

OVERCOMING THE CHALLENGES IN ESTABLISHING ARBITRATION IN BRAZIL:
A HISTORICAL PERSPECTIVE

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Abstract

This article provides a perspective on two barriers created in the Brazilian legal system that were crucial for the stagnation of arbitration in Brazil. The anti-arbitration measures adopted from 1867 until 1996 were detrimental to the acceptance of arbitration as a common method of solving disputes in Brazil. Although the practice of arbitration in Brazil is not a new phenomenon – in fact, when Brazil was a colony of Portugal there were statutory provisions allowing the use of such alternative method of dispute resolution, two Decrees enacted in 1867 and 1878 provided a step back in the arbitration scenario. They determined that the arbitration agreement was a promise to submit disputes to arbitration instead of a contract to have future disputes arbitrated and that an international arbitral award had to be recognised in the jurisdiction where it was issued before its submission to recognition and enforcement in Brazil. However, Brazil overcame these impediments which, at the end of the last century, were repealed.

Keywords: Brazil, Arbitration, Historical Development.

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INTRODUCTION

Arbitration is an alternative method of dispute resolution in which the parties allow a private tribunal to decide their dispute, making a legally binding decision.¹ Such concept has been embraced by the Brazilian legal system,² nevertheless, the development of arbitration in Brazil evolved slowly as the country went from being a Portuguese colony, to becoming an empire (in its own right) and later a republic. Even though the existence of arbitration in Brazil goes back 500 years, its modern practice, regarding aspects of international and domestic private law, is rather recent, having made its debut in the past 16 years.³

In the second half of the 19th century, two statutes enacted in 1867 and 1878 created two impediments to the use and development of domestic and international arbitration in Brazil. The first obstacle was that the arbitration agreement was a commitment (*compromisso*) established by Article 3 of Decree 3900 of 28 June 1867. This meant that the arbitration agreement was a promise to have a dispute arbitrated and not an agreement to submit disputes to arbitration. The second impediment was Article 13 of Decree 6982 of 27 July 1878 which determined that any arbitral award issued abroad would need to be homologated by the courts of the seat of arbitration before being executed in Brazil. Additionally, during the same period, the Calvo Doctrine which characterised arbitration as having the sole function of removing the local court jurisdiction to the detriment of foreign investors was adopted in Latin America.⁴ Brazil followed a similar path where a protectionist approach made litigation in courts almost the sole method of dispute resolution.

¹ Luiz Antonio Scavone Junior, *Manual de Arbitragem*, 4th ed (Editora Revista dos Tribunais, 2010), p.15.

² See Article 1 and Article 3 of the Brazilian Arbitration Act which respectively states: “Individual or corporate persons who celebrate contracts may avail themselves of arbitration to resolve disputes relating to alienable patrimonial rights.” “The arbitral award shall have the same effectiveness on the parties and their successors as a ruling of a State Court, whereas should it find the party guilty in such proceeding, the arbitral award shall constitute an enforceable instrument.”

³ Joaquim T. de Paiva Muniz and Ana Tereza Palhares Basilio, *Arbitration Law of Brazil: Practice and Procedure* (USA, Juris Publishing, 2006) p. 3.

⁴ See José Maria Rossani Garcez, *Arbitragem Nacional e Internacional, progressos recentes* (Brazil, Del Rey Publishers, 2007) p. 24 and Carlos Alberto Carmona, *Arbitragem e Processo: Um Comentário a Lei No. 9,307/96* (Brazil, Atlas Publishers, 3rd edition, 2009) p. 2.

Such barriers were only lifted in 1996 with the enactment of the AA, but even when it came to force, there was a challenge to its constitutionality and it took six years for the Brazilian Supreme Court to rule in favour to the Act's constitutionality.

Be that as it may, Brazil is becoming a traditional seat for arbitration.⁵ As an emerging economy and a BRIC country,⁶ it has a privileged position compared to its partners. China is possibly going to be the world's biggest economy but it is not a democracy.⁷ India faces serious internal problems due to its diversified ethnicities in addition to complicated relations with its neighbouring countries, particularly Pakistan.⁸ Russia also faces difficulties in establishing a democracy and it mainly produces oil and weapons.⁹ Brazil, as opposed to all the other BRIC countries is a democratic nation producing a variety of commodities. It has no severe international engagement with its neighbouring countries and its geographical position gives it an opportunity to be a leader in South America. As a result, developing arbitration in Brazil is vital to bring foreign investment to the country as in cross-border transactions, investors prefer arbitration over litigation when it comes to dispute resolution methods.¹⁰ Fortunately, the 20th century was a period of metamorphosis for Brazil: until a stable democracy could be implemented, the country went through two coups and more than 20 years of military dictatorship. Nonetheless, by 1985, the democratisation process had started, and in 1996 Brazil enacted its first Arbitration Act (AA).

This article will examine how the above mentioned two decrees were a detriment to any attempt to develop arbitration in Brazil. First, it will provide a succinct summary of the arbitration

⁵ See Arnold Wald, 'A evolução da arbitragem internacional no Brasil', *Revista de Arbitragem e Mediação*, ano 6, no 23 (2009) pp.19-38, p. 30 where the author demonstrated that in the ICC rank of arbitrations involving Brazilian parties in 1994, Brazil ranked 26th and in 2008, it ranked 9th.

⁶ The acronym was created in 2001 by Jim O'Neill from Goldman Sachs and means Brazil, Russia, India and China. The idea is that "Over the next 50 years, Brazil, Russia, India and China—the BRICs economies—could become a much larger force in the world economy." In <http://www2.goldmansachs.com/ideas/brics/index.html>, accessed on 3 March 2009.

⁷ See article *Brazil Takes Off*, *The Economist*, 12.11.2009. In <http://www.economist.com/node/14845197>, accessed on 12 November 2013.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ See 2013 International Arbitration Survey, *Corporate Choices in International Arbitration: Industry Perspectives*. Made by the School of International Arbitration, Queen Mary University. In <http://www.arbitration.qmul.ac.uk/docs/123282.pdf>, accessed on 25 September 2016.

environment before 1867 and after, analyse the effects of Decree 3900 and Decree 6982, followed by the study of how the AA repealed the procedures and survived the challenge to its constitutionality.

THE BEGINNING OF A JOURNEY: ARBITRAL LEGISLATION IN BRAZIL BEFORE 1867

By the 16th century Portugal had become a powerful maritime nation, leading to the discovery of many sea routes which are still used today for transportation of goods around the globe. One of the journeys, led by Pedro Alvares Cabral, intended to reach India, however, after departing Portugal, Cabral's fleet swung off course, veering westwards, on 22 April 1500 arrived at what today is the Brazilian State of Bahia.¹¹ After this discovery, the Portuguese started the colonisation process by sending its nationals to settle in Brazil, and subsequently divided the country into captaincies.¹²

During the colonial period, the legislation in force was a legal code named after Philip as the King Philip II Ordinances (*Ordenações Filipinas*).¹³ Regarding arbitration, the *Ordenações Filipinas* did not give it a definition but it was the first instrument in Brazil providing for arbitration to take place. In book 3, the ordinances regulated the judge arbitrators (*juízes árbitros*) in title 16 and the arbitrators (*arbitradores*) in title 17. The *juízes árbitros* were competent to analyse the facts of the case, questions of law and they could perform judicial acts. Their role resembles more the role of a modern arbitrator as they could settle disputes. The *arbitradores* had to refer questions

¹¹ Lilia M. Schwarcz e Heloisa M. Starling, *Brasil: Uma Biografia* (Brazil, Companhia das Letras, 2015) p. 28.

