law 9.307/96, regulating the use of arbitration as a means of dispute resolution. Before that, there were some legal mentions of dispute settlement, encompassing, among others, the friendly resolution of contractual disputes as an essential clause in concession agreements for public services¹⁰.

Today, Law 9.307/96 is the general arbitration law. Only the ports sector has its own regulation for arbitration – Decree 8.465/2015. Regarding renewed concession contracts within the scope of the Investment Partnership Program in roads, rail and airports, the arbitration rules contained in Provisional Measure¹¹ 752/2016 also apply.

Those advantages build more confidence for international investors, either as to time or to outcome. Based on these advantages, paramount in a sector of the economy characterized by high costs, long-term investments and financial risks, many issues related to the infrastructure sector have gone to arbitration.

Such cases encompass: construction of small hydropower plants and transmission lines, mining rights, definition of ring fences and payment of special participation (oil & gas), delays in the completion of highways and application of fines previously established in the concession agreement. As an example, from January 2008 to October 2016, 55 arbitration cases that had CCEE as party dealt with electricity trading, mostly related to contract termination or breach of contract due to an act of God or event of force majeure (price volatility), failure to present contractual guarantees and fines applied by CCEE.

A precondition for arbitration is the existence of an arbitration agreement between the parties, which is often a specific clause inserted in the contract or a separate agreement after a conflict arises¹². Arbitration should proceed according to the rules of the arbitral institution chosen by the parties. Nevertheless, modern contracts already contain some procedural rules, such as those related to the implementation of an arbitration proceeding, the number and choice of arbitrators or the time frame for a decision.

The Arbitration Law itself does not obligate that arbitration be carried out in Portuguese, nor does it require the application of the arbitral rules of the arbitration chambers established in Brazil. Nevertheless, Law 8.987/95, which reg-

⁶ Confidentiality of the parties does not derive from Arbitration Law, but rather from the contract or the arbitration agreement, which have to bring such feature expressly.

⁷ Art. 13, § 6, and Art. 22-C, sole paragraph, Arbitration Law.

⁸ According to the Wording no. 4 of the Council of Federal Justice, the Public Administration has to offer publicity in arbitration, exception being made when secrecy derives from the law and the arbitrator agrees on it.

⁹ See, for example, Art. 46 of the FGV Chamber for Conciliation and Arbitration Rules or Clause 18 of the arbitral agreement signed between CCEE and its agents.

¹⁰ Such as Art. 23, XV, of Law 8,987/95. It is worth mentioning Arts. 851, 852 and 853 of the Civil Code, which allow arbitration and arbitration clauses in contracts, except for matters regarding status, family and personal rights and others that do not have a strict patrimonial nature.

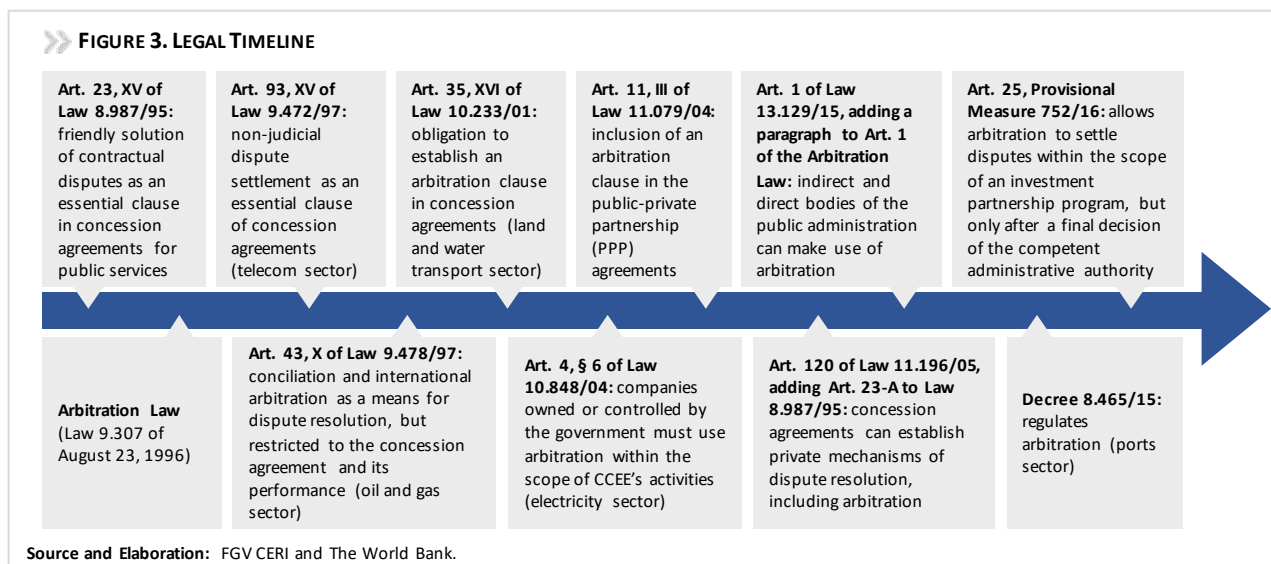
¹¹ Provisional measures (*medidas provisórias*) are presidential decrees that take immediate effect with the status of ordinary law, but then subject to congressional approval/rejection/amendment, under a priority regime. They are limited to “relevant and urgent” matters.

