The 1996 Brazilian Commercial Arbitration Law

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I. INTRODUCTION

Arbitration clauses in domestic or international contracts have been relatively uncommon in Brazil. The historical tendency has been to settle disputes in court. In a move to create a more hospitable environment for commercial arbitration, a new Brazilian Arbitration Act, Law 9,307, was adopted on September 23, 1996 (1996 Arbitration Law). This new law introduced important modifications to the arbitration regime in Brazil. The provisions of the 1996 Arbitration Law resolve a number of difficulties that previously made Brazil an unattractive site for arbitration, and particularly for those involving international disputes.

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Formerly, provisions of the Code of Civil Procedure and the Civil Code regulated arbitration in Brazil. The inadequacy of those provisions led the parties to prefer litigation as the chosen method of dispute resolution. The 1996 Arbitration Law fundamentally alters the framework existing in Brazil. It is comprehensive and covers many enforcement and procedural issues.

This study provides an overview of the main aspects of the 1996 Brazilian Arbitration Law and the major innovations that it has introduced in Brazil.

II. ARBITRATION AS AN ALTERNATIVE METHOD OF DISPUTE RESOLUTION

It is widely recognized that the Brazilian judicial system is currently unable to give efficient and quick responses to disputes. Bureaucracy, delays, high costs, and the attendant frustrations involved in court proceedings, have contributed to a lack of confidence in Brazilian judicial institutions, and to the consequent search for alternative forms of dispute resolution. By most appearances, the popularity of arbitration as a means of resolving disputes, particularly concerning to international disputes, has increased significantly over the past decades.

Arbitration is a means by which a dispute can be definitively resolved, pursuant to the parties' voluntary agreement, by a disinterested, non-governmental decision-maker. It has several defining characteristics. First, arbitration is consensual. The parties must agree to arbitrate their differences. Once the parties' agreement to arbitrate a dispute has been recognized, and an arbitrator has been appointed, judicial involvement in arbitration is (or should be) minimal. Second, arbitrations are resolved by non-governmental decision-makers. Arbitrators tend to be private persons selected by the parties, not government agents. Third, arbitration produces a definitive and binding award, which is

capable of enforcement through national courts. Another defining characteristic of arbitration is its flexibility, which generally permits the parties to agree upon the procedures that will govern the resolution of their dispute. As a consequence, the procedural conduct of arbitration varies dramatically across industrial sectors, arbitral institutions, and categories of disputes. In particular fields, or individual cases, parties often agree upon procedural rules that are tailor-made for their individual needs.³

Arbitration tends to be procedurally less formal and rigid than litigation in courts. It is usually confidential as to both evidentiary proceedings and final award. The existence of an arbitration clause and a workable, predictable arbitral tribunal may create incentives for settlement or amicable conciliation. The cooperative elements that are required to constitute a tribunal, agree upon a procedural framework which can help foster a climate conducive to a settlement. Parties sometimes agree to arbitrate *ex aequo et bono* (not based in the strict application of law) in a deliberate effort to foster settlement.⁴

A. THE INCREASE OF THE USE OF ARBITRATION IN INTERNATIONAL DISPUTES

International arbitration is similar in important respects to domestic arbitration. As in domestic matters, international arbitration is a consensual means of dispute resolution, by a non-governmental decision-maker that produces a legally binding and enforceable ruling. In addition, however, international arbitration has several characteristics that distinguish it from domestic arbitration. Most importantly, international arbitration is often designed and perceived particularly to assure parties from different jurisdiction that their disputes will be resolved neutrally. International disputes inevitably involve the risk of litigation before a

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3. *Id.*
4. *Id.*
national court that can be biased, backlogged, or unattractive for some other reason.\(^5\)

International arbitration is frequently regarded as a means of mitigating the peculiar uncertainties of transnational litigation, i.e. protracted jurisdictional disputes, expensive parallel proceedings, etc. by designating a single, exclusive dispute resolution mechanism for the parties’ disagreements. Outside of a limited number of industrialized nations, local court systems simply lack the competence, resources and traditions of evenhandedness to satisfactorily resolve many international commercial disputes. Moreover, international arbitration is often seen, as a means of obtaining an award that is enforceable in diverse jurisdictions. A carefully drafted arbitration clause generally permits the consolidation of disputes between the parties in a single forum pursuant to an agreement that most national courts are bound by treaty to enforce. This avoids the expense and uncertainty of multiple judicial proceedings in different national courts.\(^6\)

The preference for settling disputes by arbitration has strongly increased in the last few years. Currently, in international commercial agreements, the rate of arbitration clauses reaches 90%.\(^7\)

**B. MERCOSUL: THE STARTING POINT FOR THE ENACTMENT OF THE 1996 ARBITRATION LAW**

Local law at the site of an international arbitration affects numerous matters including enforceability of the agreement to arbitrate, certain procedural issues, and enforcement of arbitral awards in the absence of an international convention.

