Market Intelligence

# DISPUTE RESOLUTION 2021

Global interview panel led by Simon Bushell of Seladore Legal

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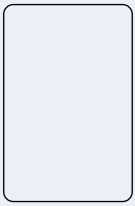
**Published by**
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

Cover photo: shutterstock.com/g/cweber






ISBN: 978-1-83862-736-2

Printed and distributed by Encompass Print Solutions

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# Brazil

Rafael Zabaglia is a partner in the dispute resolution practice at Levy & Salomão Advogados. Mr Zabaglia has been leading trial counsel for large businesses, foreign and domestic, in many cases and has also represented those clients in appeals to Brazil's highest federal and state courts. He has handled disputes involving aviation products liability, distribution and agency agreements, M&A deals and other corporate arrangements, enforcement of court and arbitral awards, restructuring and liquidation of businesses in financial distress, governmental investigations and class actions brought by private litigants or the Public Prosecutor.

Mr Zabaglia also has extensive experience in transactional matters and counsels clients in the context of legal due diligence reviews and on risk assessment related to potential and outstanding disputes.

His previous experience involves working for almost two years in Levy & Salomão's M&A and corporate practice and being seconded to Morrison & Foerster's New York's office, where he worked at the M&A and corporate practice for one and a half years.

Mr Zabaglia holds a bachelor of law from the University of São Paulo and a specialist degree in organisational management and human resources from the Federal University of São Carlos. He is fluent in Portuguese and English.

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1 What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? What is the balance between litigation and arbitration? What are the advantages and disadvantages of the most popular dispute resolution methods?

Litigation is certainly the prevailing method of dispute resolution in Brazil, contracts for the trade of goods and services are usually governed by Brazilian law and disputes are usually submitted to Brazilian courts. Arbitration is reserved for larger and complex transactions (eg, M&A deals, project financing, construction and infrastructure). There are hundreds of thousands of commercial disputes unfolding before the Judiciary, compared to an estimate of just 2,000 or so arbitrations administered by reputable domestic institutions.

Litigation is still the default dispute resolution method, in large part thanks to ingrained tradition, with few practitioners and companies having had direct contact with arbitration. Advantages of litigation are relatively few, as court proceedings tend to take more than 10 years to conclude and few judges are used to handling sophisticated commercial disputes (eg, investment funds, banking regulation, corporate and securities affairs). The key advantage of litigation is cost – it is much cheaper than arbitration.

Alternative dispute resolution, such as mediation and expert determination, are unusual in the context of commercial disputes but are gaining some traction in specific situations, such as mediation in large insolvency cases and expert determination in large infrastructure projects.

2 Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences? What effect has Brexit had on choice of law and jurisdiction clauses?

It is not uncommon nowadays to see contracts governed by English or New York law and having international arbitration (usually under the International Chamber of Commerce rules) as the prevailing dispute resolution mechanism in the context of cross-border deals or even domestic deals of Brazilian subsidiaries of foreign conglomerates. Pursuant to the Code of Civil Procedure, parties are generally free to resolve disputes stemming from international contracts abroad. While the validity of governing law clauses might still be disputable in Brazilian courts, this tends not


Rafael Zabaglia

to be an issue if the dispute unfolds in a jurisdiction that favours the autonomy of will when it comes to the determination of applicable law.

On the flip side, domestic arbitration might no longer be the an obvious choice, as some clients have opted to submit their commercial disputes to the Judiciary. São Paulo and Rio de Janeiro, the two main business hubs in the country, have courts specialised in commercial, corporate and reorganisation law. The quality and predictability of decisions have been increasing, although speed continues to be a huge problem. Additionally, some local arbitrators and institutions have a greater workload than they can handle, with adverse effects on the timing and quality of their services (at times, disputes are taking over three or even four years until final resolution).

Arbitration clauses are, themselves, becoming more complex. Some clients want to introduce tailor-made carve-outs to standard arbitration rules (preliminary injunctions, interim measures, choice of arbitrators and so forth), others choose to have the arbitration seat in a venue that is neither the parties' nor the arbitration chambers or to have the arbitration conducted in two languages. All these decisions increase costs and the interpretation of the applicable law may also become more problematic.