¹² *Ibid*, p. 30.

¹³ In 1580, the Portuguese and the Spanish entered a 60-year union due to the absence of an heir to the Kingdom of Portugal. As a consequence, Spain's Philip II became Philip I, King of Portugal. The consequence for Brazil was that the union had as one of its main goals to regulate the administrative and judicial procedures in the colony which led to the creation of the *Ordenações Filipinas*. See Thomas E. Skidmore, *Brazil: Five Centuries of Change* (UK, Oxford University Press, 1999) p. 12.

of law to the judges of the land.¹⁴ In fact, the *arbitradores* were assigned by the judges and their function was of evaluators or estimators which is different from the modern definition of arbitrator as an adjudicator of a dispute. Perhaps, the *arbitradores* fulfilled the same role of the expert that can be found today in the Brazilian Code of Civil Procedure.¹⁵ The procedure was simple, parties could agree to arbitrate and the *árbitros* would issue a decision that could be executed by courts as long as there was no appeal.¹⁶ If the parties felt that the award was not fair, they could appeal against it in court. During the appeal, a party could request the appeal judges to hear the witness depositions again if they felt that the arbitrators had not done it properly.

The *Ordenações Filipinas* were the legislation in force until the moment that Brazil ceased to be a colony of Portugal. On 9 September 1822 Pedro, the son of the Portuguese King declared Brazil independent from Portugal.¹⁷ Three months later, he was crowned Emperor of Brazil. With the settlement of the new Empire, the first Brazilian Constitution came to force in 1824. Article 160 of the 1824 Constitution declared that “[i]n civil proceedings ..., the Parties may appoint arbitrators. Their sentences will be carried out without appeal, if agreed upon by the same Parties”. This provision gave arbitration a constitutional character, making arbitration part of Brazil’s fundamental law.¹⁸ Additionally, it showed that the new government was modernising its legal

¹⁴ This is a translation from the term *juiz da terra*. According to Ives Gandra da Silva Martins Filho, *Evolução Histórica da Estrutura Judiciária Brasileira* (1999) 1 Revista Jurídica Virtual, in http://www.planalto.gov.br/ccivil_03/revista/Rev_05/evol_historica.htm, accessed on 27 February 2015, they were the judges elected by the community and they ruled on a question regarding the local issues.

¹⁵ Article 139 of the Code of Civil Procedure states: “Are of assistance of justice, besides others whose duties are determined by the rules of judicial organization, the clerk, the bailiff, the expert, the depository, the administrator and the interpreter.”

¹⁶ In modern legislation an award can be challenged in specific situations but it normally cannot be appealed. For instance, see Article 33 of the Brazilian Arbitration Act 1996 and for an exception see Section 69 of the English and Welsh Arbitration Act 1996.

¹⁷ Jorge Miguel Pedreira, ‘Economia Política na Explicação da Independência do Brasil’, in Jurandir Malerba (ed), *A Independência Brasileira: Novas Dimensões* (Brazil, Editora FGV, 2005) p. 56.

¹⁸ Such tradition did not linger throughout other Brazilian Constitutions. Although they provided for some type of regulation of arbitration, it referred to public law issues. Thus, in 1889 when Brazil became a Republic and new Constitution was approved, repealing the 1824 Constitution, the new fundamental law in Article 39 (11) only allowed arbitration for cases related to the solution of war issues. In 1930, a military coup took over and in 1934 a new constitution was enacted. The 1889 constitution was repealed but Article 4 of the new constitution repeated the provision for arbitration only in cases to resolve war issues. It declared: “Brazil will only declare war if it is not possible to resort to arbitration; and will never engage at war for conquest, directly or indirectly, for themselves or in alliance with another nation.” In 1937 another constitution was approved but this time it did not mention arbitration at all. Finally, in 1998, when Brazil was again a democratic nation, a new Constitution came to force and this time it innovated from its predecessors by having in article 114 paragraph 1 a provision establishing the use of arbitration in case of failure of collective negotiations on labour contracts.

system by trying to break the courts' monopoly over disputes. As Article 160 only guaranteed arbitration, there was a need for it to be regulated. Henceforth, inspired by the French Commercial Code of 1807, the Empire enacted its Commercial Code of 1850, which provided for several disputes to be submitted to compulsory arbitration.¹⁹ After the Commercial Code arbitration became mandatory for: (1) questions between partners in a company;²⁰ (2) issues related to the payment of assets belonging to a shipwreck that was saved;²¹ and (3) the distribution or apportionment of damages caused to vessels.²² The Code had a single title at the end which regulated the commercial courts and, in Article 20, it asserted that arbitrators, when deciding, were obligated to apply commercial legislation. The Commercial Code not only introduced compulsory arbitration, which is contrary to the autonomous nature of arbitration, but it also instituted arbitrability of certain disputes and mandatory use of commercial legislation as the applicable law. Be that as it may, the Code did not establish a framework for the arbitral procedural. It also did not define what was arbitration, it merely determined disputes in which arbitration would be compulsory. Following the Commercial Code 1850, Decree 737 of the same year came to standardise the commercial procedure. Overall, Decree 737 was a mixture of arbitration guidelines and principles of arbitration.²³ Here it can be found the first legislative mark in the history of arbitration in Brazil that established an understanding of what is arbitration. Article 411 of the Decree 737 distinguished the types of arbitration by defining the compulsory arbitration as the

¹⁹ Before the enactment of the Code, two Acts dealing with arbitration came to force. They allowed arbitration as a method to solve two types of disputes but they did not create a framework for arbitration. The first was an Act that had no number or title and it was named Law of 26 June 1837. It was a small Act related to insurance with eight articles being three about arbitration. Article 3 determined that as long as a jury was not established the matters related to insurance contracts that did not reach conciliation through the Justices of Peace should be submitted to arbitration, Article, Article 4 stated that the arbitrator's decision could be appealed if the parties had not agreed otherwise and Article 5 declared the Judges of Peace were charged with enforcing the awards. The second Act was Law 108 of 11 October 1837 about tenancy agreements. Article 14 provided for arbitration to take place to solve disputes originating from leasing contracts.

²⁰ Article 294.

²¹ Article 739.

²² Article 783.

