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Litigation and Alternative Dispute Resolution in Colombia, Mexico, Panama, and Brazil

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This InfoPAK provides the reader with a general overview of the economic conditions in four pertinent Latin America countries: Colombia, Mexico, Panama and Brazil. It discusses, in detail, the elements of dispute mechanisms available in each of these nations: Litigation and Alternative Dispute Resolution. Further, this InfoPAK delves into an analysis of the pros and cons of each type of dispute mechanism, the composition and the means of enforcing a judgment.

The information in this InfoPAK should not be construed as legal advice or legal opinion on specific facts, and should not be considered representative of the views of the authors or of ACC or any of their lawyers, unless so stated. Further, this InfoPAK is not intended as a definitive statement on the subject. Rather, this InfoPAK is intended to serve as a tool for readers, providing practical information to in-house practitioners.

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Contents

I. Introduction ... 4
II. Colombia ... 6
III. Mexico ... 17
IV. Panama ... 43
V. Brazil ... 67
VI. About the Authors ... 90
VII. Endnotes ... 92

I. Introduction

(Authored By: Lloreda Camacho & Co.)

This InfoPAK is aimed to inform its readers about litigation and alternative dispute resolution ("ADR") in four of the most important economies in Latin America: Colombia, Mexico, Panama, and Brazil.

In order to comprehend the importance of these issues, it is relevant to provide general information of the countries involved, giving a general description of its economies, background, and relevance worldwide. These countries exemplify the economic growth and investment target that the Americas represent. This InfoPAK will give a general overview of three elements of each nation: Litigation, Arbitration, and Alternative Dispute Resolution. This discussion studies the judiciary branch of each, analyzing items such as courts' hierarchy, jurisdiction, courts' specialization in business disputes, and role of precedents. Likewise, the study examines the basic principles of litigation, such as the adversarial system, judge's powers and authority, production of evidence, and enforcement of court decisions, among others. To conclude this matter, the challenges of litigating in each country and its pros and cons are analyzed.

Furthermore, this InfoPAK provides the historic background and current status of arbitration as a dispute resolution mechanism, including policy in favor of arbitration and its current legal framework. Also addressed are issues such as limitations to arbitrate, the court's position on arbitration, arbitration institutions in these four countries in order to identify the advantages and disadvantages of arbitrating in such jurisdictions.

The InfoPAK also illustrates other ADR mechanisms available to parties in a dispute, including mediation, conciliation, and negotiation, as well as their application and relevance within each country.

This InfoPAK will provide the necessary tools to determine, for each case and each country, the most advisable mechanism to resolve a dispute in these jurisdictions.

The countries discussed in this InfoPAK have relevance for companies interested in doing business in Latin America. If companies around the world are interested in starting business activities or have current business in these countries, this InfoPAK will deliver a general overview of one of the essential matters when dealing with its business scheme — the advantages and disadvantages of entering into litigation, and the alternatives that are viable according to each country's legislation.

Why is it so important? Because companies worldwide should know all relevant aspects when negotiating and doing business in a country.

In-house counsel have to balance a number of aspects, including those be explained in this InfoPAK, to determine the appropriateness of choosing among ADR mechanisms, as well as whether and when it is in company's best interest to pursue a litigation claim before the judicial system of the country. It will also give in-house counsel tools when overseeing their litigation team, or the matters handled by outside counsel and experts. Litigation continues to evolve, and so do ADR mechanisms. Knowing the different options a company has, how these options work and apply on each country, and what pros and cons you are facing when deciding how to proceed on

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your deals will help in-house teams to identify the most qualified individual to handle each matter, the issues and factors you should care for, and how to choose the best option available.

This InfoPAK will allow the readers to:

- Get to know the countries' economies, background, and relevance worldwide;
- Understand the basic principles of litigation for each country;
- Identify arbitration's quality, costs, workload, arbitrators, timeframe, and similar issues;
- Evaluate the pros and cons of litigation and ADR mechanisms;
- Decide whether to use ADR mechanisms to resolve its disputes, or face litigation; and
- Recognize the importance of choosing the proper mechanism to resolve its disputes.

Readers will have a better knowledge of dispute resolution systems in Latin America, an up-and-coming market has demonstrated its importance to the world's business activities.