¹² According to Wording no. 2 of the Council of Federal Justice, even in the absence of an arbitral clause, the Public Administration can sign an arbitration agreement.

ulates public service concessions, establishes that arbitration within the scope of concession agreements must be conducted in Portuguese and take place in Brazil¹³. This obligation is also found in Law 11.079/04, regarding PPP's¹⁴ and in the concession agreements' arbitration clause.

Many questions arise when one looks at the Brazilian legal framework regarding arbitration. The focus here is on prob-

lems related to the participation of the public sector in arbitrations, sometimes as a regulatory body, sometimes as an entrepreneur (state-owned companies or public-private companies). The next section addresses the questions related to which agents of the Public Administration can engage in arbitration, what the effects and limitations of the arbitral award are and its target subjects.



2.1 Who can agree to use arbitration?

At first, it was not entirely clear which entities could resort to arbitration to settle disputes. Broadly speaking, Law 9.307/96 originally neither prohibited nor allowed the use of arbitration by public-sector entities. It only mentioned that any person or company able to contract could make use of it. The main doubt related to the bodies of the public administration and state-owned enterprises¹⁵.

Until the lack of clarity in the Arbitration Law was resolved, some laws made room for arbitration between private companies and public entities in specific sectors (see legal timeline).

The Superior Tribunal of Justice, in a **leading decision** from 2005¹⁶, clearly held that a public-private company, engaging in economic activity or performing a state-granted public

service, has a legal right to enter into a contract with an arbitration clause. In this case, the dispute was over a power purchase agreement related to an alienable right of the public-private company.

Finally, Law 13.129/15 clarified the issue, by means of amending the original Arbitration Law to explicitly allow – not obligate – indirect and direct bodies of the public administration¹⁷ to use arbitration to settle disputes regarding alienable rights.

While most regulators engage in arbitration, there are some that opt either to leave open the possibility of entering into arbitration or to simply not do so, as Table 1 shows.

¹³ Art. 23-A, Law 8.987/95.

¹⁴ Art. 11, III, Law 11.079/04.































¹⁵ The Office of the General Attorney, in Legal Opinion no. 24/2010/BAC/CONSU/PGF/AGU, sustained that the public administration could enter into arbitration. On the other hand, and considering the lack of express provision allowing arbitration in contracts with governmental entities, the Federal Audit Tribunal (TCU) has decided on different opportunities for the **illegality of arbitration clauses in administrative contracts**, see judgments no. 2.573/2012-Plenary, of September 26, 2012; no 1.099/2006-Plenary, of July 10, 2006; no. 537/2006-2nd Chamber of March 14, 2006; no. 584/2003-2nd Chamber, of April 10, 2003; and no. 286/1993-Plenary, of August 4, 1993. With the specific provision in the Arbitration Law inserted by

Law 13.129/15, allowing the public administration to submit to arbitration, TCU now rules for the legality of arbitration clauses.

¹⁶ Special Appeal no. 612.439/RS, judged on June 6, 2007. The *Superior Tribunal de Justiça* is the highest court for non-constitutional matters, entrusted with harmonizing interpretation of federal laws by the state and regional federal courts of appeal.

¹⁷ In Brazilian Administrative Law, the Public Administration are divided into direct – ministries, state secretaries and municipalities – and indirect – agencies, public foundations, public companies and semi-public companies – bodies.

