

Arbitration procedures and practice in Brazil: overview

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USE OF ARBITRATION AND RECENT TRENDS

1. How is commercial arbitration used and what are the recent trends?

Use of commercial arbitration

Over the last 12 years, there has been a substantial increase in the use of domestic and international arbitration as an alternative means of dispute resolution in Brazil. Brazil has now established itself as the fourth top country in use of arbitration, changing perceptions of Brazilian arbitration domestically and internationally.

According to International Chamber of Commerce data, Brazilian arbitrations accounted for 41% of all arbitrations in Latin America in 2014 and 4.29% of the total number of arbitrations in the world in 2013. In addition, São Paulo is classified as one of the top ten venues for arbitration in the world.

In February 2014, the Global Arbitration Review granted the "most improved jurisdiction" award to Brazil as the country where arbitration has developed the most.

In 2014 alone, the amount of the arbitrations in the Brazil-Canada Chamber of Commerce reached BRL7 million.

The following sectors mostly use arbitration:

- Construction and infrastructure (such as oil, gas and electricity).
- Commercial and financial agreements.
- Corporate.
- Agricultural.

The use of arbitration in disputes involving international transactions has also increased because of the advantages provided by arbitration (see below, *Advantages/disadvantages*).

Recent trends

Some infrastructure sectors, such as oil, gas and electricity, have used arbitration as the principal means of dispute resolution for some time (see above, *Use of commercial arbitration*). More recently, corporate and contractual matters have also been submitted to arbitration proceedings. The implementation of Law 13129/2015, amending the Arbitration Law, has established that all the government bodies are now authorised to apply arbitration procedures to legal matters regarding alienable rights. This has resulted in an increase in the number of administrative agreements containing arbitration clauses (see *Question 2*).

Advantages/disadvantages

The main advantages of the arbitration proceedings are their increased level of legal certainty, speed, confidentiality and the level of technical knowledge, expertise and neutrality of the

arbitrators. The driving factor is usually the difference in time between concluding legal and arbitration proceedings.

The most significant disadvantages of arbitration proceedings are the high costs and the inability to appeal an arbitration award.

LEGISLATIVE FRAMEWORK

Applicable legislation

2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)

The applicable legislation is the Arbitration Law, as amended by Law 13129/2015.

The UNCITRAL Model Law (Model Law) has not formally integrated into the Brazilian legal system. However, several formal requirements of the arbitration agreement are influenced by the Model Law, including:

- The regulation of production of evidence.
- The formal and material requirements of the arbitration agreements.
- The adoption of the *kompetenz-kompetenz* principle.

Some of the differences between the Model Law and the Arbitration Law include:

- The Arbitration Law requirement to execute the arbitration agreement to start the arbitration.
- The possibility under the Model Law to make a court application for an injunction during the arbitration proceedings.
- The difference between formal validity requirements for the arbitration agreement and the arbitration award in the Model Law and Arbitration Law Mandatory legislative provisions.

3. Are there any mandatory legislative provisions? What is their effect?

Arbitration in Brazil can only be used to resolve disposable property rights disputes (see *Question 4*). There are several formal requirements concerning arbitration, including:

- The arbitration agreement must be valid and in writing.
- In standard form (adhesion agreements), which are not individually negotiated and in where one of the parties does not establish the contractual clauses, the adhering party must:
- accept the clause expressly; and

- take the initiative to commence arbitration or to expressly agree with its commencement.
- The arbitration agreement must be executed, even if there is a valid arbitration clause.
- The requirements for validity of the arbitration agreement.
- All urgent measures must be referred to the arbitrators during the course of the arbitration.

4. Does the law prohibit any types of disputes from being resolved via arbitration?

Matters of a pecuniary nature can be resolved by arbitration. Other matters cannot, such as:

- Non-disposable rights, that is, rights that cannot be waived by their holder, such as personality-related rights: life, dignity and freedom.
- Tax, criminal, family and succession, labour and consumer matters.