²³ For instance, Article 452 generated rules of how to take evidence, Article 452 established how to reject the nomination of arbitrators and Articles 443 and 444 provided for what the award should describe. As to the principles of arbitration that can still be found in the current Legislation, Article 457 declared that the arbitrators could rule on questions of law and Article 414 expressed that everyone who was able to perform a contract could make an agreement.²³

ones from the Commercial Code²⁴ and voluntary as those in which the parties had concluded a commitment (*compromisso*).²⁵ A *compromisso* was a voluntary agreement to submit disputes to arbitration in order for the arbitrator to reach a decision. Until today, compulsory arbitration is the one determined by law and voluntary arbitration is the one agreed by the parties. Yet, compulsory arbitration in the Brazilian legislation did not last very long and it was revoked in 1866.²⁶

THE FIRST CROSS-ROADS - THE ARBITRATION COMMITMENT

After 42 years of different legislative instruments regulating arbitration, Decree 3900 of 26th June 1867 came into force repealing Decree 737. It repeated some of the provisions from the previous legislation²⁷ and it can be said that it brought some innovation to the arbitral framework in Brazil,²⁸ but its real legacy was a deferral to the settlement of arbitration in Brazil. Such delay lasted for more than 100 years being fixed only in 1996.²⁹ Decree 3900 explained the concept of commitment (*compromisso*) to the arbitration scenario. Article 3 of Decree 3900 established that “[t]he Arbitration Court could only be instituted by the commitment of the parties” and Article 9 declared that the agreement to arbitrate future disputes was only valid as a promise by establishing that “[t]he commitment clause without the appointment of arbitrators or on eventual issues is not worth

²⁴ Article 411 paragraph 1.

²⁵ Article 411 paragraph 2.

²⁶ It was repealed by Law 1350 of 14 September 1866 which had three articles: the first revoking compulsory arbitration and declaring that all arbitrations are voluntary as long as they have an agreement; the second pronouncing that the pending arbitration would be processed by the old law; and the third, that the government would regulate the arbitral procedure. One innovation was that the second paragraph of Article 1 allowed the parties to have the arbitration decided by equity, independent from the rules of law.

²⁷ For instance: who could perform an agreement (Article 4), the appointment of the third arbitrators (Article 31), the annulment of the agreement in case of death and absence (Article 26), what the award should contain (Article 48) and it increased the imprisonment time for the intention to delay the issue of the award from eight days to twenty days (Article 29).

²⁸ Renato Horta Rezende, *A Necessidade da Harmonização e Cooperação das Justiças Estadual e Arbitral: Novos Tempos* in Adriana Silva Maillart, Jamile Bergamaschine Mata Diz and Mauro José Gaglietti, *XXIV Encontro Nacional do Conpedi - UFS Justiça Mediática e Preventiva* (CONPEDI/UFS 2015) p.14

²⁹ Jacob Dolinger and Carmen Tiburcio, *Direito Internacional Privado: Arbitragem Comercial Internacional* (Brazil, Editora Renovar, 2003) p. 21.

but as a promise, and for its perfection and execution it depends on a new and special agreement between the parties, not only on the requirements of Art. 8 but also on the statements of Art. 10.”³⁰

Such approach meant that the commitment clause (*cláusula de compromisso*) was a mere obligation to perform a conduct that was to make the agreement and it did not oust the court’s jurisdiction.³¹ The result was that if party A refused to arbitrate the conflict, party B could not enforce arbitration and the only remedy party B had was to seek damages for breach of contract. It was like a *pactum de contrahendo* in which the agreement to arbitrate disputes was dependent on the will of both contracting parties to make it valid.³² The legislation that followed Decree 3900 only reinforced its provision regarding the *compromisso*. In 1916, Brazil enacted its first Civil Code and Article 1037 of the Code dealt with the *compromisso* by declaring that “individuals capable of concluding a contract could, through written commitment, have their judicial or extra-judicial disputes solved by arbitrators”. It also said that in relation to the *compromisso*, the rules associated with contracts of settlement were applicable.³³ In 1932, Brazil ratified the Geneva Convention on Arbitration Clauses through Decree 21187. Such statute did not provide for commitment clauses but for arbitration clauses, and even though the Portuguese translation was of an arbitration clause and not commitment clause, it did not apply to domestic arbitration. Brazil could have changed its law to follow the international trend; however, this did not occur and Brazil was so far from it that it did not even ratify the 1927 Geneva Convention on Enforcement of Foreign Awards. After 1927, there were two opportunities to change the scenario with the enactment of the 1939 Code of Civil Procedure and the 1974 Code of Civil Procedure.

³⁰ Article 8 determined that the commitment must have the name and address of the arbitrators and the subject matter that will be submitted to arbitration. Article 10 stated that besides the requirements of Article 8 the parties could determine a deadline for the arbitrators to issue the award, if the award will be executed without appeal, a penalty that one party will have to pay if it appeals from the arbitral award despite the non-appeal agreement, the possibility for the arbitrators to rule in equity and the permission to nominate a third arbitrator.

³¹ Carlos Augusto Silveira Lobo, ‘A Pré-história da Arbitragem no Brasil’, *Revista de Direito Renovar*, Vol. 41 (2008) pp 47–62, p. 51.

³² Humberto Theodoro Junior, *Orlando Gomes Contratos* (Brazil, Editora Forense, 2001) p. 136.

³³ Article 1048.

Unfortunately, no novelty was made and both Codes of Civil Procedure did not change the commitment rule. The 1939 Code regulated the arbitral jurisdiction and by doing so, it referred to the *compromisso* through procedure rules such as: the fact that one of the arbitrators will work as the arbitral tribunal's secretary if the *compromisso* did not assigned someone else;³⁴ if the *compromisso* is concluded after legal proceedings have started the case would be submitted to arbitrators³⁵ and circumstances in which the *compromisso* had no effect.³⁶ The 1939 Code of Civil Procedure did not expand the provisions of the 1916 Civil Code or Decree 3900. The same can be said about the 1974 Code that used a language regarding the *compromisso* in almost the same way as the 1916 Civil Code. Article 1072 of 1974 Code determined that “[i]ndividuals capable of concluding contracts will be able to use, through a written commitment, arbitrators to solve their judicial and extrajudicial disputes concerning patrimonial rights of any value in which the law allows it to be object of a transaction.”

During the 20th Century, these numerous instruments were subject of debate in courts from different Brazilian states and two superior Brazilian courts. The view was not always the same but the result was to disfavour arbitration. In 1922, the Court of Appeal of Distrito Federal in *Societe d'Entrepises Generales au Bresil v. United Steel Products Co.*³⁷ ruled on a dispute in a contract related to the formation of a company in which the parties had included an arbitration clause. A challenge to the validity of the clause was raised based on the fact that it was an *compromisso* and therefore, it did not bind the parties.³⁸ At first instance Justice Pereira recognised the validity of the arbitration clause and declined its jurisdiction. There was an appeal and Justice Pereira reported

³⁴ Art. 1034

³⁵ Article 1035

³⁶ Article 1039

³⁷ [1923] Vol. XL, Revista Forense, 397, Court of Appeal of Distrito Federal, 15 September 1922.

