

**Arbitration Law of Brazil:
Practice and Procedure**

by

Joaquim T. de Paiva Muniz

Ana Tereza Palhares Basílio



Juris Publishing, Inc.

Questions About This Publication

For assistance with shipments, billing or other customer service matters,
please call our Customer Services Department at:

1-631-350-0200

To obtain a copy of this book, call our Sales Department:

1-631-351-5430

Fax: 1-631-351-5712

Toll Free Order Line:

1-800-887-4064 (United States & Canada)

See our web page about this book:
<http://www.jurispub.com>

COPYRIGHT © 2006
by JurisNet, LLC

All rights reserved. No part of this publication may be reproduced in any form
or by any electronic or mechanical means including information storage and
retrieval systems without permission in writing from the publisher.

All Rights Reserved
Printed in the United States of America
ISBN 1-929446-98-5
Juris Publishing, Inc.
71 New Street
Huntington, New York 11743
USA
www.jurispub.com

SUMMARY TABLE OF CONTENTS

Summary Table of Contents	iii
Detailed Table of Contents	v
Foreword	
Professor Theóphilo de Azeredo Santos	xv
About the Authors.....	xvii
About the Collaborators.....	xix
Acknowledgments	xxi
Chapter 1 Scope of the Book.....	1
Chapter 2 General Overview	3
Chapter 3 Arbitrability	17
Chapter 4 Law Applicable to the Merits	33
Chapter 5 Arbitration Agreements	45
Chapter 6 Arbitrators.....	75
Chapter 7 Conduct of Arbitral Proceedings	99
Chapter 8 The Award	143
Chapter 9 Recognition and Enforcement of Foreign Awards	171
Appendices.....	APP-1
Glossary	GLOSSARY-1
Index	INDEX-1

DETAILED TABLE OF CONTENTS

Summary Table of Contents	iii
Detailed Table of Contents	v
Foreword	
Professor Theóphilo de Azeredo Santos	xv
About the Authors	xvii
About the Collaborators	xix
Acknowledgments	xxi
Chapter 1 Scope of the Book	1
Chapter 2 General Overview	3
2.1 Historical Background of Arbitration in Brazil	3
2.1.1 Early Legal Framework	3
2.1.2 The Civil Code of 1916 and the Code of Civil Procedure of 1973	4
2.1.3 The Arbitration Bill	5
2.1.4 The Arbitration Law of 1996	6
2.1.5 Constitutionality of the Arbitration Law of 1996	7
2.1.6 The Civil Code of 2002	9
2.2 Definition and Nature of Arbitration Under the Brazilian Legal Framework	9
2.2.1 Definition of Arbitration	9
2.2.2 Legal Nature	10
2.3 Forms of Amicable Dispute Resolution	12
2.3.1 Mediation	13
2.3.1.1 Mediation Clauses	13
2.3.1.2 Clauses Combining Arbitration and Mediation	14
2.3.2 Conciliation	14
2.3.4 Other ADRs	16

ARBITRATION LAW OF BRAZIL: PRACTICE AND PROCEDURE

Chapter 3	Arbitrability	17
3.1	Exposition of the Issue.....	17
3.2	Subjective Limits to Arbitration—Who Can Be a Party to Arbitration?.....	17
3.2.1	Arbitration in Concession of Public Services	21
3.2.2	Arbitration in Oil and Gas Exploration and Production Agreements.....	22
3.2.3	Arbitration in Telecommunication Disputes.....	25
3.2.4	Arbitration in Transportation Disputes	26
3.2.5	Arbitration in Public-Private Partnership.....	26
3.3	Objective Limits to Arbitration—Matters Which Cannot Be Arbitrated	27
3.4	Arbitration in Consumer Contracts and Adhesion Contracts	28
3.5	Arbitration in Agency Agreements.....	31
3.6	Procedure for Preliminary Questions that Cannot Be Arbitrated	31
Chapter 4	Law Applicable to the Merits	33
4.1	Choice of Substantive Law	33
4.1.1	Choice of Foreign Law in Domestic Arbitration.....	36
4.1.2	Applicable Law If the Contract Is Silent	37
4.2	Public Policy	37
4.3	Judgment <i>Ex Aequo Et Bono</i>	40
4.4	General Principles of Law, Commercial Usage, Custom, International Business Principles and <i>Lex Mercatoria</i>	41
4.4.1	General Principles of Law	41
4.4.2	Trade Usages and Customs.....	42
4.4.3	International Business Rules.....	43
4.4.4	<i>Lex Mercatoria</i>	43
Chapter 5	Arbitration Agreements	45
5.1	Arbitration Agreements	45
5.2	Arbitration Clauses: Nature and Validity	45
5.2.1	Representation of a Party Through a Power of Attorney.....	46