"What we deem paramount for Brazilian practitioners in cross-border deals is to communicate efficiently with a client's foreign co-counsel."

Keeping current (academic papers, industry news and so forth) is, of course, essential, but what we deem paramount for Brazilian practitioners in cross-border deals is to communicate efficiently with a client's foreign co-counsel to ensure that arbitration clauses will work both in Brazil and in the jurisdiction chosen by the parties, as questions about the enforceability of the arbitral award could arise further down the road.

Brexit has not directly affected the choice of law and jurisdiction in Brazil.

## 3 How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction? How is the trend towards 'niche' or specialist litigation firms reflected in your jurisdiction?

Brazil is already a saturated market, with dozens of very qualified local law firms ranging from specialised boutiques to full-service powerhouses.

In terms of market changes and niche work, arbitration and insolvency law are particularly relevant. Over the course of the past five years, some partners have been leaving full-service firms in order to set up their own arbitration or insolvency shops, with a view to clearing potential conflicts of interest and securing larger profits. In arbitration, specifically, the market has been pressuring high-profile professionals to pick a side – either as counsel, arbitrator or legal expert, without wearing so many hats simultaneously.

Apart from this, some firms try to position themselves as boutiques in areas such as banking, securities and competition law, but the larger disputes are usually handled by firms that have proven strong practices in both substantive law and dispute resolution as these two skill sets are required.

On the legislative front, an amendment to the Business Insolvency Act and the entering into force of Brazil's Data Protection Act in 2020 are expected to new opportunities for disputes lawyers.

## 4 What have been the most significant recent court cases and litigation topics in your jurisdiction?

As Brazilian economy struggles to recover from years of recession and the impact from the covid-19 pandemic, business insolvency remains a hot topic – now with the addition of large disputes involving hardship clauses and the renegotiation of and default on large commercial contracts (eg, the leases of retail space in shopping malls). Significantly, the mining company Samarco, which was directly involved in one of Brazil's largest-ever environmental disasters (a dam breach) in 2015, recently

filed for a multibillion in-court reorganisation. This trend is expected to continue as Brazil is nowhere near controlling its covid-19 outbreak or passing structural reforms to modernise the economy and reduce public debt.

Civil cases spinning off from cartel probes and white-collar criminal charges also continue to draw a lot of attention, something which has been constant for the last five years.

Finally, while there is no reliable data on the number of awards entered, or the suits filed and awards voided, the perception by Brazil's arbitration community is that there has been an increase in the number of successful suits to set aside arbitral awards. Even if that is the case, this should not be viewed as an existential threat to arbitration, as higher courts continue to enter pro-arbitration opinions in many different contexts.

**5 What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?**

Clients are realistic about the pros and cons of the legal process and arbitration having embraced domestic arbitration wholeheartedly following the Supreme Court's affirmation of the Arbitration Act's constitutionality in 2001.

The costs of litigating claims are evidently lower than submitting them to arbitration. Litigating in some states, such as São Paulo, is not, in itself, cheap, as court fees, expert fees and appeal fees could well exceed 200,000 reais depending on the complexity of the expert evidence to be produced (plus the costs with the party's own legal counsel). Still, the fact that domestic arbitration expenditures tend to amount to 500,000 reais or more (plus the costs with the party's own legal counsel) certainly does no favours for the adoption of arbitration among small and even mid-sized enterprises – thereby preventing larger businesses from incorporating arbitration into all their contracts with those smaller businesses.

Lawsuits in Brazil still take too much time despite the transition from paper to electronic filings. On average, it will take something between eight to 10 years for a commercial lawsuit to make it through the lower court, the court of appeals and a superior court. The Code of Civil Procedure 2015 purports to reduce the number and duration of lawsuits by simplifying the procedural rules, limiting the filing of appeals, extending the cases in which higher courts' precedents will be binding to lower courts and increasing the economic risks of litigation (greater attorney's fees and imposition of daily fines for failure to comply with court orders). However, at this point, this promise is yet to be fulfilled.