Before the enactment of the Arbitration Law in 1996, the inadequacy and difficulties of the existing provisions regulating arbitration made Brazil an unattractive site for arbitration, particularly for international disputes.

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5. Id.
6. Id.
Brazil's commitment to the Common Market of the South in 1991\(^8\), was a bellweather of change. Since its adoption, the Mercosul has created expectations among the trade community, mainly in view of its trade potential and investment opportunities. The launching of Mercosul was a powerful boost to the increase of trade relations between the countries of South America.\(^9\)

The Asunción Treaty commits the four countries to eliminate all tariff and non-tariff barriers, to co-ordinate macroeconomic policies and to establish a common external tariff by the end of the transition period (31st of December 1994). At the same time, all four countries had to foster their respective trade and investments policy towards liberalization and relaxation of previous controls and to improve the business environment for foreign investors.\(^10\)

Disputes are an inevitable consequence of commercial life. The improvement of commercial relations demanded the establishment of a regime to settle disputes arising from agreements made within the framework of the Common Market. Therefore, among the first measures implemented was the Protocol on Dispute Settlement, adopted during Mercosul's first high level meeting, the ministerial and presidential meeting of Brasília on December 17, 1991. The objective was to allow a climate of confidence among foreign investors and businessmen alike.\(^11\)

According to the Protocol of Dispute Settlement, any controversies between the member states, or between private individuals and member states arising from construction, applicability or noncompliance with the provisions of the

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\(^8\) The Treaty of Asunció created the Common Market of the South – MERCOSUL, on March 26, 1991. The economies of Brazil, Paraguay, Argentina and Uruguay committed themselves to become fully integrated by January 1, 1995, in a free trade and customs union area.

\(^9\) Adriana N. Pucci, Arbitragem Comercial nos Paises do Mercosulm, EDITORA LTR (São Paulo 1997).

\(^10\) Id. at 19.

Asunción Treaty, or from the agreements executed under its scope, or even from decisions made by the Common Market Council and resolutions taken by the Common Market Group are subject to the following settlement procedures: directed negotiations, intervention of the Common Market Group or arbitration.\(^\text{12}\)

In the event an agreement is not reached though direct negotiations or with the intervention of the Common Market Group, any of the member states may request that the Administrative Office of the Common Market Group institute arbitration. The arbitration proceeding will be handled by a mechanism of *ad hoc* arbitral tribunals and will follow the set of procedural rules designated in the Protocol.\(^\text{13}\) Articles 9 to 24 contain the set of provisions addressing the rules applicable to the arbitration proceedings.

Argentina, Paraguay and Uruguay signed and ratified the 1975 Panama Convention on Inter-American Commercial Arbitration, under which foreign decrees handed down in countries of the Americas are recognized and enforced. However, only Argentina and Uruguay are signatories of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The New York Convention.

Concerning local laws, Argentina (Articles 736 to 773 of the *Código Procesal Civil y Comercial de la Nación Argentina*), Uruguay (Articles 472 to 507 of the *Código General del Proceso de la República Oriental del Uruguay*) and Paraguay (Articles 774 to 835 of the *Código Procesal Civil de la República del Paraguay*) have, each, a comprehensive and adequate set of arbitral procedural rules.\(^\text{14}\)

\(^{12}\) *Id.* articles 1-24.

\(^{13}\) Article 1 of the resolution – MERCOSUL/CMD/DEC N. 28/94 of the Council of the Common Market, establishes that the *ad hoc* arbitral tribunals mentioned in article 8 of the Protocol will have its headquarters in Asuncion, Paraguay.