³⁸ The wording of the clause was: “In case of doubts or divergences about the execution, interpretation and conditions of this contract between the shareholders or the heirs or the successors of the deceased shareholder, they shall be regulated by two arbitrators and if necessary a third arbitrators whom will be entitle to decide the question.”

to the Court of Appeal of Distrito Federal that he reversed his decision. He first addressed the fact that the 1916 Civil Code did not repeal the commitment clause because the Code regulated the *compromisso* but not the commitment clause, which is a different situation. Thus, the provision from Decree 3900 was still in force. Looking at the wording of Articles 8, 9 and 10 of Decree 3900 the legislator intended the commitment clause to be a promise as the parties needed to make a new agreement regarding some requirements of the arbitration such as who are the arbitrators, the subject matter of the dispute, the deadline for an appeal and penalties. As a result, Justice Pereira, before sending the case to the Court of Appeal, reversed his decision to declare that the commitment clause could not be enforced and the parties could resort to the judiciary to solve their dispute. The Court of Appeal understood that the agreement to arbitrate was a mere promise that had to be confirmed before arbitration could start. Moreover, following Justice Pereira's rationale, such clause could only give the arbitral tribunal jurisdiction if the legal requirements for the commitment were fulfilled.

Fourteen years later another dispute arose in a contract which had an arbitration clause. In *Empresa de Luz Ferrense v. Prefeitura Municipal de Ferros*³⁹ the Court of Appeal of the State of Minas Gerais concluded that a commitment clause could not exclude the court's jurisdiction. Reporting Justice Oliveira in his decision declared that there were three different views in relation to the commitment clause. The first was that it had no efficacy, the second was that the breach of such clause would give the aggrieved party the right to claim damages and the third was that the clause could be subject to specific performance. The first view was rejected as Justice Oliveira declared that the commitment clause was not offensive to public policy. The third view was also rejected but the interesting part was that Justice Nonato produced a dissenting vote adhering to

³⁹ [1937] Vol. LXIX, Revista Forense, 116, Court of Appeal of Minas Gerais, 07 September 1936.

such theory. According to Justice Nonato the commitment clause consisted in an obligation to do something instead of a promise and its specific performance should be granted as long as it did not cause violence to the parties. The second view was the one adopted by Justice Oliveira. He described the situation with the Latin principle of *nemo ad factum praecise cogi potest* in which led to the understanding that the commitment clause consisted of a duty to do something that, in cases of non-performance, could only entitle the grieved party to damages.

In 1967 the issue reached the Federal Supreme Court in *Bueromaschinen v. Insubra*.⁴⁰ Insubra, a Brazilian company, started legal proceedings in Brazilian courts against Bueromaschinen, a German company which was Insubra's principal, claiming damages for breach of contract. Bueromaschinen requested a stay due to the existence of an arbitration clause for disputes to be decided in Germany.⁴¹ The Supreme Court did not create a different method of interpretation and reasoned in a similar way to the above mentioned decisions. It identified that there is a difference between a commitment and a commitment clause being the latter an obligation to perform a conduct, a *pactum de compromittendo* and not an obligation to oust court jurisdiction. Hence, the commitment clause could not be enforced and its breach could lead only to a claim of damages.

Two other decisions preceding the AA analysed the commitment clause and despite the fact that the reasoning was similar to what was decided in the cases above, the argument changed slightly. In *Siemens Aktiengesellschaft Ernerwerk Fuer Medizineche Technik v. Casa de Saúde de Campinas*⁴² the parties concluded a contract to provide x-ray machinery containing an arbitration

⁴⁰ Extraordinary Appeal (Recurso Extraordinário) RE 58696/67, Third Chamber of Supreme Federal Court, Reporting Justice Luiz Galotti, decided on June 02nd 1967, published on the Brazilian official report on October 30th 1967.

⁴¹ The wording of the arbitration clause was: "All divergences originated out of this contract will not be settled in court but through arbitration under the jurisdiction of the Arbitral Tribunal of the Chamber of International Commerce of the Democratic Republic of Germany, as an obligation to both parties."

⁴² Revista de Jurisprudência do Tribunal de Justiça do Estado de São Paulo 235 (1982), São Paulo State Court of Appeal, December 16th 1981.

clause to solve disputes.⁴³ An impasse arose and an action was brought to the São Paulo State Courts. The first instance judge rejected the jurisdictional challenge. An appeal was brought to the São Paulo State Court of Appeal that maintained the decision. This time, the argument was that the arbitration clause was different from a commitment clause, which can be found in the 1923 Geneva Protocol on Arbitration. The view was that the clause established by the Protocol was an obligation to resort to arbitration whilst the commitment clause was a promise to arbitrate future disputes. Justice Cahali understood that if the law to be followed was the Protocol that had been ratified by Brasil, the court would not have jurisdiction over the dispute. However, he argued that the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (NYC) repealed the Protocol in states that have ratified it. At that time, the NYC had not been ratified by Brazil, nevertheless, Siemens was a German company and Germany at the time of the dispute was a contracting state to the NYC. As a result, Justice Cahali decided that Siemens could not raise a norm based on the principle of reciprocity that was no longer in force at its place of business. He then concluded that the clause was a commitment clause.

Six years before the enactment of the AA, another superior court in Brazil had to deal with the saga of the commitment clause. In *Lloyd v. Ivarans*⁴⁴ a dispute arose out of a maritime contract between several freight companies from Brazil, Argentina and Norway in which it was agreed that the revenue for the transportation of goods across the Atlantic Ocean would be shared. The contract had an arbitration clause under the rules of the Inter-American Commission of International

⁴³ The clause stipulated: “The questions raised between the buyer and the seller, related to the present contract, will be submitted to arbitration, choosing each party an arbitrator within 60 days starting from the date in which the dispute arose. The two arbitrators will choose a third arbitrator within 60 days of their nomination. If one party fails to nominate an arbitrator or the two nominated arbitrators cannot reach an agreement in relation to the third arbitrator, the Zurich International Chamber of Commerce will nominate an arbitrator. Once constituted, the arbitral tribunal will rule according to common sense and equity. If by any chance the solution to any question arising out of the performance of this contract cannot be solved by arbitration, the parties select the courts of the State of Guanabara, Brazil, to eventual claims.”

⁴⁴ Especial Appeal (Recurso Especial) RESP 616/67, Third Chamber of Superior Justice Tribunal, Reporting Justice Claudio Santos, decided on 24 April 1990, published on the Brazilian official report on 13 August 1990.

Arbitration.⁴⁵ An arbitral tribunal was established in Rio de Janeiro, issuing an award that was brought to the Rio de Janeiro courts to be homologated. The first instance court recognised the award and the Court of Appeal reversed the decision because there was an commitment clause made by the parties. The case was finally decided by the Superior Justice Tribunal allowing the recognition of the award. Justice Santos, the reporting justice, understood that even though it was an international contract, the 1923 Geneva Protocol on Arbitration Clauses was ratified by Brazil before the Code of Civil Procedure, and seeing that after the Protocol there was a national law on the subject, the treaty could not prevail. Moreover, he understood that the arbitration clause in the contract could not be a substitute for the commitment clause. Contrary to Justice Santos, Justice Gueiros Leite saw an international contract that was subject to the Protocol and because the Code of Civil Procedure did not repeal the treaty, they were both in force. Since the Protocol had a different approach whereby the commitment clause was substituted by the arbitration clause that was not a promise to arbitrate but a binding agreement, the award was therefore valid. In addition, he considered that the party losing the dispute could not challenge the agreement after it had voluntarily agreed and participated in the arbitration and now, facing an unfavourable result, was taking advantage of a dubious procedure tool to avoid enforcement. The three remaining Justices agreed with Justice Gueiros Leite, not in relation to the Protocol, but the fact that one of the parties was taking advantage of a situation that it had previously created. The case did not change the old view and the Superior Court took the opinion that even though the Protocol was in force, it did not exclude the existence of a commitment clause.