Limitation

5. Does the law of limitation apply to arbitration proceedings?

The Brazilian Civil Code applies to arbitration (*Articles 205 and 206, Brazilian Civil Code*). The applicable limitation period depends on the type of matter resolved in the arbitration. The term period for initiating arbitration proceedings can vary where a specific period does not apply. The limitation period runs from the date of the event that gave rise to the cause of action.

Parties can suspend or interrupt the limitation period under certain circumstances (*Articles 197 and 202, Brazilian Civil Code*). For example, interruption can occur where the debtor is in default and suspension can occur where the creditor is not in a position to enforce the obligation against the debtor. Starting arbitration proceedings also interrupts the limitation period (*paragraph 2, Article 19, Arbitration Law*).

ARBITRATION ORGANISATIONS

6. Which arbitration organisations are commonly used to resolve large commercial disputes?

The following arbitration organisations are commonly used to resolve large commercial disputes:

- Arbitration Center of the American Chamber of Commerce in Australia (AMCHAM) in Brazil.
- Arbitration Center of the Brazil-Canada Chamber of Commerce (CCBC).
- Chamber of Mediation, Conciliation and Arbitration of São Paulo (CIESP/FIESP).
- Market Arbitration Chamber (CAM).
- Arbitration and Mediation Chamber of Fundação Getúlio Vargas (CAM/FGV).
- Business Arbitration Chamber: Brazil (CAMARB).
- Arbitration Court of the International Chamber of Commerce (ICA/ICC).

See box, *Main arbitration organisations*.

JURISDICTIONAL ISSUES

7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

If a party disagrees with the jurisdiction of the arbitral tribunal, it must state its disagreement to the tribunal as soon as possible after the start of the arbitration proceedings (*Article 20, Arbitration Law*). The *kompetenz-kompetenz* principle is applicable in Brazil (*Article 8, Arbitration Law*). The arbitral tribunal can decide on its jurisdiction as well as on the existence, validity and efficacy of the arbitration agreement.

ARBITRATION AGREEMENTS

Validity requirements

8. What are the requirements for an arbitration agreement to be enforceable?

Substantive/formal requirements

Parties can enter into an arbitration agreement through an arbitration clause or arbitration submission.

An arbitration clause must be in writing and consented to by both parties. It can form a part of the main agreement or a separate instrument. In some cases, such as adhesion agreements, both parties must execute the clause.

The parties must submit the following information, in addition to the information required by the arbitration clause, to the arbitration tribunal after a dispute has arisen (*Arbitration Law*):

- The name, profession, marital status and domicile of the parties.
- The name, profession and domicile of the arbitrator or arbitrators or, if applicable, the identification of the entity to which the parties delegated the appointment of the arbitrators.
- The matter that is the purpose of the arbitration.
- The place where the arbitration award will be rendered.

Separate arbitration agreement

An arbitration clause is sufficient and there is no need for a separate agreement. It can be incorporated either in the main agreement or in a separate document that specifically refers to the main agreement.

If the main agreement does not contain an arbitration clause and there is no separate agreement providing for one, the parties can still start arbitration proceedings if a dispute arises by submitting the dispute to arbitration.

Unilateral or optional clauses

9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?

Unilateral or optional clauses are not recognised in Brazil. In an adhesion agreement it is possible that the adhering party can commence arbitration without seeking the other party's agreement (for execution requirements for arbitration in adhesion agreements, see *Question 8, Substantive/formal requirements*).

10. In what circumstances can a third party that did not sign the contract incorporating the arbitral clause in question be compelled to arbitrate disputes relating to the contract in question?

A third party can be compelled to arbitrate, even if it has not signed the agreement providing for the arbitration clause. That third party must, however:

- Belong to one of the same corporate group as one of the parties.
- Be involved in a dispute arising out of the agreement containing that clause, or an associated agreement, as long as the associated agreement is related to the principal agreement as an ancillary instrument.