\(^{14}\) Pucci, *supra* note 9, at 28-29.
Conversely, Brazil’s laws regulating arbitration at the time Mercosul was adopted (Articles 1,072 to 1,102 of the Código de Processo Civil and Articles 1,037 to 1,48 of the Código Civil), were inadequate and insufficient.15

The former regime was inadequate for two main reasons. First, it held that the agreements to arbitrate future disputes (i.e. an arbitration clause inserted in a contract) were unenforceable, requiring parties to renew their agreement to arbitrate at the time the dispute arose. Second, recognition and enforcement of foreign arbitral awards was problematic requiring a system of duplicate ratification. To be enforced in Brazil, foreign arbitration awards had to be ratified by the foreign court where the award was made and by the Brazilian Supreme Court.16

Brazil’s decision in 1996 to enact a new set of new procedural rules governing arbitration was a major step towards the necessary harmonization between all the member countries. In May 1996, Brazil ratified the 1975 Panama Convention on Inter-American Commercial Arbitration. Nevertheless it has not yet sign the New York Convention.17

In adopting the new Arbitration Law and modernizing its environment for commercial arbitration, Brazil joins the three other signatories of the Asunción Treaty and several other jurisdictions that have recently updated their national arbitration laws, including India and the United Kingdom.

15. Id.
III. THE 1996 ARBITRATION LAW

The Brazilian Arbitration Law, law n. 9,307, was adopted on September 23, 1996. It introduced important modifications to the arbitration regime in Brazil which was, formerly, regulated by Articles 1,072 to 1,102 of the Code of Civil Procedure and Articles 1,037 to 1,048 of the Civil Code.

At the time of its enactment, many jurists argued that the new Arbitration Law was unconstitutional. The main argument was that when it established in its Article 18 that the award issued by an arbitrator is a final decision it violated the Constitution by limiting the right to freedom access to the Judiciary Power. The Federal Constitutional in Article 5, XXXV states that “the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power”.18

The argument was subjected to a strong debate. Salvio Figueiredo Teixeira, Justice of the Brazilian Superior Tribunal de Justiça, is among the jurists who opposes the argument and considers the new law perfectly constitutional.19

The new regime, as Teixeira demonstrates, does not conflict with the constitutional principle of the freedom to access to courts. The Federal Constitution guarantees the access to the courts, but it does not impose it. The new Arbitration Law, on the other side, doesn’t address the arbitration as a mandatory form of dispute resolution. It doesn’t limit or prohibit the access to the Judiciary Power. It merely privileges and regulates the parties’ voluntary willingness to settle their disputes within an arbitration procedure. If the parties agreed to resolve their disputes by arbitration, with the respect of the legal provisions, there is no violation of any constitutional right. Moreover, the Arbitration Law contains several Articles

with provisions that ensure the right of the parties of judicial mechanisms against injury or threat of a right, such as Articles 32 and 33 that address the circumstances where parties can seek a judicial review of an award.

A. GENERAL PROVISIONS

According to Article 1 of the Law, persons capable to set up contracts can submit to arbitration any disputes concerning rights of patrimony. Disputes relating to family law and personal status cannot be resolved by arbitration.

Under Article 2, the rules governing arbitration procedure can be freely determined by the parties involved as long as ethics and public order are respected. Parties can choose whether the arbitration will be administered at law or equity, the governing law, or if the specialized rules of an arbitration institution will be adopted. Parties are free to determine an appropriate arbitration procedure. They are also free to agree on the development of arbitration procedures based on general principles of law, on best practice and ethics and on international rules of trade.

B. THE ARBITRATION AGREEMENT

Before the introduction of the Brazilian Arbitration law, there was a distinction between the arbitration clause (cláusula arbitral or cláusula compromissória) and the arbitration agreement (compromisso arbitral) itself. The arbitration clause is the agreement regarding future disputes, usually inserted in the contract, in which the parties undertake to submit any dispute arising from the contract to arbitration. The arbitration agreement is the commitment of the parties to subject themselves to a set of rules, which will regulate the arbitration procedure to resolve an already existing dispute.\(^{20}\)

The arbitration clause was considered unenforceable until the enactment of the Law 9,307, requiring parties to renew their agreement to arbitrate in a new arbitration agreement at the

\(^{20}\) Basso, supra note 17.
time that the dispute arose. Under the previous regime the arbitration clause was nothing more than a representation to submit any disputes to an arbitral tribunal. The refuse of one of the parties to submit the dispute to arbitration, agreed upon an arbitration clause stated in a contract, could merely generate indemnity and even this was denied by many courts on the argument that it was an indirect way of limiting access to the courts.21