⁴⁵ The clause declared: a) All questions and divergences of any nature, deriving from the contract to form a pool that cannot be solved by the signatories parties to this contract, including the circumstances indicated in Article 11, will be submitted to arbitration according to the rules and regulations of the Inter-American commission of Commercial Arbitration, before a panel of three people, being one arbitrator nominated by the claimant and another by the defendant, and the third arbitrator to be chosen by the arbitrators nominated by the parties. All arbitrators will be nominated once the opportunity to do so arises. The decision of two out of the three arbitrators will not be subject to appeal. It is possible to bring to trial any judgement according to the terms of the present contract, before any tribunal that has local jurisdiction. b) The parties agree that the costs of the arbitration will be covered by the losing party. However, if it is needed to advance costs before the arbitral procedure is over, such advance cost will be made by both parties and the losing party will reimburse the winning party once the arbitration is over.

The legislation regulating the *compromisso* and the commitment clause was in itself an impasse to the promotion of arbitration. This circumstance could not have been an attractive feature of arbitration; on the contrary, it was a failed framework. Why would someone agree to promise that in case a dispute arises out of the contract, such impasse would be decided by arbitration as long as the parties reaffirm the promise previously made? This meant that the arbitration agreement could not be subject of specific performance, making the intention of the parties to have their dispute arbitrated obsolete. The commitment clause made freedom of contract ineffective as in one hand parties were free to decide upon the method to solve their dispute but in the other hand this was a mere pre-contract and not a contract establishing that disputes will be submitted to arbitration. Arbitration was unworkable in practice, especially for international actors that wanted to invest in Brazil and wished to have their disputes settled by arbitration.⁴⁶ The interpretation of the *compromisso* given by Brazilian courts was not helpful. Additionally, courts were mixing the concepts of commitment and commitment clause being sometimes the same thing and in other occasion two different situations. Nevertheless, from a legal positivism perspective, courts seemed to be applying the law in force at the time, even if such law was preventing the use of arbitration. If Brazil was to embrace arbitration, the legislation needed to be changed, but this was not the only problem concerning arbitration as the *compromisso* and the commitment clause referred to domestic arbitration and in the international level, there was another impediment.

THE SECOND CROSS-ROADS – THE DOUBLE RECOGNITION FOR INTERNATIONAL ARBITRAL AWARDS

When it came to international arbitrations the Brazilian jurisdiction was not helpful to the parties that had a favourable foreign arbitral award against a Brazilian party. This was a result of an 1878

⁴⁶ Carmona (2009) p. 5.

statute. Decree 6982 of 27 July 1878 regulated the execution in Brazil of civil and commercial rulings issued by foreign tribunals. It established that foreign rulings could be executed in Brazil as long as the place where it was issued recognised the principle of reciprocity.⁴⁷ Additionally, it determined that foreign rulings should: meet the requirements of a court decision at the place where it was issued,⁴⁸ they should have the effect of *res judicata*,⁴⁹ be notarised by the Brazilian consul⁵⁰ and be translated to Portuguese.⁵¹ Up to this point the legislation established standard procedures for execution of foreign rulings but Article 13 of Decree 6982 stated that “the arbitral sentences approved by foreign Tribunals are also feasible of execution in Brazil, through the formalities of this decree”. Decree 6982 came to force when Brazil was an Empire but in 1889, Brazil became a Republic.⁵² The new Government approved in 1894 a law that regulated the federal justice system and established that the Federal Supreme Court was responsible for the homologation of any foreign ruling in Brazil.⁵³ Such prerogative obtained Constitutional character in the 1934 Constitution⁵⁴ being repeated in all other Brazilian constitutions.⁵⁵ In 1942, another statute called the Law of Introduction to the Brazilian Civil Code came to force to regulate the recognition and enforcement of foreign rulings.⁵⁶ Its Article 15, among other requirements, provided that in order for a foreign decision to be executed in Brazil it was necessary for it to be homologated by the Federal Supreme Court.

⁴⁷ Article 1, § 1

⁴⁸ Article 1, § 2

⁴⁹ Article 1, § 3

⁵⁰ Article 1, § 4

⁵¹ Article 1, § 5

⁵² See. Schwarcz and Starling (2015) p. 319

⁵³ Article 12 § of Brazil, Law no 221 of 20th November 1894

⁵⁴ Article 76, I, g.

⁵⁵ In the 1946 Constitution, Article 101, I, g; in the 1967 Constitution, Article 114, I, g and in the 1988 Constitution, Article 102, I, h. It is important to notice that the competence for recognition of foreign rulings is now of the Superior Justice Tribunal. The Constitutional Amendment no 45 of 2004 changed the provision of the 1988 Constitution removing the competence of the Federal Supreme Court.

⁵⁶ Brazil, Decree-Law 4657 of 4th September 1942.

In exercising its competence and following the existing legislation, the Federal Supreme Court understood that it could not homologate foreign arbitral awards – only decisions made by judges of foreign courts were subject to recognition. Hence, if a party wanted to recognise a foreign arbitral award in Brazil, it had to have the award confirmed by the local court where the award was made. This situation created a complication since many jurisdictions did not have such procedure in their procedures laws. Furthermore, the framework created a system of double recognition as the arbitral award would need to be recognised in the place where it was issued and also in the place of enforcement. Even if the arbitral award was recognised at the place where it was issued, what the Federal Supreme Court was recognising was not the foreign arbitral award but the ruling of the foreign court that had confirmed the award.⁵⁷ This approach was contrary to the international trend regarding recognition of awards. In 1927 the Geneva Convention on Enforcement of Foreign Awards was made to guarantee that signatory parties to the convention would have foreign arbitral awards recognised in their territories.⁵⁸ The Convention did not require a double recognition, having a limited number of reasons why an award would not be recognised.⁵⁹ Brazil did not ratify the 1927 convention and in 1958, the NYC came to existence substituting the 1927 convention.

⁵⁷See Lobo (2008) p. 52.

⁵⁸ Article 1 of the Convention declared: “In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called " a submission to arbitration ") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923 shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.”

⁵⁹ Article 1 of the Convention provided: “To obtain such recognition or enforcement, it shall, further, be necessary:— (a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto; (b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon; (c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure; (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition, appel or pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending; (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.” Article 2 of the Convention also stated: “Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:— (a) That the award has been annulled in the country in which it was made; (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented; (c) That the award does not deal with the differences contemplated by or fading within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration. If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it think fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.”