This legal principle is not well-established in Brazil, and can be challenged in the courts.

11. In what circumstances is a third party that did not sign the contract incorporating the arbitral clause in question entitled to compel a party that did sign the contract to arbitrate disputes relating to the contract?

A third party can compel a party that signed the contract to arbitrate disputes related to the contract, as long as:

- It belongs to the same corporate group as one of the parties that signed that contract.
- The dispute arises out of the agreement with an arbitration clause or an ancillary clause to that agreement.

See *Question 10*.

Separability

12. Does the applicable law recognise the separability of arbitration agreements?

An arbitration agreement is independent of the other terms of the contract. Therefore, a ruling that a contract is null and void will not necessarily invalidate the arbitration clause (*Article 8, Arbitration Law*).

Breach of an arbitration agreement

13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

Court proceedings in breach of an arbitration agreement

If a party begins court proceedings in breach of an arbitration agreement, the respondent can claim the existence of the arbitration clause as a defence. The judge will then dismiss the court proceedings and acknowledge that the arbitral tribunal has jurisdiction to hear the case.

Arbitration in breach of a valid jurisdiction clause

If a party commences arbitration proceedings in breach of a valid jurisdiction clause, the arbitrator will dismiss the arbitration proceedings as invalid. If the arbitrator fails to do so, the respondent can apply to the court for annulment of the arbitration proceedings.

14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

Brazilian courts can grant injunctions to restrain proceedings commenced overseas in breach of an arbitration agreement. They can also impose pecuniary penalties in such cases.

Joinder of third parties

15. In what circumstances can a third party be joined to an arbitration or otherwise be bound by an arbitration award?

There is no express legal provision that governs the circumstances under which a third party can be joined to or otherwise bound by an arbitration. The arbitrator can join a third party to an arbitration if he feels that the third party's presence is indispensable for resolving the dispute and the award's subsequent validity. However, it is up to the third party to decide whether to get involved in the arbitration.

ARBITRATORS

Number and qualifications/characteristics

16. Are there any legal requirements relating to the number and qualifications/characteristics of arbitrators? Must an arbitrator be a national of, or licensed to practice in, your jurisdiction in order to serve as an arbitrator there?

The parties can appoint either a single arbitrator or a panel composed of an uneven number of arbitrators (*Article 13, Arbitration Law*). If the parties appoint an even number of arbitrators, the arbitrators must choose (by a majority vote) another arbitrator bringing the tribunal up to an uneven number of arbitrators. The president will be elected by a majority vote between all the arbitrators. The main arbitration chambers restrict the number of members of the arbitral tribunal to three. The arbitrators must be impartial and trusted by the parties, with no conflict of interest with the case under discussion (*see Question 17*).

There are no specific requirements concerning nationality, professional experience or professional authorisation to carry out the duty of arbitrator. However, the arbitrator must have specific technical knowledge about the matters in question and must properly carry out the arbitration.

Independence/impartiality

17. Are there any requirements relating to arbitrators' independence and/or impartiality?

An arbitrator must be impartial at all times (*Article 14, Arbitration Law*). Arbitrators must not have any financial, political or personal connection to any of the parties in the arbitration. When appointed, the arbitrators must disclose any facts that may raise any suspicion about their impartiality or independence. The principal arbitration chambers have strict appointment rules on arbitrator impartiality and independence.

Appointment/removal

18. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of arbitrators

If the arbitration agreement does not outline the procedure for appointing arbitrators, the parties must jointly appoint the arbitrator. A party can start legal proceedings for appointing an arbitrator if the parties have not agreed on the procedure in the agreement or if one of the parties refuses to appoint their own arbitrator (*Articles 6 and 7, Arbitration Law*).