This requirement constituted a barrier for parties wanting to incorporate a clause in international contracts calling for arbitration of disputes that may arise in the future. Parties already in dispute, rarely agreed upon arbitration, and further upon all the rules of the proceedings to be applied.22

The Arbitration Law now recognizes agreements to arbitrate future disputes inserted in contracts (the arbitration clause) as enforceable under the Brazilian law, and parties do not need to renew the convenant at the time the dispute arises, they may proceed to arbitrate. The new law makes it compulsory to adopt arbitration if it is established in an agreement. Under the new Law, the cláusula arbitral and the compromisso arbitral, although different concepts, now have the same effect.23 The 1996 Law defines the former as the agreement that is inserted in a contract and relates to future disputes while the latter as the agreement entered into by the parties when a dispute already exists and there was no previous provision for arbitration.24

International arbitration can be either institutional or ad hoc. A number of organizations, located in different countries, provide institutional arbitration services. Among the best known are the International Chamber of Commerce (ICC), the

23. 1996 Law, supra note 1, article 3.
American Arbitration Association (AAA), and the London Court of International Arbitration (LCIA).²⁵

Arbitration in Brazil, domestic or international, has been relatively uncommon with the existence of few arbitral institutions. The first arbitral institution created in Brazil was the Brazil-Canada Chamber of Commerce Arbitration Commission, installed in 1978 in the city of São Paulo. Other examples are the Arbitration Commission of the ICC’s Brazilian Chamber of Commerce created in 1985 in Belo Horizonte and the Arbitration Commission of the State of Paraná created in 1996 by the Paraná’s Chamber of Commerce Association (ACP).²⁶

Several arbitral institutions have promulgated sets of procedural rules that apply where parties have agreed to arbitrate. In addition each arbitral institution has a staff and a decision-making body. It is fundamental to point out that arbitral institutions themselves do not arbitrate the merits of the parties’ dispute. This is the responsibility of the particular individuals selected by the parties or by the institutions as arbitrators.²⁷

Conversely, ad hoc arbitration is not conducted under the auspices or supervision of an arbitral institution. Instead, private parties simply select an arbitrator or arbitrators, who resolve the dispute without institutional supervision. The parties will sometimes select a pre-existing set of procedural rules designed to govern ad hoc arbitrations. The United Nations Commission on International Trade Law (UNCITRAL) has published a commonly used set of such rules.²⁸

Brazilian Arbitration Law addresses both the institutional and the ad hoc arbitrations. Under Article 5 of the Brazilian Arbitration Law the parties can determine in the arbitration clause that arbitration will be held under the supervision and

²⁵. BORN, supra note 2, at 11-16.
²⁶. Rechsteiner, supra note 7, at 45.
²⁷. BORN, supra note 2, at 11-16.
²⁸. BORN, supra note 2, at 9-10.
pursuant the procedural rules of an arbitral institution. Parties can also establish either in the same clause or in another separate document how the arbitration is going to be proceeded.

When a dispute arises and the parties have not previously agreed upon the proceedings in the arbitration clause, according to Article 6 of the law, the interested party must communicate with the other party its intention to arbitrate the dispute, by mail or any other means of communication.

A party may also refuse to commence arbitration or to honor the arbitration clause when a dispute arises. In this case, the party pursuing arbitration may raise the meaning and enforceability of the clause in a judicial action seeking an order to compel arbitration. The interested party may require a judicial court, under Article 7 of the Law, to summon the other party to honor the arbitration clause and participate in the arbitral process. The judge will schedule a hearing and seek an agreement between the parties. If the dispute over arbitration remains the judge will issue a decision in ten days based on the terms expressed in the arbitration clause. The decision compelling arbitration will have the force of an arbitration agreement.

The arbitration clause is independent of the contract in which it is inserted, so that the invalidity of the contract shall not necessary render the arbitration clause void or null. Under the Brazilian law, Article 8, arbitrators will decide the disputes over the existence, validity or enforceability of the arbitration agreement.