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Infrastructure Sector	Entity	Already entered into arbitration	Signed arbitral clause	Regulates what is taken to arbitration
 Electricity (trade only)	ANEEL			
	CCEE (private entity)			
 Oil & Gas	ANP			
 Ports	ANTAQ			
	CODESP (semi-public company)			
 Rail & Road	ANTT			
 Airports	ANAC			
 Telecom	ANATEL			

2.2 What can be taken to arbitration?

According to the Arbitration Law, arbitration can be used to settle a dispute that has a “alienable right” as its object. Some institutions – the Federal Audit Tribunal¹⁸, the Supreme Court¹⁹, the Superior Tribunal of Justice, the Council of Federal Justice²⁰ and some regulatory agencies – have been discussing and modulating the rights that can be submitted to arbitration, especially when contracting with governmental entities.

The definitions have been emerging on a case-by-case basis and in some disputes it is left to the judiciary to decide whether the dispute is related to an alienable right or not.

Saying that the public administration is entitled to “dispose” of such rights does not mean it can do so freely. Rather, it indicates merely that the public entity can negotiate those rights. While the **public interest** is inalienable, a **patrimonial right** can be waived by public entities. “Patrimonial” rights

relate to the activities developed by the government susceptible to economic valuation.

Rights that refer to the contract’s subject matter and the forms of its performance derive from the public administration’s regulatory power and cannot be disposed; rights related to the remuneration of a private company and to the economic-financial balance have a typical contractual nature and can be agreed between the parts involved. Therefore, they can be object of arbitration.

Besides that, courts hold that public entities’ legal competence and the exercise of State authority defined by law cannot be the subject of arbitration, because they are not negotiable rights. It is possible, though, to submit to arbitration the patrimonial **effects** – supervening financial imbalance of contracts, compensations – derived from the use of such entities’ legal prerogatives.

¹⁸ Judgments no. 188/95, 587/03, 631/03, 215/04, 1271/05, 391/08, and 2145/13.

¹⁹ In the leading case for arbitration – recognition of a foreign arbitral award, SE-Agr. 5206-7, of 2004 – the Brazilian Supreme Court **declared the Arbitration Law constitutional**. Other cases decided by the Supreme Court (STF) and by the Superior Tribunal of Justice (STJ) include: STF, Civil Appeal 3.021/MG, of June 4, 1918; Interlocutory Appeal 52.181/GB, of February 15, 1973; STJ, Mandamus Action 11.308/DF, of October 30, 2006; Special Appeal 06.345/RS,

of May 17, 2007; Special Appeal 612.439/RS, of June 6 2007; and Special Appeal 904.813/PR, of February 28, 2012.

²⁰ According to the Wording no. 13 of the Council of Federal Justice, arbitration can have as its object, among others, issues related to contractual default and restoration of the economic-financial balance.

Definition of “oil field” as an alienable right

The National Petroleum, Natural Gas and Biofuels Agency (ANP), following the legal opinions issued by the Office of the General Attorney, decided at two different moments that the legal concept of “oil field”²¹ could not be submitted to arbitration, since it is not an alienable right²². The legal opinions²³ submitted argued that the establishment of an “oil field” derives from the law and is a binding act (as opposed to a discretionary act), which ANP cannot fail to recognize. Once the legal requirements were met, ANP – and not private arbitrators – would have the obligation to recognize the existence of an oil field. The concept of “oil field” would constitute a “non-disposable non-patrimonial right”, which could not be subject to arbitration.

In order to avoid new claims and pleas, ANP inserted a new sub-clause in the standard concession agreement for the 13th Bidding Round (2015), limiting “alienable rights” to the rights and obligations based solely on the reciprocal clauses of the contract, which are not related to obligations derived by laws, interpretations of legal definitions, public law matters or environmental obligations.

This measure limits a substantive appeal against an incorrect or erroneous technical decision by ANP. Regarding the example above, the legal definition for “oil field” is not immune to different interpretations and by adopting this new sub-clause, ANP limits the possibility to permit challenges under arbitration, where experts can ultimately decide. If a different interpretation of a legal definition arises, the concessionaire is left to judicialize the matter.

Modulating objective arbitrability in telecommunications

The National Telecommunications Agency (ANATEL)²⁴ established that a legal matter that falls within its decision-making competence cannot be subject to arbitration. According to this interpretation, an arbitral tribunal cannot act as a regulatory body, because the competencies and duties of regulatory agencies are established by law. ANATEL included in its concession agreements the matters that can be arbitrated: (i) infringement of a concessionaire’s right to have its economic situation protected; (ii) tariffs revision – but restricted to assessment of the adequacy between the amount in question and the restoration of economic-financial balance; and (iii) indemnities for contractual termination (Clause 33.1 of the Concession Agreement for Fixed Switched Telephone Service).