TABLE OF CONTENTS

5.2.2	Lack of Signature of a Party in the Contract Containing the Arbitration Clause	47
5.3	Autonomy of Arbitration Clauses	48
5.4	Negotiating and Drafting an Arbitration Clause	49
5.5	Scope of the Clause.....	50
5.6	Institutional or <i>Ad Hoc</i> Arbitration	51
5.6.1	Institutional Arbitration	51
5.6.1.1	Advantages and Disadvantages of Institutional Arbitration	51
5.6.1.2	Choice of Arbitration Institution	53
5.6.1.2.1	Administrative Fees Charged by Arbitration Institutions	53
5.6.1.3	Selection of an Institution As Deterrence Against Future Claims	54
5.6.1.4	Administration of Arbitration by One Institution Under Another Institution's Rules	54
5.6.2	<i>Ad Hoc</i> Arbitration	55
5.7	Language.....	56
5.7.1	Applicable Language If the Arbitration Agreement Is Silent	57
5.8	Seat of Arbitration	58
5.8.1	Seat of Arbitration, in the Absence of Agreement.....	60
5.8.2	Performance of Procedural Acts in Places Other than the Seat of Arbitration.....	61
5.9	Efficacy of Burdensome Arbitration Clauses	61
5.10	Pathologic Arbitration Clauses	62
5.11	Effects of Arbitration Clauses Against Third Parties.....	63
5.11.1	Effects of an Arbitration Clause on a Contract's Assignee.	63
5.12	Specific Performance of Arbitration Clauses	64
5.12.1	Controversy As to the Need to Seek Judicial Enforcement, in Case of a Full Arbitration Clause	65
5.12.2	Previous Notice Before Judicial Enforcement	66
5.12.3	Procedure for Judicial Enforcement of Arbitration Clauses	67

ARBITRATION LAW OF BRAZIL: PRACTICE AND PROCEDURE

5.12.4	Judicial Enforcement of Arbitration Awards Involving Contracts Executed Before the Arbitration Law of 1996	69
5.13	Submission Agreements	71
5.14	Termination of the Arbitration Agreement	73
5.14.1	Bankruptcy.....	74
Chapter 6	Arbitrators.....	75
6.1	Requirements to Serve As Arbitrator.....	75
6.2	Number of Arbitrators	76
6.3	Choosing the Arbitrators.....	76
6.3.1	Knowledge of the Subject Matter	77
6.3.2	The Arbitrator’s Nationality	78
6.3.3	Language.....	79
6.4	Chair of the Arbitral Tribunal	79
6.5	Co-Arbitrators.....	80
6.6	Secretary of the Arbitral Tribunal.....	81
6.7	Procedure for Appointment of Arbitrators.....	81
6.7.1	Arbitrator Appointment in Institutional Proceedings	82
6.7.1.1	List of Recommended Arbitrators	82
6.7.2	Arbitrator Appointment in <i>Ad Hoc</i> Proceedings.....	83
6.7.3	Arbitrator Appointment in Multiple-Party Arbitrations.....	84
6.7.4	Judicial Court Assistance in Appointment.....	85
6.8.	Arbitrators’ Duties	85
6.8.1	Competence	85
6.8.2	Diligence.....	86
6.8.3	Discretion.....	86
6.8.4	Independence and Impartiality.....	87
6.8.4.1	Neutrality	89
6.8.4.2	<i>Ex Parte</i> Contacts with the Arbitrator	90
6.8.5	Duty to Disclose	90
6.9	Challenge of Arbitrators	92
6.9.1	Grounds for Challenge.....	92
6.9.2	Procedure for Challenge	92
6.9.3	Confirmation of Arbitrators.....	95
6.10	Replacement of Arbitrators.....	95