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Arbitration takes much less than eight years to unfold, of course, thanks to the lack of an appeal phase, but the bad news is that its duration has, on average, increased to three years from the request for arbitration, which is somewhat disappointing to some parties who expect a swifter resolution of their dispute.

Certainty of the decisions may be the aspect in which arbitration has the upper hand over litigation in clients' views. Clients strongly feel that arbitrators deliver more consistent and technical rulings on business law than judges, although they have, at times, felt frustrated with arbitrators who lack a more proactive approach during hearings and examinations or whose awards do not contain in-depth assessment of the parties' arguments. Clients are particularly worried that judges may not be familiar with market practices nor knowledgeable about industry-specific regulation (especially in infrastructure and project finance disputes) or corporate and M&A law. However, there is a chance that this perception will change given the Judiciary's efforts to have courts specialise in business law.

"The covid-19 pandemic has led to the wider adoption of online dispute resolution."

## 6 Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

There have been two recent pieces of legislation that directly affect commercial disputes.

The first is an amendment to the Business Insolvency Act 2005. The amendment introduces rules on cross-border insolvency, given the increasing interaction between Brazilian and foreign courts in high-profile cases such as Samarco, infrastructure conglomerate Odebrecht, telecom carrier Oi, foreign claim-holders must be treated on a par with local claim-holders in domestic proceedings. The amendment also allows creditors to propose an alternative restructuring plan if debtor's plan is rejected at the general creditors' meeting or assembly, and it provides clearer rules and greater certainty for debtor-in-possession financing.

Another significant piece of legislation has been a statute that set forth an 'emergency and transitional legal regime' in private law, which extended certain time limits for the commencement of disputes and softened certain legal requirements to renew contracts and convene meetings and assemblies, all in the context of the covid-19 pandemic. This statute stayed in force for most of 2020 but is no longer applicable.

Another bill of law was proposed in 2020 in the wake of the covid-19 crisis to create a temporary legal regime to prevent business insolvency by ordering a pre-court negotiation between debtor and the pool of creditors. The bill is still under Congressional review and is not expected to be passed – at least not in connection with the ongoing crisis (though it still might as a standalone initiative).

## 7 What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

Expedited arbitration has been a market trend triggered domestically by the launching of the São Paulo office of the International Chamber of Commerce few years ago. While other reputable domestic institutions had already embraced expedited arbitration, the trend gained momentum in 2021 as two of the most in-demand arbitration centres (the Brazil–Canada Chamber of Commerce and the São Paulo Industry Union ) issued their own expedited procedure provisions for smaller cases, which has the potential to increase the popularity of arbitration among mid-size businesses given lower costs.

The covid-19 pandemic has led to the wider adoption of online dispute resolution, in part enabled by specific rules issued by arbitration centres like those maintained by the São Paulo Stock Exchange. This is a cost-effective alternative, but 114 its

long-term effects may only be assessed once the pandemic is over and parties are again fully able to opt between online and ordinary arbitration.

Conflict of interest has been a hot topic recently and is under new scrutiny, as the Judiciary has set aside a handful of arbitral awards on the grounds that arbitrators had failed to disclose relevant circumstances potentially affecting their impartiality. This might lead more parties to try their luck at the Judiciary and file anti-arbitration suits or suits to set aside awards and led arbitral institutions to place more stringent disclosure duties on arbitrators.

## 8 What are the most significant recent developments in arbitration in your jurisdiction?

Multiple federal, state and local rules have been passed over the past few years to expressly allow the government to refer certain disputes in specific sectors (for example, certain claims for damages or for revision of contracts) to arbitration. While that may be seen as an incentive for private investments at a time when Brazil is in dire need for them, the fact is that the higher courts have expressly recognised

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the government's ability to be bound by arbitration agreements in many cases. This position is prevalent and has resulted in an already broad provision in the Arbitration Act to allow the government to validly enter into arbitration agreements.

Separately, the Business Insolvency Act, as amended in 2020, now expressly sets forth that the court-appointed administrator (trustee) may not refuse to perform arbitration agreements once liquidation or reorganisation proceedings have been commenced. This is an exception to the general rule allowing the administrator to determine whether to perform contracts entered into by the bankrupt company.