II. Colombia

A. Introduction **7**

B. Litigation **7**

1. General Overview of the Judicial System 7
2. Basic Principles of Litigation 8
   a. Legal System 8
   b. Judges' Powers and Authority 8
   c. Production of Evidence 9
   d. Enforcement of Court Decisions 9
   e. Allocation of Costs and Legal Assistance Fees 9
3. Challenges of Litigating in Colombia 10
4. Enforcement of Foreign Decisions and Collecting Evidence Abroad 10
5. Conclusion 11

C. Arbitration **11**

1. General Overview of the Arbitration System 11
2. Applicable Regulation for Arbitration 12
3. Areas of Law that Cannot be Arbitrated 13
4. Possibility of Enforcing or Vacating Arbitration Awards 13
5. Enforcement of Foreign Arbitration Awards 14
6. Arbitration Centers 14
7. Conclusion 14

D. Other Alternative Dispute Resolution Mechanisms **15**

1. Dispute Resolution Mechanisms 15
2. Mediation 16
3. Conclusion 16

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A. Introduction

Colombia, the oldest democracy in Latin America, is located in the northwestern corner of South America. Colombia's total consumption and Gross Domestic Product ("GDP") per capita have grown above the regional average. According to the nominal GDP of 2009, Colombia is the 36th largest economy in the world and 5th in Latin America.[1] Colombia's credit rating was raised to investment grade by Moody's Investors Service, matching an earlier move by Standard & Poor's, as economic growth accelerates[2].

Colombia is one of the best Emerging Markets Bond Index ("EMBI+") in Latin America.[3] Furthermore, Colombia is included in the "CIVETS" (acronym for Colombia, Indonesia, Vietnam, Egypt, Turkey, South Africa), markets expected to rise to economic prominence in the coming decades, just as the emergence Brazil, Russia, India, and China ("BRIC") were forecast earlier. According to the speech of April 26, 2010, to AmCham Hong Kong by Michael Geoghegan, CEO of HSBC:

> "The new BRICs are Colombia, Indonesia, Vietnam, Egypt, Turkey and South Africa. They are countries with major populations, dynamic, diverse economies, political stability and each of them has a brilliant future. Any company with global ambitions will have to take immediate action in these markets."[4]

Colombia has the most competitive Free Trade Zone ("FTZ") in Latin America[5] and offers great investment opportunities in the agro-industrial sector, among others, due to the availability of unexploited lands and the vast amount of natural resources available.[6]

Colombia features a skilled labor force that can meet the requirements of any business, as confirmed by the 2010 International Institute for Management Development ("IMD") World Competitiveness, which ranked Colombian labor force as the second most qualified labor force available in the regional in the ranking of 58 countries.[7]

The Colombian constitutional and legal systems are based on the Rule of Law, and mainly follow the European continental law system. The government is comprised of three branches: Executive, Legislative and Judicial. The system permits judicial review of executive and legislative acts.

B. Litigation

The most common types of cases litigated in Colombia are labor disputes and civil matters. Disputes arising out of complex business transactions are usually arbitrated. Frequently, cases involving large international companies are arbitrated, as arbitration is more expedient than the judicial proceedings before a court.

1. General Overview of the Judicial System

Colombian civil court system has a hierarchical structure. The Supreme Court is the highest judicial organ of the Civil Jurisdiction. Below the Supreme Court, there are different courts of appeals (called *Tribunales Superiores del Distrito Judicial*), which exert jurisdiction over specific regions of the country. Each of these courts of appeals has a civil chamber that concentrates on civil

matters. Under the courts of appeal, civil circuit courts have jurisdiction on the main cities of the country. Finally, the lowest courts are the civil municipal courts, with jurisdiction in cities and municipalities.

The jurisdiction between the different civil lower courts (municipal and circuit) is allocated depending upon the amount of the claim. Appeals are raised before the courts of appeals or circuit courts if the judgment was issued by a municipal court. The Supreme Court only hears an exceptional recourse (*casación*) against second-instance judgments handed down by courts of appeals in specific cases. This recourse is not considered an appeal or third instance, but instead a legal review of the judgment addressed to amend errors of the courts in applying the law and to unify the national jurisprudence.

Besides the hierarchical structure described above, Colombian courts have special jurisdictions for labor cases, criminal cases, administrative cases, and civil cases. The head of the Civil, Criminal and Labor tribunals is the Supreme Court, which has special chambers for Criminal, Labor, and Civil disputes. The head of the Administrative jurisdiction is the Council of State. In addition, another high Court is in charge of protecting the constitution and reviewing constitutional actions (*tutela*), which is the Constitutional Court.

