

market intelligence

GETTING THE
DEAL THROUGH 

Dispute Resolution

English courts
abroad – London's
competition grows

*Simon Bushell leads the
global interview panel*

2018

Treaty claims • Third-party funding • Major cases • Brexit
North America • Asia-Pacific • Europe • Latin America

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GETTING THE
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Welcome to *GTDT: Market Intelligence*.

This is the 2018 edition of *Dispute Resolution*.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at:
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Contents

Global trends	2
Austria	6
Brazil	12
British Virgin Islands	20
Cayman Islands	25
Cyprus	31
France	38
Germany	42
Hong Kong	49
India	60
Italy	64
Mexico	68
Russia	73
Spain	80
Switzerland	83
United Kingdom	89
United States	99

DISPUTE RESOLUTION IN BRAZIL

Angela Di Franco heads Levy & Salomão's dispute resolution practice. She has tried hundreds of cases to final verdict in over 20 years at the firm. She also has resolved many cases through arbitration and other methods of alternative dispute resolution (ADR). She served the São Paulo state court system as a mediator and was a featured lecturer on ADR.

Rafael Zabaglia is a senior associate in the firm's dispute resolution practice, having been lead trial counsel on many cases and represented clients in appeals before federal and state courts. He is experienced in transactional matters, having worked for almost two years at the firm's M&A and corporate practice and for almost one-and-

a-half years at the M&A and corporate practice of Morrison & Foerster LLP, New York office.

Ms Di Franco and Mr Zabaglia have handled matters as diverse as M&A deals and other corporate arrangements, shareholder actions, commercial contract disputes, aviation products liability, enforcement of judgments, and reorganisation and liquidation of businesses. They also counsel clients on risk assessment related to potential and outstanding disputes.

They have been listed among the top dispute resolution practitioners in Brazil by *Chambers and Partners'* global and local rankings.

“Beside the adoption of escalation clauses, some clients want to introduce tailor-made carve-outs to standard arbitration rules.”

GTDT: *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? To what extent are treaty claims increasing?*

Angela Di Franco and Rafael Zabaglia: Court litigation still is by far the prevailing method of dispute resolution in Brazil; contracts for the trade of goods and services are usually governed by Brazilian law and disputes stemming therefrom are usually submitted to Brazilian courts. Arbitration has gained a lot of traction over the course of the past 15 years in connection with more sophisticated commercial transactions: it has been a staple in domestic and cross-border M&A deals, project financing and other investment-related transactions.

Alternative dispute resolution (ADR) methods such as mediation and expert determination are still unusual in the practice of commercial disputes as parties are usually afraid that consenting to ADR before litigation or arbitration may be perceived by the opposing party as a sign of low confidence in the merits of the claim (ie, some sort of ‘weakness’); many contracts do contain the escalation clauses – language mandating the parties to negotiate a resolution of any dispute in good faith for a given period (usually 30 to 60 days) before engaging in litigation or arbitration – but the parties usually simply stall for time and do not meaningfully pursue a settlement during this period.

Treaty claims are not frequent because Brazil is not a party to any bilateral investment treaties with other countries.

GTDT: *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? Has Brexit affected choice of law and jurisdiction?*

ADF & RZ: It is not uncommon nowadays to see contracts governed by English or New York law and having international arbitration (usually under the ICC rules) as the prevailing dispute resolution

mechanism in the context of cross-border deals. As Brazilian companies seek to attract foreign investment and acquire goods and services in the international market, they have been more flexible in that respect than in the past. We now have a statutory rule setting forth that the parties are generally free to resolve disputes stemming from international contracts abroad (article 25 of the 2015 Code of Civil Procedure). And although the validity of governing law clauses might still be disputable in Brazilian courts, this no longer tends to be an issue as long as the matter is being litigated or arbitrated in a jurisdiction that favours the autonomy of will in the determination of applicable law.

On the flipside, domestic arbitration might no longer be such an obvious choice as far as cost-benefit analysis goes, as some clients have opted to submit their commercial disputes to the judiciary. On the one hand, the quality and predictability of the decisions entered by courts specialised in commercial, corporate and reorganisation law have been increasing; on the other hand, some domestic arbitration chambers have a greater workload that they can handle, with adverse effects on timing and quality of their services.