Removal of arbitrators

A party can submit an application to remove an arbitrator if:

- The party suspects that the arbitrator is partial. Objective criteria for absence of full impartiality are contained in the orange list of the International Bar Association Guidelines.
- The party considers that the arbitrator has breached the conflict of interest criterion. Objective criteria for partiality are set out in the red list of the International Bar Association Guidelines.

Parties must submit their application to remove an arbitrator to the arbitrator or to the president of the arbitration tribunal, who will then decide on the outcome of the application (*Article 15, Arbitration Law*).

PROCEDURE

Commencement of arbitral proceedings

19. Does the law provide default rules governing the commencement of arbitral proceedings?

The arbitration proceedings are deemed to have started as soon as the arbitral tribunal has been constituted, that is, when all arbitrators accept their appointments (*Article 19, Arbitration Law*).

Applicable rules

20. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Applicable procedural rules

The applicable procedural rules are contained in the Arbitration Law, the arbitration agreement and the regulations of the arbitration chamber. However, the parties can make some changes to the procedure, so long as they take into account the following:

- The right to adversarial proceedings.
- The right for parties to be equal.
- The requirement for the arbitrator to be impartial and independent.

Default rules

The Arbitration Law includes mandatory provisions that parties cannot contract out of. Those include the following:

- The formal and material requirements of the award (*Article 26, Arbitration Act*).
- The right to make a court application to annul the arbitration award (*Article 33, Arbitration Act*).

See *Question 28*.

Arbitrator's powers

21. What procedural powers does the arbitrator have under the applicable law? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

For the purposes of the arbitration proceedings, arbitrators have similar powers as judges, with the exception of the enforcement power (*Article 18, Arbitration Law*).

The arbitrator must conduct the proceedings in a way that allows him to reach a substantiated decision on the dispute. The arbitrator is responsible for requesting the production of any evidence that he thinks is necessary to enable him to obtain a full understanding of the dispute.

Arbitrators can determine the submission of any documents or order any witness to provide their testimony. As the arbitrator does not have enforcement powers, he must issue an arbitration letter for the courts to enforce his decision (*Article 22-C, Arbitration Law*).

EVIDENCE

22. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

Scope of disclosure

Submitting all of the documents relating to the dispute is not common. The arbitrators usually limit themselves to ordering the submission of documents that they believe to be essential to resolving the dispute. Much like in legal proceedings, the parties can use any legal means to demonstrate their allegations. However, the respondent cannot be forced to produce evidence against its own interests.

Parties' choice

The parties are free to choose what rules apply to disclosure, even including rules of evidence present in other legal systems, such as the US. However, parties cannot restrict the powers of the arbitrators, who are free to make enquires of the parties and require them to produce any evidence that the arbitrators deem necessary for the analysis of the arbitral issue.

CONFIDENTIALITY

23. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

Arbitration in Brazil is not confidential by default. Parties generally agree for the arbitration to be confidential. As a rule, the scope of confidentiality comprises the entire arbitration proceedings. This applies to all parties involved, including arbitrators, parties or their respective assistants. However, it is necessary to see whether the matter is actually confidential or subject to mandatory disclosure, such as arbitrations on matters involving the public administration.

COURTS AND ARBITRATION

24. Will the local courts intervene to assist arbitration proceedings seated in its jurisdiction?

The courts can only intervene to assist arbitration proceedings on the parties' request to do so. The parties will usually make such a request if one of the following applies:

- There is a need to supplement the content of an arbitration clause that does not have all requirements for the start of the arbitration.
- One of the parties refuses to take part in the arbitration proceedings.
- Any provisional and urgent remedies are required before the commencement of the arbitration proceedings.
- The use of enforcement powers is required for compliance with any determination of the arbitrator.

There are no courts with specific jurisdiction to handle arbitration matters.

25. What is the risk of a local court intervening to frustrate an arbitration seated in its jurisdiction? Can a party delay proceedings by frequent court applications?