Even with this first delimitation of the matters that can be submitted to arbitration, the risks involved are not necessarily mitigated. It is not always easy to objectively verify in which cases the rights of an economic-financial balance was violated; it is also not clear which matters relate to the assessment of the “adequacy” mentioned above and which matters do not.

²¹ Art. 6, XIV, Law 9.478/97.

²² The definition of oil field is of utmost importance for the calculation of a financial compensation called “special participation” (Art. 21, 22, and 23, Decree 2.705/98). Concessionaires that explore oil in big amounts or from especially profitable fields are obliged to pay this financial compensation. In general terms, the greater the oil field, higher is the special participation to be paid. Dividing oil fields into smaller ones would generate lower compensations.

²³ Legal Opinions no. 267/2014-PF-ANP/PGF/AGU and no. 346/2014/PF-ANP/PGF/AGU.

²⁴ Following Legal Opinion no. 1140/2010/LBC/PGF/PFE-Anatel.

Arbitration and CCEE

Regarding the electricity sector, Law 10.848/2004 **explicitly conceives as a disposable right** those rights related to credits and debts derived from the transactions in the Chamber for Trading Electric Energy (CCEE), a private nonprofit entity regulated and supervised by National Electric Energy Agency (ANEEL)²⁵.

The Agreement on the Trading Electric Energy regulates dispute settlement but does not define “alienable rights” nor does it list the topics that can be arbitrated. The use of arbitration – between two or more agents of CCEE or between one or more agents and the Chamber itself – is restrained to conflicts which are not under ANEEL’s direct legal competence or, in case they are, where arbitration can be used if administrative appeals are no longer possible²⁶⁻²⁷.

It is interesting to mention FGV Arbitral Proceeding 26/2014, in which some private companies entered into arbitration against CCEE, questioning the application of ANEEL Normative Resolution 531/2012, regarding the form through which contracts were registered and validated by CCEE. According to the companies’ interpretation, the revoked Normative Resolution 336/2008 should have been applied instead, which was in effect at the time of the contract’s signing. ANEEL’s Office of the General Attorney pointed out that questions regarding the application and effect of a normative resolution on the generality of the sector’s agents could not be taken to arbitration, since it is not an alienable right²⁸.

Nevertheless, the arbitral tribunal decided in favor of its competence and started the arbitration proceeding. CCEE took the matter to court, filing a suit to annul the arbitral proceeding. A final sentence is yet to be issued.

Given the lack of consensus as to what can be submitted to arbitration, ANEEL’s Superintendent for Market Regulation requested CCEE to analyze alternatives to the procedure and to present a revision of its standard arbitral agreement.

Arbitration in the ports sector

According to Law 12.815/2013, the failure of concessionaires or lessees to pay fees and other charges to the port administration and the National Waterway Transport Agency (ANTAQ), recognized in a final decision, prevents extending concession and lease agreements. Disputes in this respect (payment of port fees and other financial obligations) can be settled by means of arbitration²⁹.

Decree 8.465/2015 regulates arbitration in the ports sector. According to that rule, the extension of concession and lease agreements when arbitration is still in course is explicitly

²⁵ The Superior Tribunal of Justice considers the rights derived from a contract for trading electricity as disposable patrimonial rights; see Special Appeal 612.439/RS, of June 6, 2007. The Paraná State Court of Appeals has the same position; see Interlocutory Appeal 174.874-9, of October 18, 2005.

²⁶ Regarding bilateral contracts between two agents of the CCEE, arbitration is also possible if the divergence arises from those contracts or from the Trading Rules and Procedures, and has an impact on the obligations of the contracting agents of the CCEE.

²⁷ Art. 58 of the Agreement. The same rules can be found in the Arbitral Agreement signed by CCEE and its agents, approved by ANEEL Resolution 531 of August 7, 2007.

²⁸ Legal Opinion no. 19/2015/PFANEEL/PGF/AGU.

²⁹ Art. 62, Law 12.815/2013.

Arbitration in the ports sector (cont.)

allowed³⁰. Therefore, arbitration offers a solution through which companies in default can nevertheless extend their contracts, as an exception to the abovementioned rule.

Besides that, alienable rights are defined as those involving (i) a general contractual default; (ii) the restoration of the economic-financial balance of the contract; and (iii) other defaults specifically related to the payment of port fees and other financial obligations³¹.