The arbitration agreement shall include the following: (1) the name profession, marital status and domicile of the parties; (2) the name, profession and domicile of the arbitrator(s), as the case may be, the particulars of the entity to which the parties have delegated the appointment of the arbitrators; (3) the matter referred to arbitration; and (4) the place where the
The arbitration award will be issued. The arbitration agreement may also include: (1) the place where arbitration is to be conducted; (2) any authorization for the arbitrator(s) to decide on equity; (3) the deadline for submission of an arbitration award; (4) the citation of the laws or statutes applicable to the arbitration; (5) the declaration of liability for payment of arbitration fees and charges; and (6) the setting of arbitration fees.

The arbitration agreement shall be extinguished in the following circumstances: first, if any arbitrator presents his declination before acceptance of the appointment, when the parties have expressly declared that no alternative would be acceptable; second, if any arbitrator dies or is rendered incapable of voting, provided that the parties have expressly declared that no alternative would be acceptable; third, on the expiration of the deadline for submission of the arbitration award, provided that the interested party has notified the arbitrator, and that he is allowed a ten day period to prepare and present the corresponding arbitration award.

C. THE ARBITRATORS

Any capable person who has the trust of both parties can be an arbitrator. The choice of the arbitrator is made by the parties, or by the procedure stipulated by them. The selection of arbitrators must result in an odd number. If the parties appoint an even number of arbitrators, the selected arbitrators will appoint one more arbitrator.

Arbitrators shall be impartial and independent. Persons who have a relationship with one of the parties or with someone connected with one of the parties or who have any other relationship that could be characterized as biased are precluded from serving as arbitrators. Furthermore, the Arbitration Law requires, under Article 14, that the same

29. 1996 Law, supra note 1, article 10.
30. 1996 Law, supra note 1, article 11.
31. 1996 Law, supra note 1, article 12.
32. 1996 Law, supra note 1, article 13.
standard applied to judges stated in the Brazilian Civil Procedure Code be applied to arbitrators.

Upon nomination, a prospective arbitrator is required, under Article 14, to provide a statement disclosing relationships that might reasonably compromise his or her independence and impartiality.

The appointment of an arbitrator can normally be challenged only for a reason arising after the appointment. If the reason predates the appointment, a challenge can be made in only two cases: when the arbitrator had not been directly appointed by the parties or when the reason for the objection has only become known after the appointment. The party interested can seek to challenge the appointment of an arbitrator under those circumstances, according to Article 15, by sending a written statement of the reasons for the challenge to the arbitrator or to the arbitral tribunal. The Brazilian Law also addresses under Article 16, paragraph 2, the possibility of the party to pursue its complaint in a court when unsuccessful in the arbitral forum.

Under Article 18 the arbitrator is considered a judge of law and fact and his or her decision is final. The scope of judicial review is extremely limited.

D. THE ARBITRAL PROCEDURE

Once the parties' arbitration has been enforced and the sole arbitrator or all arbitrators accept the task the arbitral procedure is ready to begin.\textsuperscript{33}

The arbitration will be held according to the procedure established by the parties in the arbitration agreement, which may adopt the rule of an institutional arbitration agency or specialized entity.\textsuperscript{34}

\begin{footnotesize}
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\item[33.] 1996 Law, supra note 1, article 19.
\item[34.] 1996 Law, supra note 1, article 21, paras. 1 & 2.
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If no provision has been agreed upon relating to arbitration procedure, the arbitrator or arbitrators will regulate it, observing the principles of contradictory and equal rights of the parties.\footnote{1996 Law, \textit{supra} note 1, article 21, para. 3.}

A variety of factors influence the availability and scope of discovery in an international arbitration. Most important are the national laws applicable at the arbitral situs, the arbitration agreement itself, the arbitral rules under which the arbitration is conducted and the nationalities and legal background of the arbitrators.\footnote{BORN, \textit{supra} note 2, at 82.}

In Brazil discovery will be very limited. There are no provisions in the Brazilian Code of Civil Procedure regulating party-directed discovery. Under the new Brazilian arbitration regime, parties can agree between themselves on particular rules of discovery either in their arbitration agreement or after the arbitration commences. Nevertheless, the decision to order discovery and the scope of such discovery is usually determined by the arbitral tribunal and arbitrators. This rule is common to civil law countries such as Brazil, which come from inquisitorial traditions: party-initiated discovery is rare and arbitrators are especially reluctant to order party-directed discovery.\footnote{BORN, \textit{supra} note 2, at 83.}