Risk of court intervention

In the past, when arbitration had not been properly established in Brazil, the use of legal measures to frustrate or delay arbitration proceedings was very common. Courts, however, now dismiss court proceedings started in breach of the parties' arbitration agreement, on the basis of lack of jurisdiction.

Delaying proceedings

Although delaying proceedings is possible, it has become increasingly rare for courts to allow court proceedings entered into to delay arbitration proceedings.

REMEDIES

26. What interim remedies are available from the tribunal?

Interim measures

Before the commencement of the arbitration proceedings, parties must make any provisional and urgent applications for remedies to the courts. Once arbitration proceedings have started, parties must make such applications to the arbitrator. The arbitrator has the same powers as the ones the court has except for the enforcement power (*Article 18, Arbitration Law*) (see *Question 21*).

Ex parte

The arbitrator can grant ex parte remedies, without hearing the respondent's arguments, whenever he believes it is necessary.

Security

The arbitral tribunal can order the parties to grant securities on a provisional basis to protect certain rights.

27. What final remedies are available from the tribunal?

There are various final remedies that the tribunal can award, depending on the nature of the matter submitted to the arbitral tribunal. The most common remedy is the payment of indemnity.

APPEALS

28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

Rights of appeal/challenge

The arbitration award is not subject to appeal. However, although the court cannot review its content, it can still review its validity. The court can declare an arbitration award invalid if (*Article 32, Arbitration Law*):

- The arbitration agreement is null and void.
- The award is rendered by someone that could not be an arbitrator.
- The mandatory requirements, that is, the statement of reasons, and the provision and the date and time when the award is rendered, are not complied with.
- The award is provided:
 - outside the scope of the arbitration agreement;
 - through delay, dishonesty or corruption; or
 - beyond the established term.
- The arbitration violates either of the following:
 - the parties' right to adversarial proceeding;
 - the parties' right to be equal; or
 - the requirement for the arbitrator to be impartial and independent.

Grounds and procedure

The Brazilian Code of Civil Procedure establishes the procedure for any ordinary action for annulment. For the grounds, see *Rights of appeal/challenge*.

Excluding rights of appeal

The parties cannot exclude the right of access to the courts under Article 5, LV of the Federal Constitution. Any clause which attempts to do so will be null and void.

29. What is the limitations period applicable to actions to vacate or challenge an international arbitration award rendered?

A party must challenge an international award within 90 days from receipt of the interim or final award or the decision on the request for clarifications (*Article 33, Arbitration Law*).

COSTS

30. What legal fee structures can be used? Are fees fixed by law?

There is no legislation governing legal fee structures, which can be established by agreement between the parties. A significant number of arbitral institutions have their cost tables based on hours incurred (according to the tasks performed) or on the amount involved in the dispute.

31. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost allocation

As a rule, unless the parties have agreed otherwise, the defeated party pays the winning party's costs. Where the parties have won on some issues and lost on others, costs are apportioned based on the extent to which each party won or lost. The costs are included in the arbitration award.

Cost calculation

The costs are usually calculated by attributing the expenses to each of the parties proportionally to the extent they lost or won the dispute.

Factors considered

Usually, all costs incurred by the parties in the course of the arbitration are considered as calculation factors, such as lawyers and technical assistants.

ENFORCEMENT OF AN AWARD**Domestic awards**

32. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

Because they are not subject to appeal or ratification, arbitration awards rendered in Brazil are enforced the same way as any court judgment or order.

To enforce a domestic arbitration award, a party must make an enforcement application to the court.

Foreign awards

33. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Brazil is a signatory to the New York Convention, which they ratified on 23 July 2002 (*Decree No. 4317*). Brazil is also a signatory to other international conventions, including:

- The Inter-American Convention on International Commercial Arbitration 1975.
 - OAS Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979.
 - The Geneva Protocol on Arbitration Clauses 1923.
 - The Olivos Protocol for the Settlement of Disputes in Mercosur 2002.
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34. To what extent is a foreign arbitration award enforceable?