Investment Partnership Program (PPI) and arbitration

Law 13.334/2016 created the Investment Partnership Program (PPI), targeted at expanding and strengthening the interaction between government and the private sector by means of partnership contracts for the execution of infrastructure projects.

Provisional Measure 752/2016, organizing the rules regarding tendering procedures for the PPI, opened the possibility of using arbitration to settle disputes within the scope of the PPI, but **only after** a final administrative decision of the competent authority. This possibility is restricted to **renewed PPI contracts in the highways, railways and airport sectors**.

Not only it was made possible to add ex post the arbitration clause to old contracts, but also the topics that can be subject to arbitration were defined: (i) matters related to the contractual economic-financial balance; (ii) compensation calculation resulting from the concession agreement's termination or transfer; and (iii) breach of contractual obligations by any of the parties.

3. Risks of arbitration

Although arbitration has long been promoted as a fast and trouble-free dispute settlement system, nowadays it is clear that arbitration has its own share of risks and uncertainty.

The difficulty of finding arbitrators with the necessary technical expertise at a reasonable cost, delays in the supposedly streamlined process and the lack of adequate instruments to counteract delay tactics by the parties, lack of clarity regarding the confidentiality principle as well as the need to apply to state courts to enforce the awards are examples. In the infrastructure sector, where the need to promote investor confidence through legal security is paramount, the risks involved in arbitration play a key-role in investment decision-making.

³⁰ Art. 13, § 1, Decree 8.465/2015.

³¹ Art. 2, Decree 8.465/2015.

3.1 Judicialization

One of the greatest risks is the uncertainty created by the **judicialization** of arbitration, which can be legally authorized or derived from the will of the parties. According to the Arbitration Law, the arbitral award produces with respect to the parties the same effects as a court decision, and it constitutes a directly enforceable instrument³².

The arbitral award can nevertheless **be declared null** if: (i) the arbitration agreement is declared invalid; (ii) it was issued by legally unqualified arbitrators; (iii) one of the mandatory requirements for the arbitral award is missing; (iv) it goes beyond the limits of the arbitration clause/agreement; (v) it was

influenced by corrupt practices; (vi) it was delivered untimely; or (vii) if some principles were not satisfied³³⁻³⁴.

Besides those situations, there are two others in which an arbitration process can be rightfully submitted to litigation: (i) recognition, by the arbitrators, of lack of competence to decide the issue, as well as the nullity, invalidity or ineffectiveness of the arbitration clause/agreement; and (ii) precautionary or urgent measures **before** the arbitration process is commenced³⁵.

3.2 Conflict of Jurisdiction no. 139.519-RJ and why it matters

The Superior Tribunal of Justice was called on to decide in Conflict of Jurisdiction no. 139.519-RJ (2015) which jurisdiction – arbitral or State – was competent to decide the merits of a case involving Petrobras and ANP.

In summary, ANP defined the ring fences of the oil field known as Jubarte, which encompasses various fields. According to Petrobras' understanding of "oil field", those various fields could not be aggregated together to form a single oil field. Petrobras then initiated arbitration against ANP and, **concomitantly**, filed an action for precautionary measure with the federal judiciary in Rio de Janeiro, which was denied. Petrobras then appealed, but before the Federal Court of Appeals for the 2nd Region could judge the appeal, ANP, being notified of the arbitration process, filed an action with the federal judiciary in Rio, seeking suspension of the arbitral proceeding since there was a risk of the arbitral award being given before the judgment on the appeal. The 8th Specialized Chamber of that Regional Court suspended

the arbitration process, holding that the judiciary was competent to decide the case.

The Superior Tribunal of Justice, in a **decision by the reporting judge**³⁶, recognized the need to preserve the arbitral authority as competent to decide the case, in order not to weaken the Arbitration Law. The precautionary measure was **granted**, (i) giving competence to the arbitral tribunal but also (ii) determining, until the Conflict of Jurisdiction is judged by a chamber of the STJ, the suspension of the arbitration.

A final decision is yet to be issued. This case is of extreme relevance because the STJ has to decide whether a public-sector company can invoke the arbitration clause and ask an arbitral tribunal to challenge a final decision of a regulatory body issued according to its legal competence (inalienable non-patrimonial right). If STJ eventually recognizes the arbitral tribunal as competent, that could establish an important legal precedent to question administrative decisions through arbitration.