TABLE OF CONTENTS

6.11	Arbitrators' Liability.....	96
6.11.1	Civil Liability.....	96
6.11.2	Criminal Liability	97
6.12	Arbitrators' Fees	97
Chapter 7	Conduct of Arbitral Proceedings.....	99
7.1	Procedural Rules.....	99
7.1.1	Subsidiary Application of Foreign Procedural Rules	100
7.2	Mandatory Principles.....	101
7.2.1	Full Defense and Proper Response (<i>Contraditório</i>)	101
7.2.2	Equal Treatment of the Parties.....	103
7.2.3	Arbitrators' Impartiality and Free Convincement	103
7.3	Confidentiality	103
7.3.1	Confidentiality and Administrative Law Entities	105
7.4	Representation of the Parties	106
7.5	Initial Written Submissions	107
7.5.1	Request for Arbitration	107
7.5.2	Answer to the Claim	109
7.5.3	Respondent's Default.....	110
7.5.4	Counterclaims	111
7.5.5	Amendment to the Claim or Counterclaim.....	112
7.5.6	Further Written Statements.....	112
7.6	Multiple-Party Disputes	113
7.6.1	Compulsory Joinder.....	113
7.6.2	Permissive Joinder	114
7.6.3	Consolidation of Claims	115
7.7	Third Party Intervention.....	116
7.8	Formal Institution of the Arbitration.....	117
7.9	Pleas Against Jurisdiction and/or the Arbitrator	118
7.10	The Arbitral Tribunal's Competence to Rule on Its Own Jurisdiction ("Competence-Competence") and Anti-Suit Injunctions.....	120
7.10.1	Anti-suit Injunctions	121
7.11	Terms of Reference.....	122
7.12	Mandatory Conciliation of the Parties	123

ARBITRATION LAW OF BRAZIL: PRACTICE AND PROCEDURE

7.13	Coercive and Urgent Measures During the Arbitration.....	124
7.13.1	Urgent Measures Before Formation of the Arbitral Tribunal.....	124
7.13.1.1	Revocation by an Arbitration Tribunal of Preliminary Injunctions Granted by a Judicial Court.....	126
7.13.2	Coercive and Urgent Measures After the Formation of the Arbitral Tribunal.....	127
7.13.3	Venue for Coercive and Urgent Measures.....	128
7.13.4	<i>Antecipação De Tutela</i>	129
7.14.	Interlocutory Orders.....	129
7.14.1	Mandamus Against Interlocutory Orders.....	130
7.15	Summary Judgment.....	131
7.16	Submission of Evidence.....	131
7.16.1	Statements of Representatives and Witnesses.....	132
7.16.2	Request for Documents and Discovery.....	133
7.16.3	Expert Examinations.....	135
7.17	Hearings.....	136
7.17.1	Hearing Dates.....	136
7.17.2	Place of the Hearing.....	136
7.17.3	Language of the Hearing.....	137
7.17.4	Calling of Witnesses or the Parties' Representatives to Appear at the Hearing.....	137
7.17.5	Attendance at Hearings.....	138
7.17.6	Hearing Procedure.....	138
7.17.7	Cross Examination at Hearings.....	139
7.17.8	Record of the Hearing.....	140
7.17.9	Post-Hearing Submissions.....	140
7.18	Closing the Proceeding.....	140
7.19	Repetition of Evidence, in Case of Arbitrator Replacement.....	141
Chapter 8	The Award	143
8.1	Time Limit to Issue the Award.....	143
8.1.1	Extension of the Time Limit.....	144
8.2	Formal Requirements of the Award.....	145
8.2.1	Summary of the Proceeding.....	146

TABLE OF CONTENTS

8.2.2	Reasons for the Decision	146
8.2.3	Decision	147
	8.2.3.1 Liquidated Awards.....	147
	8.2.3.2 Interest and Indexation for Inflation	147
8.2.4	Date and Place of the Award	148
8.2.5	Signature of the Arbitrators	148
8.2.6	Practical Note on Drafting an Award	149
8.2.7	Tied Decision.....	150
8.2.8	Dissenting Arbitrator's Opinion	150
8.3	Partial Arbitral Awards.....	151
8.4	Settlement Award	153
8.5	Scrutiny of the Award by the Arbitration Institution.....	153
8.6	Delivery of the Arbitral Award.....	154
8.7	Correction and Clarification of the Award	154
8.8	Res Judicata in Arbitration	156
8.9	Application to Set Aside an Arbitral Award.....	157
	8.9.1 Invalidity of the Arbitration Agreement	159
	8.9.2 Incompetence of the Arbitral Tribunal	159
	8.9.3 Formal Defects of the Award.....	159
	8.9.4 Awards Outside the Scope of the Arbitration Agreement or That Do Not Decide All the Issues Submitted to Arbitration	160
	8.9.5 Criminal Misbehavior of the Arbitrators	161
	8.9.6 Failure to Issue the Award within the Applicable Time Limit.....	162
	8.9.7 Breach of Procedural Principles	163
	8.9.8 Procedure for Such Application.....	163
	8.9.9 Partial Invalidity of the Arbitral Award.....	164
	8.9.10 Application to Set Aside Foreign Arbitral Awards.....	164
	8.9.11 Suspension of the Enforcement of an Arbitration Award Pending an Annulment Lawsuit.....	165
	8.9.12 Rescission Lawsuit	166
8.10	Challenge Against Judicial Enforcement of an Arbitral Award (<i>Impugnação</i>)	167
8.11	Decision on Costs and Expenses	168
	8.11.1 Attorney's Fees	168