The Senior Court of Justice must recognise a foreign arbitration award before it can be enforced (*Articles 38 and 39, Arbitration Law*). The procedure for recognising a foreign arbitration award is set out in the Superior Court of Justice's Resolution 9/2005.

The following are the requirements for recognition of a foreign arbitration award in Brazil:

- The arbitration agreement must be valid:
 - under the law to which the parties submitted it; or
 - in the absence of an agreement on the law, under the law of the country where the arbitration award was rendered.
- The notice sent to the respondent must be valid. This protects the party's right to a defence and right to the adversarial proceeding.
- The arbitration award must have been rendered within the scope of the arbitration agreement.
- The arbitration must have been started in accordance with the arbitration agreement.
- The arbitration award must be mandatory for the parties and must not have been annulled or suspended by any judicial body of the country where the arbitration award has been rendered.
- The subject of the arbitration is arbitrable under Brazilian law.
- The award must not violate the Brazilian public order.

Once the requirements have been met, the Superior Court of Justice will carry out the recognition.

35. What is the limitations period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

The recognition of the foreign arbitration award is not subject to the statute of limitations. The foreign arbitration award is enforced in the same manner as any domestic arbitration award before the judiciary. However, enforcement is subject to the statutes of limitations in Articles 205 and 206 of the Brazilian Civil Code (see *Question 5*).

Length of enforcement proceedings

36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?

The Superior Court of Justice proceedings for recognition of the foreign arbitration award usually take about two years. Once recognised, the award can be enforced. This can take several months or years, depending on several factors, including the speed of the enforcing court and the availability of the defendant's assets.

REFORM

37. Are any changes to the law currently under consideration or being proposed?

Law 13129/2015 has come into force recently and has introduced amendments to some of the Arbitration Law provisions. It has brought important innovations including:

- Allowing the public administration to use to arbitration to settle conflicts relating to its disposable property interests.
- Granting of provisional and urgent reliefs before and after implementation of arbitration.
- Introducing the arbitral letter through which the arbitrator requests the judiciary to perform or order compliance with a certain act.

MAIN ARBITRATION ORGANISATIONS

Arbitration Center of the American Chamber of Commerce in Australia: Brazil (AMCHAM)

Main activities. Administers the arbitration proceedings and provides rules and arbitrators.

W www.amcham.com.br/centro-de-arbitragem-e-mediacao

Arbitration Center of the Brazil-Canada Chamber of Commerce (CCBC)

Main activities. Administers the arbitration proceedings and provides rules and arbitrators.

W www.ccbc.org.br

Chamber of Mediation, Conciliation and Arbitration of São Paulo (CIESP/FIESP)

Main activities. Administers the arbitration proceedings, providing rules and arbitrators.

W www.camaradearbitragemsp.com.br/index.php/pt-BR

Arbitration and Mediation Chamber of Fundação Getúlio Vargas (CAM/FGV)

Main activities. Administers the arbitration proceedings and provides rules and arbitrators.

W <http://camara.fgv.br>

ONLINE RESOURCES

W www.cbar.org.br

Description. The website is maintained by the Brazilian Arbitration Committee (*Comitê Brasileiro de Arbitragem*) which is a non-profit organisation whose main purpose is to disseminate Arbitration and ADR. The website contains all the applicable laws and rules, case studies and relevant information in both Portuguese and English.

Practical Law Contributor profiles



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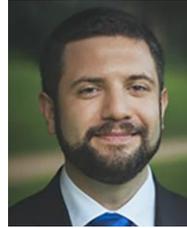
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Recent transactions

- Acting in complex business litigation, representing domestic and international companies on a wide range of commercial disputes.
- Representing foreign law firms in arbitration proceedings of highly complex issues, both domestic and international, under the rules of institutions such as the International Court of Arbitration (ICC), the Inter-American Commercial Arbitration Commission (IACAC) and the American Arbitration Association (AAA).

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