The NYC also had a procedure to facilitate recognition and enforcement of foreign arbitral awards⁶⁰ but Brazil waited forty-four years to ratify it. As Brazil was not a contracting state to the NYC or the Geneva Convention on Enforcement of Foreign Awards, there was no procedure for recognition of foreign awards, only domestic awards were valid. Hence, the method for recognition of foreign arbitral awards was the unproductive pursuit of its ratification by a foreign judiciary in order to enforce it in Brazil. In effect, if the legislature was not determined to change such procedure, one might think that the judiciary would not be so strict towards foreign awards. Regrettably, this was not what happened and despite the fact that the case law shows examples of awards that manage to obtain this double recognition, the interpretation of the law was strict. For instance, in *La pastina v. Centropin*⁶¹ the parties agreed to have any dispute arising out of it by arbitration in a contract of sale of goods between a Brazilian company and a Swiss company. When an impasse arose, an arbitral tribunal was set in Hamburg, Germany. The parties were duly represented and the tribunal issued an award. The reported decision does not explain how but the award was homologated by a Court in Hamburg in a procedure which the defendant was given notice. As a result, the Federal Supreme Court granted recognition and repealed the defendant's allegation that foreign arbitral awards could not be recognised in Brazil. Justice Neder clearly pronounced that once "homologated the arbitral award by the State in which it was produced, the jurisdictional decision homologating the arbitral award is capable of being homologated by the Brazilian judiciary."

⁶⁰ Article 3 of the convention declares: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

⁶¹ Recognition of Foreign Arbitral Award (Agravo Regimental na Ação Homologatória de Sentença Estrangeira), SE 2178-1, Full Court of the Supreme Federal Court, Reporting Justice Antonio Neder, decided on 08 November 1979, published on the Brazilian official report on 14 December 1979

Similar situation occurred in *Schubert E Salzer v. Suessen Maquinas*⁶² but this time the award came from France. As the award had been recognised by the Parisian *Tribunal de Grande Instance* the Federal Supreme Court had no problems to homologate it. This time, Justice Buzaid declared that the purpose of the recognition of a foreign ruling that gives *exequatur* to an arbitral award is the existence of a jurisdictional procedure at the country of its origin in which guarantees due process of law. Commenting the French system, Justice Buzaid asserted that arbitral awards in France, at the time, would only be *res judicata* when *exequatur* was granted. Before and after the *exequatur* parties are guaranteed due process which reflects the jurisdictional procedure.

The same rationale was applied in *N V Bunge v. Indústria de Óleo Pacaembu*⁶³ but this time the arbitral award came from the United Kingdom of Great Britain and Northern Ireland (UK). A Brazilian and a Belgium company concluded a contract for the sale of Brazilian peanut oil. The Brazilian company sent to the Belgium company a mixture of peanut oil and soya oil. As the contract had an arbitration clause under the rules of the Federation of Oils, Seeds and Fats Association, the Belgium party started arbitral proceedings in the UK. An award was issued and the Belgium party took it to the Queen's Bench Division in order to give the award the same status as a court decision. The Brazilian party was regularly served by the procedure in the Queen's Bench Division and even appealed, unsuccessfully, the decision that ratified the arbitral award. In this case Justice Silveira referred to the process of the English and Welsh Arbitration Act and declared that the award obtained its *exequatur* based on Section 26 of the Act. The Act that Justice Silveira referred to was the Arbitration Act 1950 and Section 26 dealt with enforcement of an

⁶² Recognition of Foreign Arbitral Award (Homologação de Sentença Estrangeira), SE 3236-8, Full Court of the Supreme Federal Court, Reporting Justice Alfredo Buzaid, decided on 05 October 1984, published on the Brazilian official report on 22 June 1984

⁶³ Recognition of Foreign Arbitral Award (Sentença Estrangeira), SE3707-6, Full Court of the Supreme Federal Court, Reporting Justice Néri da Silveira, decided on September 21st 1988, published on the Brazilian official report on February 02nd 1989

award.⁶⁴ In effect, the ratification or homologation required by the Brazilian legal system was in reality a procedure to enforce the award in the UK. The Brazilian party argued that it had not been properly served and the Queen's Bench Division decision could not be recognised as it violated due process of law. The Federal Supreme Court decided that an award issued by the Federation of Oils, Seeds and Fats Association gave the parties all the opportunities to present their case and also appeal from the decision recognising the award, guaranteeing thus, due process of law. Moreover, it declared that the Brazilian party was also given an opportunity to present its case which led to the Queen's Bench Division analyses of the merits of the award. Consequently, it was not for the Supreme Court to go through it again, being all the requirements to recognition already present in the request.

Notwithstanding the favourable character of the above mentioned decisions, as it can be seen enforcing a foreign arbitral award in Brazil was a lengthy and expensive process. Parties would have to go through the arbitral procedural, a court procedure where the award was issued and after it, a court procedure in Brazil. Thus, when parties brought their awards to Brazil without the court procedure at the seat of arbitration, the Federal Supreme Court did not consider the decision made by an arbitral award valid. For example, in *Cranikon Rionda v. União Federal*⁶⁵ an award issued by the Refined Sugar Association in London against the Brazilian Federal Government had its recognition denied because it was not recognised by the courts in the UK. *Cranikon Rionda* presented to the Federal Supreme Court an affidavit made by a British lawyer informing that such confirmation did not exist in the English legal system and tried to convince the judges that an arbitrator is a judge at law according to Article 1078 of the Code of Civil

⁶⁴ The wording of the article expressed: "An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

⁶⁵ Recognition of Foreign Arbitral Award (Sentença Estrangeira), SEC 4724-2, Full Court of the Supreme Federal Court, Reporting Justice Sepúlveda Pertence, decided on April 27th 1994, published on the Brazilian official report on December 19th 1994.

Procedure.⁶⁶ The Federal Supreme Court kept the view that arbitral awards are not recognised in Brazil and only foreign rulings giving the award legitimacy of a court decision would be accepted. Furthermore, the court referred to the case of *N V Bunge* in which the Queen's Bench Division recognised an arbitral award giving doubts about the affidavit presented. In another contract related to grains between a Brazilian and a Swiss company a similar situation occurred. In *Otraco SA*⁶⁷ a Swiss company requested the recognition of an arbitral award issued in London by the Cattle Food Trade Association determining the payment of French fr.40,000 by Conoil, a Brazilian company with its place of business in the State of São Paulo. Since no local court either in Switzerland or England confirmed the arbitral award, the request for recognition was denied.

Although some foreign arbitral awards were susceptible of recognition and enforcement, it is hard to find that such procedure was contributing to the development of international arbitration in the Brazil. It is not unreasonable that the Federal Supreme Court wanted to guarantee due process of law when recognising foreign rulings but at the same time, it was giving Brazilian parties a safe haven to escape when they chose not to fulfil its contractual duties. To have an arbitral award recognised in the country where it was issued before bringing the award to be executed in Brazil was very expensive. Such circumstance in itself would discourage parties to pursue their rights. This should have not been the image adopted by Brazilian courts, after all, the rationale behind accepting the recognition of foreign rulings is based on the idea of fairness as a decision that cannot be enforced loses its value. If in the domestic part of the arbitration scenario the *compromisso* was a detriment to the promotion of arbitration in Brazil, in the international

⁶⁶ The wording of the article declares: The arbitrator is the judge in fact and in law and the award it issues is not subject to appeal, unless otherwise agreed upon by the parties.