In connection with the role of precedents, Colombian Court must rule according to the law (codifications), and Jurisprudence is a subsidiary source of law. In addition, article 4 of Law 169 of 1896[8] determines that three uniform or consistent decisions issued by the Supreme Court of Justice concerning a legal issue constitute "probable doctrine" (*doctrina probable*), and should be used by judges to construe and analyze similar cases.[9]

2. Basic Principles of Litigation

a. Legal System

Colombian legal system is based on Civil Law. Also called European Continental Law, this system recognizes codification or written law as the main legal source. The Colombian Political Constitution establishes that legislation is enacted by the congress, and that judges are ruled by legislative statutes or executive-branch actions in their decisions. They may apply other subsidiary sources, however, such as jurisprudence, custom, doctrine, general principles of law, and equity.

Civil procedure in Colombia is mainly governed by the Civil Procedure Code, hereinafter ("CPC").[10] The CPC has been amended several times; additional regulation aside, the CPC also governs certain civil procedural matters.[11]

b. Judges' Powers and Authority

Judges in Colombia are empowered to manage the procedures, to sanction any fraud or conduct against justice, to use legal powers to collect evidence, to set the dates for the hearings, and to pronounce judgments, among other powers.[12]

Pursuant to article 39 of the CPC, the judge can impose a fine from two to five minimum wages (approximately USD$ 630 to USD $ 1,574) to someone that disobeys his orders. The judge can also

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order the arrest for one to five days if the person acted in a disrespectful manner towards the judge.[13]

Other legal powers of the judge consist of the authority to return a "disrespectful" brief filed before the court (meaning the brief was rude, offensive, or impolite towards an authority), to expel a party from a hearing, and to fine the employers that impede their employees to attend court to render testimony.[14]

c. Production of Evidence

The burden of proof lies on both parties, who must prove their allegations. Each party has to request the court to collect during the trial the evidence that supports their respective allegations. However, the judge can request evidence *ex-officio* that she deems necessary to render the judgment. As a general rule, courts order collection of any evidence that is relevant, pertinent and adequate to prove the arguments of each party.

The CPC establishes the opportunities to request evidence, the type of evidence that may be requested, the rules of collecting the evidence, the rules to value documentary evidence, and the sanctions that may be imposed to the parties or third parties during the collection of the evidence (e.g., article 225 of the CPC establishes a fine to a witness that do not attend a Court hearing).

The types of evidence that may be admitted includes public and private documents, photographs, records, videos, inspections by the court, experts' opinions, party declarations, and witness testimonies. The parties may also voluntarily and independently disclose certain evidence, such as experts' opinions produced by independent professionals or entities specialized in the corresponding field.[15] Other experts may be appointed by the court.[16]

Inadmissible evidence includes evidence not filed on the legal term set forth in the CPC; documents that have been amended (altered); and declaration of incapable individuals such as minors (below 12 years old), deaf and mute individuals, or mentally unsound individuals.

The court decides about the evidence that can be introduced into the proceedings, participates in the collection thereof during the trial, and valuates the evidence in the judgment. In addition, as mentioned, the court may order evidence *ex-officio*.

d. Enforcement of Court Decisions

Domestic judgments that are final can be enforced through execution proceedings, in which the plaintiff may obtain attachment of the assets belonging to the debtor.

Foreign judgments should be first recognized by the Supreme Court of Justice (Exequatur) in order to be regarded as a local judgment prior to being submitted to enforcement proceedings.

e. Allocation of Costs and Legal Assistance Fees

There are no judicial fees or taxes to be paid in order to pursue a legal action. The costs and expenses incurred in the proceeding, plus an amount for legal fees (attorney's fees), are freely determined by the court along with the judgment, and must be borne by the losing party. However, only part of the legal fees (usually very small) is recognised as per Regulation issued by the National Judicature Council in 2003.[17]

Recently, Law 1394 of 2010 introduced a special fee for summary collection proceedings called *"arancel judicial."* The fee corresponds to percentage of the amount of money collected in the proceedings.[18]

3. Challenges of Litigating in Colombia

Colombian courts can be considered to be impartial and independent. The greater challenge of litigating in Colombia is the duration of a civil proceeding. An ordinary civil proceeding can last approximately 6 to 10 years in courts (starting with a first instance decision, followed by the appeal and, if applicable, the exceptional recourse of *casación* before the Supreme Court of Justice).