Arbitration clauses are themselves becoming more complex. Beside the adoption of escalation clauses, 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 chamber’s, or to have the arbitration conducted both in Portuguese and in English – these decisions increase cost and interpretation of the applicable law may also become more problematic.

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 client’s foreign co-counsel to make sure 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. Top-tier Brazilian firms have been encouraging not only M&A but also dispute resolution attorneys to study or work



Rafael Zabaglia



Angela Di Franco

abroad as a way to facilitate communication and to make sure that legal concepts can be correctly adapted from UK and US common law systems to the Brazilian civil law system and the other way around.

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

GTDT: How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction?

ADF & RZ: These are very competitive times for Brazilian dispute resolution attorneys. It is already a very saturated market, with over two dozen highly qualified local law firms with different profiles ranging from specialised boutiques to full-service powerhouses. In addition, although foreign attorneys must take the Brazilian Bar examination to practise Brazilian law and represent clients in Brazilian courts of law, many top-tier foreign firms have been settling in the country to compete for arbitration work, which does not require formal qualification to practise law under the 1996 Arbitration Act.

It would be hard to point to one or two specific recent changes in the market with immediate impact on commercial contentious matters. Non-legislative changes have been taking place gradually. For example: (i) the increasing exchange with foreign practitioners not only in the context of arbitration but also in some high-profile court proceedings (such as civil liability

claims stemming from mass torts in cases of environmental disasters, air crashes and product recalls, or global-scale antitrust and insurance disputes) has influenced Brazilian practitioners in many different ways, from legal interpretation to negotiation techniques to evidence production; and (ii) the growing complexity of commercial transactions requires dispute resolution lawyers to master accounting and business structures to better represent the clients. On the legislative front, several statutes were enacted in 2015 that directly affect each of litigation, arbitration and ADR – respectively a new Code of Civil Procedure (Law No. 13,105), an update to the Arbitration Act (Law No. 13,129) and a Mediation Act (Law No. 13,140).

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

ADF & RZ: Judicial reorganisations of high-profile businesses have been on the rise for the past couple of years given the country's ongoing economic struggles. The utmost example of this trend is Oi, the leading fixed-line carrier and fourth-largest wireless carrier in the country. Oi's insolvency filing in 2016 was the largest ever in terms of indebtedness (over 65 billion reais) and has been a very challenging process considering that Oi is a publicly traded corporation in a regulated sector with debt issued in Europe and the US via Dutch special purpose vehicles and holding certain interests and assets in Africa; on

“On average, it will take something between eight and 10 years for a commercial lawsuit to make it through the lower court, the court of appeals and the STJ and/or the Supreme Court.”

top of that, litigation against and negotiations with bondholders first, and then shareholders, ensued. Oi’s reorganisation has involved nearly all top-tier Brazilian firms in some capacity, and quite a few international firms. There has been sophisticated work in connection with insolvency, regulatory, capital markets, corporate, tax, international, contract, employment and labour law; M&A could also be in the cards, as Oi has been rumoured to be a potential target of merger attempts soon, now that its restructuring plan has been approved by creditors.

Investigations in connection with Operation Car Wash and other corruption and embezzlement schemes have also kept Brazilian firms and courts busy. Civil liability claims for malfeasance are expected to make news in the aftermath of the ongoing administrative proceedings and criminal charges.

Court precedents on domestic and international arbitration always draw a lot of attention from both arbitration attorneys and litigators. The Arbitration Act was enacted in 1996 and only in late 2001 did the Supreme Court affirm its constitutionality, so we have only 15 years’ worth of case law. Many controversial aspects have already been addressed by the Superior Court of Justice (STJ), the highest Brazilian court with jurisdiction over non-constitutional affairs), but the view of courts of law on the Arbitration Act is still very relevant for practitioners to counsel their clients on whether to opt for arbitration and to design the most suitable strategy for the dispute itself.