As a matter of fact, Brazil is nowadays seen as one of the most arbitration-friendly jurisdictions in Latin America, mostly because of the Judiciary's supportive interpretation of the Arbitration Act and the enactment of pro-arbitration legislation over time.

## 9 How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

ADR has not gained much traction in Brazil yet, but this has been changing gradually, especially in connection with mediation in mass tort disputes and reorganisation proceedings, in which debtors have been asking the Judiciary to force other parties to attend mediation sessions. The *Oi* reorganisation case was a landmark in that regard, as the court instituted separate mediation processes in an attempt to settle shareholder disputes, disputes between Oi and telecom watchdog Anatel and disputes against small claim-holders. Likewise, mining companies Samarco and Vale, each of which involved in a catastrophic dam breach (Samarco in 2015 and Vale in 2019), engaged in mediation with communities affected by the disasters and local authorities with a view to settling the environmental tort claims.

Brazilian courts are overwhelmed and widespread adoption of ADR would be useful. The Judiciary has been promoting ADR through campaigns and seminars, capacitating mediators and expert negotiators and implementing specific programmes to submit certain disputes (for example, family affairs and consumer rights) to those specialists. Banks and telephone companies have been partnering with the Judiciary to implement some innovative ADR programmes to prevent mass litigation. Banks, for instance, are part of a government-sponsored online mediation system and also operate an ADR facility in the city of São Paulo to review and settle lawsuits immediately after they have been filed by clients.

As to expert determination, larger players in the civil construction industry tend to employ International Federation of Consulting Engineers contracts and other standard form agreements, and to appoint dispute boards to prevent or solve

disputes that arise during the performance of the contract so as to avoid disruption in construction work and schedule delays.

**10 What is the position in relation to litigation funding in your jurisdiction? Is funding available? Have there been any significant developments in this area in your jurisdiction?**

Third-party funding is not prohibited under Brazilian law and it is available in arbitration. However, there are very few local funders and foreign funds have not been very active in domestic disputes, but this is becoming more usual.

As to litigation, funding is much harder to envisage because proceedings take too long to unfold and investors tend to fear the lack of predictability of court decisions regarding arbitral awards. In some cases, especially in large disputes against the government and in the context of liquidation proceedings, claim-holders assign claims to investors and remain as parties of record to the proceedings while the investor controls the claim. However, this may not be confused with a typical funding arrangement.

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# The Inside Track

**What is the most interesting dispute you have worked on recently and why?**

We have been assisting several clients in matters that involve the interplay between corporate integrity and dispute resolution. The most interesting work in this area has been the representation of clients in private disputes between companies and their service providers for alleged breach of compliance-related duties. Corporate integrity is the subject matter of the dispute but also affects procedural strategy itself – it becomes a key factor in defining which evidence the client may be able to produce, whether the client is in a position to settle and so forth.

**What do you consider to have been the most significant legal development or change in your jurisdiction of the past 10 years?**

Much has changed since 2011, such as a new Antitrust Act, the first-ever Data Protection Act, the first-ever Clean Company Act to promote corporate integrity and amendments to the Corporations Act, the Arbitration Act and the Business Insolvency Act. However, the most consequential statute for dispute resolution attorneys was the Code of Civil Procedure 2015, which sought to streamline the judicial process by making it harder to lodge appeals, allowing parties to negotiate certain procedural issues as if they were in arbitration, forcing lower courts to observe precedents from higher courts and reducing some bureaucracy.

**What key changes do you foresee in relation to dispute resolution in the near future arising out of technological changes?**

Courts in Brazil and elsewhere are still reluctant to embrace artificial intelligence – and, above all, to allow parties to do so and mine data and predict judges' decisions. AI will inevitably become part of the equation sooner or later, however. It will not only allow parties to better assess the prospects of disputes but also to essentially substitute machines for lawyers in simpler cases. As a side effect, we expect that sophisticated legal counselling will become more and more valuable to clients, as they will need sound judgment and strategic analysis in the disputes that AI cannot handle.

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ISBN 978-1-83862-736-2