In addition, parties are using the Constitutional Action of *"Tutela"* to challenge final judgments. The Colombian Constitutional Court allows the *Tutela* against judicial decisions if the judicial decision violates a fundamental right and the plaintiff does not have any other legal mechanism to protect the fundamental right.[19]

Tutela against judicial decisions is not commonly granted, and has specific and restricted requisites; nevertheless, it remains a recourse available to challenge a final judgment. Some examples of cases in which Constitutional Actions were granted are: T-613 of 2005[20], T-395 of 2010[21] and T-125 of 2012.[22]

4. Enforcement of Foreign Decisions and Collecting Evidence Abroad

To collect evidence abroad, courts issue rogatory letters (or letter of request from a court to a foreign court for some type of judicial assistance). By means of the rogatory letter, the Colombian Ministry of Foreign Affairs requests that the authorities of a foreign country provide judicial assistance. The judicial collaboration among different countries is regulated by certain conventions. For example, Colombia ratified the Hague Evidence Convention (Convention on the Taking of Evidence Abroad in Civil or Commercial Matters).[23]

Foreign judgments should be first recognized by the Supreme Court, in order to be regarded as a local judgment, before they are submitted to enforcement proceedings. Exequatur proceedings shall be commenced before the Supreme Court of Justice for this purpose. The Court will validate the foreign award if it complies with the following requirements.

- That the foreign judgment or award must be a definitive and final decision in the country in which it was issued.
- That the country where the foreign judgment or award has been issued is a party to a treaty in which Colombia is also a party, which recognizes the enforceability of foreign judgments; or that the laws of the country where the judgment has been issued recognize the enforceability of Colombian judgments or awards in said country (reciprocity).
- That the foreign judgment or award does not relate to rights constituted on assets that were located in Colombia at the moment of the initiation of the proceedings where the judgment or award was issued.
- That the judgment or award does not contravene the Colombian public order laws or regulations, except for procedural law.

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- That a duly legalized copy of the award is filed before the court ("Civil Section of the Colombian Supreme Court"), along with an official Spanish translation of the same.
- That the matter to which the award refers is not of the exclusive competence of the Colombian courts.
- That there are no proceedings, pending or already decided, by the Colombian courts referring to the same case.
- That in the proceedings in which the award was issued the defendant had the opportunity to answer the complaint and be a party to the proceedings. This is presumed if the judgment or award is definitive.
- The exequatur petition (formal request for the enforcement of a judgment) should be filed before the civil section of the Colombian Supreme Court and should follow the rules provided by article 695 of the CPC.[24]

Once exequatur is granted, the interested party may commence summary execution proceedings before a lower court.

5. Conclusion

The advantage to litigate in Colombia is that courts can be considered independent, due process is highly respected, and the legal procedure allows practicing precautionary measures in some situations.

The main disadvantage of litigating in Colombia is the extensive duration of judicial proceedings, which encourages parties to arbitrate their disputes, despite the cost of arbitration. As will be discussed in the following section (III.B), Colombia is a signatory to several treaties that recognize foreign judgments.

C. Arbitration

1. General Overview of the Arbitration System

Arbitration is a voluntary dispute resolution mechanism commonly used to solve commercial disputes. Arbitration is regulated by the CPC in title XXXIII of the third book of the Colombian Civil Procedure Code[25] and on title III from the fourth book of the Colombian Code of Commerce.[26] Later, said regulation was derogated by Decree 2279 of 1989[27] and by Law 664 of 1998.[28]

Originally, arbitration was not broadly used. After the Constitution of 1991 and the subsequent regulation that was enacted, however, arbitration became widely accepted and used to solve commercial disputes.[29]

Jurisprudence has recognized the validity and legitimacy of arbitration, and has considered arbitration as an effective and efficient mechanism to solve conflicts with practical advantages to the parties involved in a dispute.[30]

Due to the accumulation of cases in the courts, it has become increasingly common for parties to seek alternative forms of solution to their disputes. The most important of these is arbitration.

Arbitration tribunals have issued a series of decisions that have come to create legal doctrine that establishes positions with regard to important matters, especially in the area of commercial law.