While lawsuits of a collective nature such as class actions filed either by the Public Prosecutor or civil associations are somewhat customary in connection with environmental matters and consumer protection, interest in them has been renewed lately in connection with antitrust and competition law (repression of cartels, dumping, market manipulation, etc) and corporate governance and shareholder activism (accountability of principals and controlling shareholders for wrongdoings or loss in share value). Not many of those lawsuits have been filed yet but this is something to keep an eye on.

GTDT: 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?

ADF & RZ: Clients seem to be realistic about the pros and cons of legal process and arbitration after having embraced domestic arbitration wholeheartedly following the Supreme Court’s affirmation of its constitutionality 15 years ago.

The costs of litigating claims are evidently lower than arbitrating them. Litigating in some states such as São Paulo is not in itself cheap as court fees, expert fees and appeal fees could well exceed 100,000 reais and perhaps even 200,000 reais depending on the complexity of expert evidence to be produced (plus the costs with the party’s own legal counsel). That is hefty for small enterprises, and one could argue that it is at any rate too expensive in light of the excessive duration of lawsuits and the perceived unpredictability of court decisions. But the fact that domestic arbitration expenditures tend to amount to 1 million reais or more in many chambers (plus the costs with the party’s own legal counsel) certainly does no favours to the adoption of arbitration among small and even medium-size enterprises – and thereby prevents larger business from incorporating arbitration into all of their contracts with those smaller businesses.

Lawsuits in Brazil still take too much time despite the transition from paper to electronic filings over the course of the past five years: on average, it will take something between eight and 10 years for a commercial lawsuit to make it through the lower court, the court of appeals and the STJ and/or the Supreme Court. The 2015 Code of Civil Procedure 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), but whether it has accomplished such purposes is something to

be assessed five or 10 years from now. Arbitrations take much less than eight years to unfold, of course, thanks to the lack of an appeal phase, but the bad news is that their duration has on average increased to two or three years, which is somewhat disappointing for 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' view. 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 conduct 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 or knowledgeable to 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.

GTDT: Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

ADF & RZ: There has been a plethora of recent legislative initiatives and reforms affecting litigation practice in Brazil. As for reforms, the most significant one was obviously the enactment of a new Code of Civil Procedure in 2015, which has brought several significant changes such as: (i) it is harder to file appeals in certain circumstances; (ii) parties are allowed to agree upon a calendar for and the conduct of court hearings, evidence production and other procedural acts, as if they were in an arbitration proceeding; (iii) the binding effect of certain court precedents upon lower courts has been strengthened; and (iv) ADR is incentivised as a mediation hearing is now a mandatory step prior to the filing of defence. As for initiatives: (i) there are not one but two separate bills in the Congress for introduction of a new Commercial Code after the 1850 Commercial Code was revoked upon enactment of the 2002 Civil Code, and this has been the reason for a very heated debate among scholars as many of them believe that the Civil Code suffices for commercial affairs and immense transaction costs will kick in with a new Commercial Code; and (ii) another bill addressing the lifting of the corporate veil is in the works and may already supersede in part the Code of Civil Procedure enacted last year.

The way litigators work has been strongly affected also by four non-legislative initiatives of the judiciary. The first one is the shift from paper to electronic filings, which began in 2013 and is now prevalent. The second one is the improvement of the courts' online databases so access to case law is now easier, which in

turn impacts the way lawyers bring forth their arguments and the way courts enter their decisions. The third one is the growth in the number and attendance of seminars in which judges and attorneys interact with foreign practitioners; for instance, model legislation issued by the United Nations Commission on International Trade Law on cross-border insolvency, which is not binding in Brazil, is now the topic of more studies and debates than ever before and has even been invoked by the judge responsible for the Oi reorganisation proceedings to accept the insolvency filing by two foreign subsidiaries of Oi. The fourth one is the specialisation of judges and justices on business law in São Paulo and Rio de Janeiro, which are the two main business hubs of the country. These changes require more sophistication from lawyers: in the past the mere possession of relevant information unknown to the opposing counsel would sometimes suffice to convince a non-specialised court, but this is no longer enough – the fact that whole case files on similar disputes and also specific precedents are readily available online to all attorneys levels the playing field, and the fact that courts are more knowledgeable to the specificities of the market and of business law reduces the leeway for superficial or inaccurate arguments.