The new Arbitration Law contains rules governing arbitral hearings in Article 22. The arbitrator(s) may conduct oral hearings if requested by one or both parties or whenever they deem it to be appropriate. The 1996 Law granted arbitrators substantial freedom to structure hearings and provide for the presentation of evidence. Arbitrators will select the date, time and location where hearings are going to be held and must ensure that the parties receive adequate notice of schedule. They can take depositions of the parties and witnesses and hear other expert testimony.\footnote{1996 Law, \textit{supra} note 1, article 22, para. 1.}

\footnotesize{\begin{itemize}
\item 35. 1996 Law, \textit{supra} note 1, article 21, para. 3.
\item 36. BORN, \textit{supra} note 2, at 82.
\item 37. BORN, \textit{supra} note 2, at 83.
\item 38. 1996 Law, \textit{supra} note 1, article 22, para. 1.
\end{itemize}}
role, the Brazilian Law requires the tribunal to prepare written summaries of all depositions and testimonies. The written transcriptions must be signed by the person who gave the deposition or testimony and by the arbitrators.  

The legal traditions of the tribunal and counsel are reflected in the character of cross-examination and in the initiative displayed by the arbitrators at the hearing. In hearings and evidentiary presentation, unlike the common law tradition, civil law lawyers are not accustomed to aggressive cross-examinations, directed at both the substance of a witness's testimony and credibility. In civil law jurisdictions judges conduct questioning with no interjections by lawyers. Thus, where a civil law approach is followed, questioning will presumptively be the responsibility of the arbitrators.

In the Brazilian Arbitration law, arbitrators do not possess the authority to order provisional measures. They must seek the grant of any necessary enforcement or provisional measures by addressing a request to a judicial authority. The only exception is contained in Article 22, paragraph 2 that authorizes arbitrators to determine the penalty of a witness who refuses to appear and give a deposition. In this case the arbitrator can request the enforcement of his or her order by a judicial authority.

The new Law makes provision for defaulting parties in Article 22, paragraph 3. If a party defaults, the arbitration should proceed on an *ex parte* basis. The arbitration may go forward without the defaulting party's presence. The absence of one of the parties in the arbitral proceedings will not impede the issuance of an award. The new Law however made no further provisions for *ex parte* proceedings, such as ensuring that the defaulting party at every step of the way receives notice of the ongoing proceeding.

39. Id.
40. BORN, supra note 2, at 81-89.
41. 1996 Law, supra note 1, article 22, para. 4.
E. THE ARBITRAL AWARD

The arbitration award must be made within the period determined by the parties. According to Article 23, if no express agreement has been made in this respect, the award must be issued within six months from the initiation of the arbitration procedure. The parties and the arbitrator(s) can extend the deadline for the issuance of the award by means of mutual agreement.

Article 24 requires that all awards be in writing. The decision has to be by majority vote, and if there is a tie, the chairman of the arbitration panel will cast the tie-breaking vote. Arbitrators are also permitted to issue dissenting or concurring opinions.

Article 26 states the mandatory requisites for an award to be handed down. The arbitral award shall consist of a report, containing the parties' names and a summary of the case. It will refer to the basis for the decision, addressing the material and legal aspects involved and specify whether the arbitrators rendered an award in equity or in law. The award also has to mention the provision by which the arbitrators were called into the dispute and the deadline for compliance with the decision. Finally, it has to state the date and place where the award was made.

Decisions concerning the responsibility for the fees and expenses of the arbitral tribunal, the institutions, and the parties' lawyers, are at the discretion of the arbitral tribunal, subject to guidance from the dispositions of the parties' arbitration agreement.\(^{42}\)

The arbitrators are required to sign the award. If an arbitrator refuses to sign, the remainder of the panel may issue the award with a notation explaining the circumstances of the refusal.\(^{43}\)

\(^{42}\) 1996 Law, supra note 1, article 27.
\(^{43}\) 1996 Law, supra note 1, article 26.
With the execution of the award the procedure is ended. A copy of the arbitration award will be sent to the parties. Five days after receipt of the notice of the award, the interested party may request the arbitration panel to proceed with the correction of any material mistake contained in the award or the clarification of any inaccurate, ambiguous or contradictory points or omissions concerning any matter the should be addressed in the award.

