

# Commentary

## Brazil — A Brief Overview Of Arbitration In Contracts Entered As Part Of Public And Private Sector Partnerships [PPPs]

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Law No. 11.079 ("PPP LAW") was finally enacted on 30 December 2004. The PPP LAW makes general provisions on bidding and procurement procedures valid in Brazil for partnerships entered between the public and the private sector.

On the one hand, the PPP LAW raises the Brazilian government's expectations in its urgent mission to build the infrastructure required to consolidate the sustainable development process and, on the other, gives rise to an attractive investment alternative for both Brazilian and foreign investors. Though further studies are obviously necessary to clarify its restrictions, limitations, characteristics and particulars, the initiative to pass such a law was immediately acclaimed because of the significant advances introduced in its text. Especially — and this is the main focus of interest here — it allows for the use of arbitration as a dispute resolution mechanism in conflicts arising from or relating to PPP contracts.

The PPP LAW is especially important right now, when the public agencies are facing budgetary constraints, but we are of the opinion that the feasibility of PPP contracts will largely depend on arbitration as provided in the law in the question. In this sense,

arbitration works as a guarantee to the parties because conflict resolutions via traditional Judiciary Power channels would take too long entailing, therefore, a higher risk of the final decision being totally unrelated to the reality of the parties involved.

Article 11, item II of the PPP LAW sets forth that the contract may provide for "*the use of private dispute resolution mechanisms, arbitration included, to be carried out in Brazil in the Portuguese language, pursuant to Law No. 9,307 of 23 September 1996,<sup>1</sup> in order to solve conflicts arising from or relating to the contract.*"

The provision regarding the possible use of arbitration in the PPP LAW is in line with the general trend of Brazilian legal regime concerning dispute resolution arising from contracts where the public administration is a party. Examples are the Concessions Law,<sup>2</sup> the General Telecommunications Law,<sup>3</sup> the National Energy Policies Law,<sup>4</sup> the Water and Land Transportation Law<sup>5</sup> and the recently enacted law on electricity sales.<sup>6</sup> In this respect, the position of the Brazilian Superior Court of Justice<sup>7</sup> is as follows: "*according to article 54 of Law No. 8,666/93, administrative contracts are governed by public law clauses and principles combined with private law principles, which reinforces the possibility of adopting arbitral procedures to solve contractual disputes.*"

The wording of article 11 does not expressly say that the award shall be rendered in Brazil. The expression "arbitration to be carried out in Brazil" (*a arbitragem a ser realizada no Brasil*) could be interpreted as al-

lowing the parties to select a place of arbitration in a different country although the arbitral proceedings shall be taken in Brazil, or could imply that the hearings could take place — at least in part — in Brazil with the award rendered elsewhere, or that the award could be rendered in Brazil with hearings taking place outside Brazil. It is still too early for a definite interpretation of this statutory language.

It is also worth noting that by establishing the arbitration to be carried out in Portuguese, the article does not prevent the arbitration from being conducted in two languages, even though this would lead to a substantial increase in costs and time. The legislation apparently (and correctly) leaves the parties the freedom to choose the arbitration rules applicable to the proceedings. There is no requirement as to the nationality of the arbitrators, although one can argue that a challenge could be raised based on his/her lack of proficiency in Portuguese.

The first PPP projects are now on the way. It is important to follow how the resolution-of-dispute clause has been drafted and — equally important — how the courts, if a conflict arises, will interpret article 11. Despite some uncertainties as regards the extent and scope of such provision, the enactment of the PPP LAW, expressly allowing the use of private dispute resolution mechanisms, must be seen as an important

legal step towards the development of arbitration in Brazil.

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## Endnotes

1. Brazilian Arbitration Law.
2. Law 8,987/95 — article 23, item XV.
3. Law 9,472/97 — article 93, item XV.
4. Law 9,478/97 — article 43, item X.
5. Law 10,233/01 — article 35, item XVI.
6. Law 10,233/02 — article 2º, para. 3º thru 5º and Law 10,848/034.
7. Mandado de Segurança 1998002003066-9 — Conselho Especial — TJDF — *Rapporteur*: Judge Fatima Nancy Andrighy. For comments on this decision see Clavio Valença Filho, Arbitragem e Contratos Administrativos, 359, *Revista de Direito Bancario, do Mercado de Capitais e da Arbitragem*, Ano 3, n. 8, Editora Revista dos Tribunais (2000). ■