GTDT: What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

ADF & RZ: Third-party funding (TPF) has become available in domestic arbitrations for the past three years or so by the hands of local asset managers and entrepreneurs. Leading foreign players have not entered the Brazilian market yet, but it would not be a surprise if they did so in the near future: an aggressive expansion of TPF could be fuelled by the steady growth in the number of arbitration disputes in Brazil and the fact that many local companies are currently in financial distress and have been looking for ways to limit their budget for commercial disputes. The Arbitration and Mediation Centre of the Chamber of Commerce Brazil-Canada (CCBC), which is currently the largest arbitration chamber in Brazil, has recently issued specific regulation on TPF to mitigate the risk of conflicts of interest between funders and arbitrators, but TPF may still spark a lot of controversy until the market becomes mature.

The interaction between arbitration and ADR also tends to be in the spotlight. The 2015 Mediation Act may have effects on arbitration as (i) mediators are now prohibited from acting as arbitrators or being deposed in disputes regarding the subject matter of the mediation, (ii) arbitration must be stayed if parties have previously agreed to an escalation clause and the mediation has not been completed within the period or under

the conditions set forth in the clause, and (iii) information produced or shared during mediation is deemed confidential and may not be subsequently disclosed in related arbitration. Also, dispute boards and adjudications, which are two ADR methods that have not been regulated in statute, have become more common in the context of construction and infrastructure agreements that also contain arbitration clauses; ADR seeks to prevent or at least simplify arbitration further down the road, and discussions over the boundaries and effectiveness of each dispute resolution mechanism in complex disputes may ensue.

GTDT: *What are the most significant recent developments in arbitration in your jurisdiction?*

ADF & RZ: The most relevant recent development in arbitration was the enactment of Law No. 13,129/2015 to amend and update the 1996 Arbitration Act. Its content is not really innovative but rather a codification of existing case law on the Arbitration Act. That is not surprising. Brazil is nowadays seen as one of the most arbitration-friendly jurisdictions in Latin America mostly owing to the judiciary's supportive interpretation of the Arbitration Act: instead of affirming their jurisdiction over disputes submitted to arbitration and then challenged in court as they might otherwise have done, courts have consistently safeguarded the validity and lawfulness of arbitration, arbitrators' rights and jurisdiction, and the binding nature of arbitration agreements and the existence of implied consent to arbitrate.

Pursuant to Law No. 13,129/2015, the government and the entities it owns or controls are now expressly allowed to choose to arbitrate their disputes as long as those disputes regard alienable rights and the arbitration files are not sealed. This means that foreign investors may be able to submit many contractual disputes against the government to arbitration as opposed to litigating in Brazilian courts, which tend to be pro-government. Earlier this year the CCBC was the first chamber to clearly regulate the publicity of arbitrations involving the government, in advance of an expected increase in demand. We anticipate this field to be the new frontier of the competition between local and international law firms, but foreign clients should beware when retaining counsel: it is our understanding that administrative law in Brazil substantially differs from common law systems in many respects, so international firms may not be well suited to handle those matters without having an experienced local firm aboard as well.

Law No. 13,129/2015 has also expressly vested arbitrators with the power to enter partial awards, to grant any injunction or relief after commencement of the arbitration and to have the relevant court of law simply practise any act mandated in the arbitration without review of its merits.

GTDT: Market Intelligence – Dispute Resolution



“Brazil is nowadays seen as one of the most arbitration-friendly jurisdictions in Latin America mostly due to the judiciary’s supportive interpretation of the Arbitration Act.”

THE INSIDE TRACK

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

We have been assisting a national trade association of telecommunication companies in several challenges to (i) city taxes levied by São Paulo and Rio de Janeiro for use of the public right-of-way to instal fibre-optic cables and also (ii) similar taxes levied by the federal agency in charge of ground transportation and infrastructure. This matter is interesting because it ultimately involves preserving the companies' abilities to invest in infrastructure and also ensuring a level playing field for all companies, which is important for society as a whole, by baring illegal taxation by the government.