Article 32 of the Law lists the circumstances in which an arbitral award is considered null. An award is null: (1) when made by an ineligible arbitrator; (2) when it exceeds the parameters set out in the arbitration agreement; (3) when fails to address the whole of the matter referred to arbitration; (4) when issued upon fraud or corruption; (5) when it omits one of the mandatory requisites set out in Article 26; (6) when handed down after the time limit; or (7) when the principles of contradictory, equal rights of the parties and the arbitrators' impartiality are violated. Under these circumstances, the party can seek the nullification of the defective award through a judiciary court, under the rules of the Brazilian Code of Civil Procedure.44

F. ENFORCEMENT OF FOREIGN ARBITRATION AWARDS

The 1996 Arbitration Law seeks to overcome Brazil's deficiency in relation to foreign law in matters of arbitration, caused by the fact that Brazil did not sign the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The new Law 9,307, which refers to recognition and enforcement of foreign awards, basically follows the rules of the New York Convention. Articles 37, 38 and 39 of the Brazilian law are almost an authentic reproduction of Articles IV and V of the Convention.45

Before the enactment of the new regime, recognition and enforcement of foreign arbitral awards was problematic,
requiring a system of duplicate ratification. To be enforced in Brazil, foreign arbitration awards had to be ratified by the foreign court where the award was issued and by the Brazilian Supreme Court.

The 1996 Law innovates by establishing that one ratification of the foreign arbitral award is sufficient. Foreign arbitral awards are now subject to approval solely by the Brazilian Supreme Court. Article 35 expressly states that a foreign arbitration award does not need to be ratified by a foreign court, though it must be ratified by the Brazilian Federal Supreme Court to have legal effect in Brazil. For the purposes of recognizing and enforcing the foreign arbitration award, the provisions in Articles 483 and 484 of the Code of Civil Procedure will apply.

Concerning to domestic arbitral awards, the Law is also innovative. The former requirement of judicial ratification is no longer necessary under the new regime. Article 31 of the Arbitration Law establishes that a Brazilian arbitral award now has the same binding effects as courts' decisions. It is a judicial execution instrument, according to Article 44, and does not need to be submitted to judicial ratification in order to be enforced.

To obtain the recognition and enforcement of a foreign award, the party applying for the recognition and enforcement shall addressed a request in accordance with the provisions of the Brazilian Code of Civil Procedure and shall supply the request with: (1) the duly authenticated award or a duly certified copy thereof, followed by an official translation; and (2) the original arbitration agreement or a duly certified copy thereof, followed by an official translation.46

The recognition and enforcement of a foreign arbitration award may be denied at the request of the party against whom it is invoked only if that party proves any of the following circumstances listed in Article 38. First, that the parties of the

46. 1996 Law, supra note 1, article 37.
arbitration agreement were under some incapacity. Second, that the arbitration agreement is void under the laws to which the parties submitted or under the law of the jurisdiction in which the arbitration award was made. Third, that the party against whom the award is invoked was not properly given notice of the appointment of the arbitrator or the arbitration proceedings or the principle of contradictory was violated and the defense was impaired. Fourth, that the arbitral award exceeds the scope set forth in the arbitration agreement and the excessive part cannot be set aside. Fifth, that the arbitration procedure was not in accordance with the agreement of the parties. Sixth, that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which that award was made.

Recognition and enforcement of an arbitral award may also be refused if the Brazilian Supreme Court finds that: (1) the subject matter of difference is not capable of settlement by arbitration under Brazilian law; and (2) the recognition or enforcement of the award would be contrary to the public policy of Brazil.47

IV. CONCLUSION

The new legislation was a result of the claim by the Brazilian and international business community to bring Brazil closer to the international trade practices, which demand efficient and prompt responses. It improves arbitration as a method of resolving commercial conflicts.

Disputes are an inevitable part of commercial life. These changes should help business, whether in Brazil or overseas, to resolve any disputes more speedily and cost-effectively. The new Law will enhance the attraction of Brazil as a center of international arbitration and, in turn, enhance the commercial and legal infrastructure, which is so vital to competitiveness.

47. 1996 Law, supra note 1, article 39.
The new law introduced substantial changes in the arbitration regime in Brazil. It is a comprehensive set of rules that now needs only a degree of fine-tuning to be complete. Then arbitration will become a truly effective way of solving disputes in Brazil.