³² Art. 31. As early as 1973, the Supreme Court ruled for the legitimacy of a clause stating that the arbitral award could not be appealed, Interlocutory Appeal 52.181-GB, published in RTJ 68/382. As already mentioned, an arbitral award has the same effects as a judicial sentence, Art. 515, VII, Civil Procedure Code.

³³ Arts. 32 and 33, Arbitration Law.

³⁴ The 41st Civil Court in Rio de Janeiro granted a precautionary measure filed by Usina Jirau consortium, composed by private – Engie and Mitsui – and public companies – Eletrobras, Chesf and Eletrosul –, against Camargo Corrêa, determining the suspension of the arbitral award, on grounds that, within the

scope of the arbitral procedure, the consortium had its right of defense restricted.

³⁵ Art. 20 and Arts. 22-A and 22-B, Arbitration Law.

³⁶ Cases at the appellate level are first assigned to a reporting judge, whose job is to summarize the case for the other judges of the panel/chamber/full court and write a leading opinion, which may or may not prevail in the final vote. The reporting judge, acting alone, can also issue certain interim remedies and rulings, subject to review by the full panel/chamber/court through a mechanism called a regimental (or internal) appeal.

3.3 When the concessionaire prefers to judicialize: nullification of a gas distribution concession agreement in Espírito Santo

Another example showing risk in arbitration is found in the recent termination of the gas distribution concession agreement in the state of Espírito Santo. On February 1, 2016, State Law 10.493 held null and void the concession agreement with BR Distribuidora, signed in 1993 without a tender process³⁷.

Despite the absence of an arbitration clause in the concession agreement, State Law 10.493/16 authorized the Espírito Santo state government to enter into arbitration to discuss the compensation amount due following the agreement's

breach provided that (i) there is a consensus between the State and the concessionaire and (ii) that consensus is reached within 180 days from the date the law became effective, resulting in an agreement to arbitrate.

Whether or not a consensus regarding the use of arbitration was reached in a timely manner is not clear, **since BR Distribuidora instead filed** a mandamus action, questioning the state law. A preliminary decision issued by Espírito Santo's Justice Court denied the requested preliminary injunction to suspend the law's relevant provisions.

4. Concluding remarks

After a first phase marked by tentative contractual and legal provisions regarding alternative dispute resolution in general – and conciliation and arbitration in particular – a second phase followed the enactment of a specific legal instrument for arbitration (Law 9.307/96). Since then, a third phase has been in course, related to the possibility for public entities' entering into arbitration and the definition – by the regulator rather than the judiciary – of “alienable rights”.

Although the legal possibility is clear and the enforceability of arbitration clauses and awards have been recognized by the Brazilian courts, arbitration faces some challenges, which are translated into risks for investors. For example: in some infrastructure sectors there is a grey zone regarding the delimitation of an “alienable right”; an arbitral proceeding still takes some time (almost always more than the legally established “six months”); there are high costs involved in the process; and finally, praxis has shown that a resort to judicialization is often chosen, more in the case for precautionary and urgent measures but also to declare the arbitral award null.

In the context of emerging markets, investors tend to see a concession agreement as having inherently higher risk or to seek a higher rate of return to compensate for the risk, if the right to see an unfair or incorrect decision of a regulatory body revisited by an arbitral institution is denied.

A legal rule defining how, when and which bodies of the Public Administration can enter arbitration could provide more legal certainty and therefore less risks to investors.

Each concession agreement – depending on the infrastructure sector – brings its own set of rules regarding the time required to settle a dispute, the choice of arbitrators, the arbitral court where the issue should be taken to, cost sharing between the parties and so on.

It is important for private companies and the public administration to firmly rely on arbitration when there is an arbitration clause in the concession agreement, in order to not weaken the gains achieved by arbitration so far. The formulation of a standardized and well-defined arbitration clause can reduce interpretation risks and offer legal security.

On the other hand, it is necessary for public bodies to define “alienable right” and to draw a line separating the application of a regulatory measure from its economic effects on particular concessionaires – only the latter could be submitted to arbitration. The inclusion of such definitions in concession agreements can prevent frivolous arbitration.

Furthermore, arbitration institutions should implement governance mechanisms targeted to reduce the costs – such as guidelines related to third party funding – and to reduce the time needed to settle a dispute – use of mediation and emergency arbitrators, expedited procedures, commitment to a schedule and sanctions for dilatory conduct.

³⁷ According to Art. 175 of the Brazilian Constitution, all contracts for public services must be preceded by a tender process. Art. 43 of Law 8,987/95 states

that every public service concession awarded without a tender process is thenceforth extinct.

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