If you could reform one element of the dispute resolution process in your jurisdiction, what would it be?

Regardless of the innovations introduced by the new Code of Civil Procedure, the parties still have very little incentive to refrain from challenging an unfavourable lower court decision – costs of appealing are relatively low and the appeal more often than not will immediately stay enforcement of the ruling. Stay should be the exception, not the rule, and the appellant should

be subject to greater economic burden in case the lower court ruling is upheld.

What piece of practical advice would you give to a potential claimant or defendant when a dispute is pending?

Avoid being emotional about winning the dispute; an ingrained dispute-oriented mentality may harm your interests in the long run. If you are a claimant, you may have invested many years and tons of money and end up with a pyrrhic victory (which is particularly true in litigation). If you are defendant, keeping the dispute going may backfire: not only are costs high in Brazil but applicable interest rates while the dispute is pending may be greater than low-risk investments such as sovereign debt. Disputes are tools to solve problems and should be used efficiently – acting to gain leverage to settle the claim in favourable terms rather than gambling on an uncertain outcome (much) later may be the most efficient approach.

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The downside of new legislation passed in 2015 – the new Code of Civil Procedure and Law No. 13,129/2015 – is that this was a missed opportunity to correct at least two distortions. As for the Code of Civil Procedure, the rule pursuant to which the defendant to a lawsuit must present its jurisdictional defences (such as the existence of an arbitration agreement binding upon claimant) simultaneously with – and not prior to – filing its defence on the merits was maintained; this means that such defendant will still have to incur costs with attorneys twice and claimant will have access to the defendant's arguments before arbitration has even started. As for Law No. 13,129/2015, language contained in the bill allowing companies to arbitrate their employment disputes against its top management was eventually vetoed by the President; Brazilian labour and employment courts are very protective of workers for historical reasons related to the low qualification and instruction of the average workman and it seems unfair to us that individuals as sophisticated as executive officers can benefit from that protectiveness as well.

Two recent opinions entered by the STJ have drawn the Brazilian arbitral community's attention. First, in the *Abengoa v Ometto* matter, the STJ refused to recognise and enforce a foreign award favourable to Abengoa on the grounds that

the chairman of the tribunal failed to disclose that his firm (albeit not the chairman personally) had rendered legal services in connection with deals involving other entities of the Abengoa group (although not to Abengoa); that is a very low threshold for breach of disclosure duties by the tribunal. Second, in the *ANP v Petrobras* matter, the STJ found that the arbitral tribunal has the jurisdiction to affirm or deny its own jurisdiction before courts can do so, even when the dispute involves public entities (Petrobras is a government-controlled company and the ANP is the federal oil and gas agency); that precedent will have direct impact on future disputes between the ANP and private entities over concession agreements for the exploration and production of oil and gas.

GTDT: 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?

ADF & RZ: ADR has not gained much traction in Brazil yet but we expect this to change in light of efforts on both the judicial and the legislative fronts: Brazilian courts are overwhelmed and widespread adoption of ADR would come in handy: per the most recent official data available,

courts resolved around 29,400,000 disputes in 2016, but there were still around 80 million additional lawsuits pending (another 29.4 million of which filed in 2016 alone).

The judiciary has been promoting ADR through campaigns and seminars, capacitating mediators and expert negotiators and implementing specific programmes to submit certain disputes (family affairs, consumer rights, etc) to those specialists. In addition, Law No. 13,140/2015 was enacted to regulate mediation systematically for the first time, and the 2015 Code of Civil Procedure also contains several rules to incentivise it.

Banks and telephone companies have been partnering with the judiciary to implement some

innovative ADR programmes to prevent litigation. Banks, for instance, have very recently adhered to a government-sponsored online mediation system and also opened an ADR facility in the city of São Paulo to review and settle lawsuits immediately after they have been filed by clients. It is still unclear whether other sectors with a very large number of standardised consumer-related claims such as airlines will follow suit.

Larger players in the civil construction sector tend to employ FIDIC contracts and other standard form agreements and to appoint dispute boards to prevent or solve disputes which arise during the performance of the contract, so as to avoid disruption in construction work and schedule delays.

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