Brazilian federal government issues decree regulating arbitration in disputes between Public Administration and transport and logistics sectors

International Arbitration Alert

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Arbitration is alive and growing in Brazil. According to research conducted among Brazil's six main arbitral institutions, in 2010 there were 128 new arbitration proceedings; then in 2017, this number jumped to more than 275. During this period, 1,567 new cases were filed before these arbitral institutions. In terms of amounts involved, in 2010 the amount at issue in the arbitrations files was cumulatively BRL2.8 billion. In 2017, this amount increased to more than BRL26 billion.

Further, according to the ICC, in 2016, Brazil was fifth on the list of countries with the highest number of parties involved in ICC arbitral proceedings.

Following this trend, in 2015 the Brazilian Arbitration Act was amended to officially allow the Public Administration to use arbitration as a dispute resolution method. In line with this, the States of Rio de Janeiro and São Paulo issued rules regarding arbitration related to their disputes, and Federal Law 13,867/2019 allows arbitration in real estate appropriation disputes.
Most recently, on September 23, 2019, the Brazilian President issued Decree no. 10,025 regulating arbitration of disputes involving the Public Administration and relating to infrastructure projects – ports, roads, railways, waterways and airports. According to this Decree, arbitration may be used by the federal government and its entities to settle disputes with infrastructure operators, such as concessionaires, permittees, lessees of public facilities, authorized entities or port operators. Disputes regarding the economic-financial balance of agreements, the calculation of indemnities arising from the termination or assignment of agreements, and alleged breaches of contractual obligations by either party may be submitted to arbitration.

The Decree also provides the following general rules to be applicable to the arbitrations proceedings: (i) the arbitral tribunal shall apply Brazilian law; (ii) the proceedings must be conducted in Brazil and in Portuguese; (iii) the information related to the arbitral proceedings shall be available for public scrutiny, except trade secrets; and (iv) arbitrations shall be carried out before an arbitral institution previously approved by the federal attorney General’s Office (AGU). Ad hoc arbitration will be accepted when it is duly justified.

In order to be accepted by the AGU, an arbitral institution must have been in regular operation as an arbitral chamber for at least three years, have a good reputation for competence and experience conducting arbitral proceedings and have its own regulation available in Portuguese.

According to the Decree, the final award shall be issued in no more than 24 months from the date of the terms of reference, and this deadline may be extended once, to allow the arbitral tribunal an additional 24 months. Moreover, the infrastructure operators shall advance the costs of the arbitral institution and the arbitrators’ fees. When applicable, these costs shall be reimbursed in accordance with the final award in the arbitral proceeding. The costs of the experts will be borne by each party.

Regarding arbitral awards, the Decree provides that payment by the federal government must be made by certificate of judgment debt of the government (precatório) or small amount order of payment, as the case may be.

The parties may agree that the enforcement of the award may be made by instruments provided for in their agreement (for example, the rebalance of the agreement), by replacing the monetary debt, or by set-off of already existing debts between the parties.

Given that the arbitration proceedings as authorized will be quicker than a typical judicial procedure in Brazil, and that arbitrators with experience in large infrastructure disputes are more specialized than traditional judges, the Decree should provide private sector participants in large infrastructure projects with a faster, and more predictable way to settle any dispute with the federal government in relation to their projects, which in turn will promote the development of infrastructure in the country.

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