2. Applicable Regulation for Arbitration

Colombia recognizes arbitration as a form of dispute resolution by the Constitution of 1991 in article 116.[31] After the new constitution was issued, Law 23 of 1991[32] established the basic rules of arbitration. Later, they were modified by Law 446 of July of 1998,[33] which authorized the President to compile and gather the applicable rules from various regulations concerning alternative dispute resolution mechanisms.

In September 1998, the President issued Decree 1818 of 1998,[34] which became the statute for alternative dispute resolution mechanisms. This decree modified and revoked several provisions of Law 23 of 1991.

Moreover, Law 315 of 1996 governs International Commercial Arbitration, and allows the parties of a contract to freely agree in the method of selection of arbitrators. According to that law, arbitration may be considered "international" when the parties have agreed on international arbitration, and if:

- The parties to the agreement are domiciled in different countries,
- 2)The agreement must be carried out in a different country from the one in which the parties are domiciled, or
- The agreement concerns matters of international trade.

In addition, Colombia is party to international treaties related to arbitration, such as the New York Convention of 1958, for recognition and enforcement of foreign arbitration awards adopted by Law 39 of 1990; and the Inter American Convention for International Commercial Arbitration of Panama of 1975, adopted by Law 44 of 1986.

As per article 116 of Decree 1818 of 1998, there are three types of arbitration in Colombia in terms of their procedure:

- The institutional arbitration;
- the independent arbitration; and
- The legal arbitration.

Institutional arbitration is carried out pursuant to the rules and mechanisms determined by the arbitration centre (e.g., Chamber of Commerce). In the independent arbitration, the parties determine the rules that are going to apply to solve the dispute. Legal arbitration is the one in which the parties do not set the rules applicable to solve their dispute, neither do they choose for

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institutional rules; by default, therefore, the arbitration is carried out according to the rules set forth in Decree 1818 of 1998.

On July 26, 2011, the government submitted to the congress a bill for a new Statute of National and International Arbitration, which was voted and approved on July 12th, 2012. Law 1563 will be in force as of October 12th, 2012. In general terms, the main issues discussed and that are now part of this regulation include:

- Reduced duration of the arbitration proceedings;
- Introduction of the use of technology in the proceedings (e.g., a "digital dossier");
- Different tariff structure of the arbitrators;
- Creation of the possibility that arbitrators issue precautionary measures like the ones that a judge can issue; and
- Annulment petitions must be filed before the Supreme Court of Justice or the Council of State and not before the tribunals, aiming to unify jurisprudence concerning arbitration.

Moreover, Law 1437 of 2011 created a new statute with the regulation for administrative proceedings. The new statute (*Código Contencioso Administrativo*) is in force as of July 2, 2012, and will apply to the new administrative proceedings starting after that date. Administrative proceedings that initiated before then will remain regulated according to the previous statute.

3. Areas of Law that Cannot be Arbitrated

Most of the conflicts in Colombia admit the use of dispute resolution methods. Some matters, however, may not be subject to arbitration, such as criminal cases, tax issues, family rights, and certain governmental decisions (*actos administrativos*).

A new consumer protection law, which became effective on April 12, 2012, determined that manufacturers or service providers cannot include arbitration clauses in the contracts entered into with consumers, on the basis that consumers cannot be forced to arbitrate the disputes arising out of consumers' claims.

4. Possibility of Enforcing or Vacating Arbitration Awards

Arbitration awards are usually voluntarily enforced by the parties, and have the same binding effect of a judgment issued by a court. If the losing party does not comply with the arbitration award, the award (which is considered a final judgment) can be brought to court in order to enforce the award by means of a "Summary Collection Proceeding."

On the other hand, the losing party in an arbitration proceeding can file an annulment petition against the arbitration award. The annulment petition must be filed before a tribunal (*Tribunal superior de Distrito*). Grounds for the annulment refer only to procedural considerations during the arbitration. Annulments are not a second instance, but instead serve as a control mechanism to ensure that the arbitrators have not impaired the right of defense.

Tribunals do not commonly grant annulments, which makes arbitration a stable and effective solution for dispute resolution.

5. Enforcement of Foreign Arbitration Awards

Under Colombian law, arbitration awards are considered as a final judgment. Therefore, an arbitration award issued by a foreign arbitration panel can be enforced in the courts of Colombia upon compliance of the requisites and procedures set forth in the CPC[35] in order to obtain an exequatur from the Supreme Court of Justice of Colombia.

The exequatur proceeding applies for enforcement of foreign judgments and foreign arbitration awards. The requisites for an exequatur in Colombia are the same as described earlier for the enforcement of foreign judgments.