⁶⁷ Recognition of Foreign Arbitral Award (Sentença Estrangeira), SE2006/ING, Full Court of the Supreme Federal Court, Reporting Justice Osvaldo Trigueiro, decided on 18 November 1971, published on the Brazilian official report on 15 December 1971.

arena the difficulty to enforce foreign arbitral awards maintained the trend and showed that when trading with a Brazilian party, it was better to litigate in court.

THE END OF A SAGA?

Until 1996 arbitration in Brazil was facing severe obstacles, and without a dramatic transformation such institute would have no future within the Brazilian legal system. Adding to this idea, Brazil used the outdated *compromisso* and for international awards, the requirement of ratification by the court where it was issued before enforcing it in Brazil. This line of thought did not prevail and in 1996 Brazil's first Arbitration Act was enacted, modifying the anti-arbitration scenario.

The Act was prepared by an initiative from a private group called Liberal Institute of Pernambuco. It was titled *Operação Arbiter* and its scope was to debate the development of arbitration in Brazil and to change the legislation on the subject. Other institutions such as the Brazilian Institute of Procedure Law, the São Paulo Commercial Association and the Federation of Industries in São Paulo decided to sponsor the project. One year after the project was initiated, a working group was established, a draft of a bill was prepared and presented for public consultation and was debated in a conference in 1992. After the event a final version of the Arbitration Act was given to Senator Marcos Maciel who introduced it as a bill in the Brazilian Senate. The bill was approved by the Senate and the House of Representatives and it was signed by the President on 23 September 1996, coming to force in December 1996. As opposed to the tradition of civil law countries, Brazil did not introduce the arbitration provisions in its Code of Civil Procedure.⁶⁸ Since the subject of arbitration contained rules that are not entirely of a

⁶⁸ See for instance Sections 1025–1066 of the German Code of Civil Procedure and articles 1504–1527 of the French Code of Civil Procedure.

procedural nature, it was preferable to have a singular statute to regulate the topic.⁶⁹ The Act has 42 articles divided in seven chapters covering (from first to seventh) terms regarding: general provisions, the arbitration convention and its effects, arbitrators, arbitration procedure, arbitral award, recognition and enforcement of foreign arbitral awards, and final provisions.

The AA's second chapter addresses the arbitration agreement and puts an end to the *compromisso* and the commitment clause. It established that an arbitration convention allows the parties to submit their dispute to an arbitral tribunal through an arbitration clause and the submission to arbitration commitment.⁷⁰ In relation to foreign arbitral awards, chapter VI provided for rules regarding the recognition and enforcement of foreign arbitral awards that were in line with provisions from the NYC and the UNCITRAL Model Law on International Commercial Arbitration. There was no longer any statutory predicament for the double recognition. Despite the fact that in 1996 Brazil had its first Arbitration Act, Brazilian parties only felt stimulated to adopt arbitration in their contracts after a decision from the Federal Supreme Court regarding the constitutionality of the Act.⁷¹ The possible unconstitutionality of the Act was raised in 1996, the same year that it was enacted; the final decision establishing that there was no offense to the Brazilian Constitution was reached in 2001. This meant that for five years, parties were reluctant to use arbitration in Brazil due to the uncertainty of the Act's constitutionality. The decision was in favour of arbitration, but only after strong arguments and without a unanimous decision, with four Justices voting for the unconstitutionality of the Act.⁷²

⁶⁹ See Carmona (2009) p. 14.

⁷⁰ Article 3 of the Arbitration Act.

⁷¹ See Dolinger (2003) p. 69.

⁷² The Brazilian Federal Supreme Court is composed of eleven judges.

The story began in *M.B.V. Commercial & Export Management Establishment v. Resil Indústria e Comércio LTDA*⁷³ when a dispute arose out of a contract of commercial representation of a Brazilian company abroad. The contract had an arbitration clause with a seat in Spain. A tribunal was formed in Barcelona and after it issued the award, it was brought to Brazil for enforcement. The first request for recognition in Brazil was denied because, at the time it was made, the requirement of having it recognised by the courts of the seat was still in force. In the meantime, the Brazilian law changed and this requirement was removed; thus, a new request was made through an interlocutory appeal. The Brazilian party did not try to challenge the recognition. On the contrary, it wanted to pay the amount established in the award and it needed the court ruling for accounting purposes. During the second trial, Justice Moreira Alves raised a constitutionality issue on an incidental basis⁷⁴ and, following the Internal Rules of the Federal Supreme Court, after the issue was raised it had to be decided by the 11 Supreme Court Justices.⁷⁵

After the constitutionality issue had been raised, the reporting Justice, Sepulveda Pertence, voted for the recognition of the award but considered that Articles 6 sole paragraph, 7, 41 and 42 of the Brazilian Arbitration Act were unconstitutional.⁷⁶ He said that since Article 5, XXXV of the

⁷³Recognition of Foreign Arbitral Award (*Agravo em Sentença estrangeira*), SE-AgR 5206/EP-ESPANHA, Full Court of the Supreme Federal Court, Reporting Justice Sepulveda Pertence, decided on 12 December 2001, published in the Brazilian official report on 30 April 2004.

⁷⁴The constitutionality of a law in Brazil can be challenged in two ways, directly through a claim arguing that a statute is unconstitutional according to Article 102, I, a of the Brazilian Constitution (it declares: The supreme federal court is responsible, essentially, for safeguarding the Constitution, and it is within its competence: I – to institute legal proceeding and trial, in the first instance, of: (a) direct actions of unconstitutionality of a federal or state law or normative. If it is act, and declaratory actions of constitutionality of a federal law or normative act;) having an effect *erga omnes* or incidentally through cases submitted to the Supreme court having an effect between the parties only (for instance, see article 102 III of the Brazilian Constitution: III – to judge, on extraordinary appeal, cases decided in a sole or last instance, when the decision appealed: (a) is contrary to a provision of this Constitution; (b) declares a treaty or a federal law unconstitutional; (c) considers valid a law or act of a local government contested in the light of this Constitution; (d) considers valid a local law challenged in the light of a federal law).

⁷⁵This is the wording of Article 176, first paragraph of the Internal Rules of the Supreme Court: “Challenged the constitutionality of Law or federal normative act, state or municipal, in any other case submitted to the full chamber, it will be decided in accordance with the provisions of Articles 172 to 174, after having heard the Attorney-general. If the challenge is made in a case of competence of a chamber, and considered relevant, it will be submitted to the full chamber, independent of judgment, after having heard the Attorney-General.”

⁷⁶The articles provided: “Article 6 ... Sole Paragraph: In the event the notified party shall fail to appear or if it shall refuse to sign the arbitration commitment, the other party shall have the right to file a lawsuit, as provided for in Article 7 of this Law, at the Judiciary Branch which originally would have had jurisdiction over the case.” “Article 7. If there shall be an arbitration clause but there shall be controversy as to the commencement of such arbitral proceedings, the interested party may request the other party be summoned to appear in Court to officially file arbitration proceedings, whereas the Judge shall order a special hearing to that end.” “Article 41. Articles 267, item VII; 301, item IX and Article 584, item III of the Code of Civil Procedures, shall henceforth have the following wording:” Art. 267 VII – by the arbitration convention;” “Art. 301 IX – arbitration convention;” “Art. 584. III – an arbitral award and a homologation arbitral award of settlement or conciliation;” and Article 42. Article 520 of the Code of Civil Procedures shall have a new item with the following wording: “Art. 520. VI – consider the request for arbitral proceedings has grounds”.