ARBITRATION LAW OF BRAZIL: PRACTICE AND PROCEDURE

Chapter 9	Recognition and Enforcement of Foreign Awards	171
9.1	Domestic and Foreign Awards	171
9.2	Recognition and Enforcement of Foreign Awards	172
9.3	The New York Convention.....	174
9.3.1	Alleged Abolishment of the Exequatur Requirement.....	175
9.4	Grounds to Deny Recognition of Foreign Awards	177
9.4.1	Incapacity of a Party	178
9.4.2	Invalidity of the Arbitration Agreement	179
9.4.3	Absence of Proper Notice and Other Impediments to Presenting a Proper Defense	179
9.4.4	Awards Outside the Scope of the Arbitration Agreement.....	180
9.4.5	Arbitration Proceedings Conducted Contrary to the Arbitration Agreement.....	180
9.4.6	Not Yet Binding, Annulled or Suspended Arbitral Awards	181
9.4.7	Arbitral Award on a Non-Arbitrable Matter.....	183
9.4.8	Arbitral Award Against Public Policy	183
9.4.8.1	Unreasoned Foreign Decisions	184
9.4.8.2	Service of Process As a Public Policy Issue.....	185
9.5	Standard Exequatur Procedure.....	186

APPENDICES

A.	Ten Years of the Arbitration Law of 1996: Overview and Prospects. <i>Pedro A. Batista Martins</i>	APP A-1
B.	Arbitration in Brazil: Case Law Perspective <i>Arnoldo Wald</i>	APP B-1
C.	Arbitration in Brazil: The ICC Experience <i>Cristian Conejeros Roos and Renato Stephan Grion</i>	APP C-1
D.	Treaties on Arbitration in Force in Brazil <i>Carmem Tiburcio</i>	APP D-1

TABLE OF CONTENTS

E.	Some Remarks on Arbitration in Corporate Law <i>Nelson Eizirik</i>	APP E-1
F.	The Arbitration Process <i>Carlos Alberto Carmona</i>	APP F-1
G.	Selected Treaties and Legislation	
G 1	Laws.....	APP G 1-1
G 1.1	Arbitration Law of 1996	APP G 1-1
G 1.2	UNCITRAL Model Law.....	APP G 1-17
G 2	International Treaties	APP G 2-1
G 2.1	New York Convention of 1958.....	APP G 2-1
G 2.2	Geneva Protocol of 1923	APP G 2-8
G 2.3	Panama Convention of 1975.....	APP G 2-11
G 2.4	Montevideo Convention of 1979	APP G 2-15
G 2.5	Protocol of Brasilia of 1991	APP G 2-19
G 2.6	Las Leñas Protocol of 1992 (Portuguese).....	APP G 2-29
G 2.7	Protocol of Ouro Preto of 1994.....	APP G 2-39
G 2.8	Buenos Ayres Convention of 1998 (Portuguese).....	APP G 2-56
G 2.9	Olivos Protocol of 2002.....	APP G 2-70
G 3	Rules of International Arbitration	
	Institutions	APP G 3-1
G 3.1	Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce – ICC.....	APP G 3-1
G 3.2	International Dispute Resolution Procedures for the International Centre for Dispute Resolution – ICDR.....	APP G 3-37
G 3.3	Rules of Procedure of the London Court of International Arbitration – LCIA	APP G 3-55
G 3.4	UNCITRAL Arbitration Rules	APP G 3-62
G 3.5	UNCITRAL Conciliation Rules	APP G 3-82

ARBITRATION LAW OF BRAZIL: PRACTICE AND PROCEDURE

G 3.6	Rules of Procedure of the Inter-American Arbitration Commission	APP G 3-90
G 4	Rules of Brazilian Arbitration Institutions.....	APP G 4-1
G 4.1	Arbitration Rules of the Arbitration Center of the American Chamber of Commerce São Paulo	APP G 4-1
G 4.2	Arbitration Rules of the Brazilian Center of Mediation and Arbitration – CBMA	APP G 4-16
G 4.3	Arbitration Rules of the Brazil-Canada Chamber of Commerce.....	APP G 4-30
Glossary		GLOSSARY-1
Glossary of General Terms.....		GLOSSARY-1
Glossary of Brazilian Civil Procedure Terms.....		GLOSSARY-5
Index		INDEX-1