Brazilian Constitution stipulates that “the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power”, it created a conflict with the above mentioned provisions of the Brazilian Arbitration Act. He supported his ruling on grounds that arbitration represents the right to renounce court jurisdiction and, therefore, it could not be done before the dispute starts, only after it, just like the *compromisso*. What he asserted was that arbitration per se is constitutional, but the specific performance of the arbitration agreement that would oust the court jurisdiction is not. Hence, if after the dispute arises the parties agreed to have it arbitrated, the form of conflict resolution will be constitutional, but whether they agree to have future disputes arbitrated means that they will be excluding “any injury or threat to a right from the consideration of the Judicial Power”. This interpretation would have had serious negative repercussion for the Brazilian Arbitration Act and a setback on the attempt to make Brazil a crucial player in the world’s arbitration scenario since this interpretation would retrace the anti-arbitration approach developed in the history of Brazilian arbitration.

Three Supreme Court Justices followed Justice Pertence’s understanding, but Justice Jobin’s vote prevailed and was adopted by the remaining Supreme Court Justices. The view that opposed Justice Pertence’s was that the construction of the Brazilian Arbitration Act did not generate the right to renounce access to courts. On the contrary, according to the Act, not only the award that was incorrectly or illegally issued could be challenged in courts, but the Act actually has several provisions on how courts can interact with the arbitral procedure, which preserves the court’s jurisdiction to have the final say, if required. Moreover, there was no constitutional prohibition asserting that capable parties could not submit the solution of their disputes to arbitration. The provision in Article 5, XXXV of the Brazilian Constitution is not addressed to private parties, but to the legislator, meaning that the legislator cannot create laws that will

“exclude any injury or threat to a right from the consideration of the Judicial Power”. This was a rule that originated from the idea of avoiding despotic practices by the government against the people, as was done during the military dictatorship period in Brazilian history.⁷⁷ Notwithstanding a favourable decision, its effect was not *erga omnes* because the unconstitutionality was raised incidentally, only to assist in the ruling and not to declare the statute unconstitutional. Even so, had the result been for the unconstitutionality, the Supreme Court would have to inform the Brazilian Senate and then the Senate could stop the application of this law.⁷⁸ Since it was incidental and not direct, the decision is not binding to the lower courts, but it is improbable that such a challenge would be raised again.⁷⁹

After the decision, Brazil was ready for arbitration and in 2002 it ratified the NYC.⁸⁰ In addition to the convention, the Constitutional Amendment number 45 of December 2004 changed the constitutional provision declaring that the Federal Supreme Court had the sole competence to recognise and enforce foreign rulings, including arbitral awards. With the amendment, this prerogative shifted to the Superior Court of Justice, representing an important step forward in the development of arbitration in Brazil. The Federal Supreme Court is “responsible, essentially, for safeguarding the Constitution”.⁸¹ This means that, adding to its natural function which represents a substantial workload, it had the task of recognising and enforcing foreign arbitral awards. Once the Superior Court of Justice took over, the swiftness of recognitions and enforcement grew in Brazil and each year there is more consolidated jurisprudence being implemented.⁸²

⁷⁷ From 1964 until 1985, Brazil was under a military dictatorship. It started with a coup by Marshal Castelo Branco and it lasted until 1985 when President Tancredo Neves was elected by the Brazilian legislative. The first direct elections in Brazil after the Military dictatorship took place in 1989, after the enactment of the 1988 Constitution. See Evaldo Vieira, *Ditadura Militar 1964 - 1985: Momentos da República Brasileira* (Cortez, 2014).

⁷⁸ See Article 52, X of the Brazilian Constitution: Article 52. It is exclusively the competence of the Federal Senate: X – to stop the application, in full or in part, of a law declared unconstitutional by final decision of the Supreme Federal Court;

⁷⁹ Still, according to Dolinger (n 36) p. 65, a new composition of the Supreme Court can change the decision.

⁸⁰ This was done by Decree 4311/2002.

⁸¹ Article 102 of the Brazilian Constitution.

⁸² See Renata Brazil-David, ‘An Examination of the Law and Practice of International Commercial Arbitration in Brazil’, *Arbitration International*, Vol. 27, No. 1 (2011) pp. 57–74, Leonardo de Campos Melo, ‘Recognition of Foreign Arbitral Awards in Brazil’, *American Review of International*

CONCLUSION

Until 1996 Brazil had undergone many adjustments regarding the practice of arbitration. The AA is the result of a long journey faced by the nation in order to make way for arbitration to be accepted and employed as a traditional method of dispute resolution. The barriers created in Brazil towards arbitration were counter-productive. The *compromisso* was an archaic tool that should have been eradicated before 1996. In fact, when Brazil ratified the 1923 Geneva Protocol on Arbitration Clauses the *compromisso* should have been extinct; conversely, that was not the case and the judiciary was disinclined to embrace the treaty. The problem with recognition and enforcement of foreign awards made Brazil an unattractive place for investment as they had to undergo an uncertain bureaucratic procedure to be enforced. As a BRIC country, Brazil has an emerging economy with a steadily growing commercial trade. It is therefore expected that the country will embrace other forms of dispute resolution mechanisms besides court litigation.

The AA was a milestone to arbitration in Brazil and it only became effective in 2002 after the challenge of its unconstitutionality was repealed. Hence, arbitration is quite young but is becoming a common procedure in the Brazilian legal culture. This was reflected in the fact that Brazilian legislative approved a new Act amending the 1996 Arbitration Act.⁸³ The 2015 Act embraces the existing jurisprudence regarding arbitration and covers some lacunas made by the 1996 statute. It expands the application of arbitration by regulating some issues of arbitrability regarding the state and state-owned companies;⁸⁴ it establishes that statutory limitations will be suspended by the commencement of arbitration⁸⁵ and the possibility of seeking injunctions in court

Arbitration, Vol. 24 No. 1 (2013) pp. 113–161, Leandro Tripodi, ‘Provisional Measures, Permanent Changes: The Arbitration-Friendliness of the Brazilian Superior Court of Justice’, *Journal of International Arbitration*, Vol. 29, No. 6 (2012) pp. 643–649 and Leonardo V. P. de Oliveira & Isabel Miranda, ‘International Public Policy and Recognition and Enforcement of Foreign Arbitral Awards in Brazil’, *Journal of International Arbitration* Vol. 30, No. 1 (2013) pp. 49–70.

⁸³ Law no 13129 of 26 May 2015.

⁸⁴ Article 1, § 1.

⁸⁵ Article 19 § 2

to be ratified by the arbitral tribunal once it has been formed.⁸⁶ It is too early to verify if the amendment to the 1996 Act will successfully modernise the practice of arbitration in Brazil. Nevertheless, from a historical perspective, in the last 25 years, arbitration in Brazil developed much faster than over the last a hundred years.

⁸⁶ Articles 22–A and 22–B.