Once the Supreme Court grants exequatur, the execution proceeding to enforce the award can be filed before a lower court.

6. Arbitration Centers

Some of the major dispute resolution institutions in Colombia are the Chamber of Commerce of Bogotá (Cámara de Comercio de Bogotá), the Chamber of Commerce of Medellín (Cámara de Comercio de Medellín), and the Chamber of Commerce of Cali (Cámara de Comercio de Cali).

These Chambers of Commerce issue lists or arbitrators according to their specialties, such as insurance law, intellectual property law, or telecommunications. This enables the parties to choose the arbitration panel from a list of experts in the particular field in which the dispute has arisen.

Although arbitration institutions in Colombia offer a quality service, the service is relatively expensive. However, businessmen tend to choose arbitration despite the costs, due to the fact that arbitration awards are rendered in a very short time (approximately 1 year), while a final ruling from a court can take up to 15 years.

In addition, arbitration is expressly recognized under the law as fully binding and enforceable. Arbitration awards are only subject to a limited recourse to set aside the award. This recourse is rarely granted.

7. Conclusion

The use of arbitration as a dispute resolution method is increasing in Colombia. The delay by the justice system in rendering decisions continues to be the main reason for many companies to agree on arbitration.

One of the current issues affecting arbitration is the challenge of arbitration awards by means *Tutela*. This type of action relies on summary proceedings addressed to protect fundamental rights, such as due process.

On the other hand, arbitration awards can be annulled or revoked by means of an annulment request filed before civil courts of appeals regarding civil cases, as well as the Council of State if

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the dispute involved a governmental entity. Considering that the annulment may be requested only under limited events, however, losing parties have requested annulments of awards by filing fundamental-rights protection action that usually allege violations of due process.

The Constitutional Court repeatedly had rejected constitutional actions filed to challenge arbitration awards. Nevertheless, the Constitutional Court has recently held that it is possible to obtain the annulment of arbitration awards by means of the fundamental-right protection action[36]. This has given rise to controversy around the traditional final and binding effects of arbitration awards *vis a vis* the current possibility of annulment by means of a constitutional summary actions. It is expected that the constitutional action will only continue to proceed in the extreme cases in which the right to due process has been violated in a substantial manner and the victim has no other means of defense. The recourse to set aside the award usually takes between six months and one year. A constitutional action to annul an award can take approximately four months, including the appeal of the decision.

The disadvantages of arbitration includes their cost; the possibility that the arbitrator panel renders an award dividing evenly among the parties, due to the fact that both parties are paying the fees of the panel; and the fact that arbitrators tend to compromise and feel the need to grant both parties something.

Despite these drawbacks, arbitration offers many advantages, such as the reduced time to obtain an award compared to the duration of a trial, the possibility to choose expert arbitrators with specific knowledge on the matter subject to dispute, and the stability of the arbitration award based on the fact that they are subject to a limited annulment recourse to set aside the award. This recourse is rarely granted.

D. Other Alternative Dispute Resolution Mechanisms

1. Dispute Resolution Mechanisms

In addition to arbitration, the alternative dispute resolution methods available in Colombia are mediation and appointment of a third party in charge of deciding the dispute, called a "friendly mediator."

Mediation has increased during the last years, particularly after the enactment of Law 640 of 2001 that introduced compulsory mediation for several proceedings as a requirement to file a subsequent complaint. Arbitration is also increasing in contract disputes.[37]

"Amicable" or "friendly" mediators are not very common in practice. Amicable mediation proceeds when both parties agree to submit their dispute to a third individual, who is in charge of deciding the dispute.

The Political Constitution, the Civil Code, the Civil Procedure Code, Law 446 of 1998, and Law 640 of 2001 principally govern dispute resolution methods. However, the main rules governing alternative dispute are included in Decree 1818 of 1998.[38]

2. Mediation

Under article 1 of Decree 1818 of 1998, mediation is a alternative dispute resolution method by means of which one or more individuals solve their differences with help of a third neutral person qualified as a mediator.

Mediation only refers to private matters that the parties may decide without violating public order law and matters expressly permitted by law. Law 446 of 1998, Law 640 of 2001, and Decree 1818 of 1998 regulate mediation, the centres and persons authorized to act as mediators, and the like.

The settlement agreement reached by the parties has effects of *res judicata* in last resort, and terminates all differences existing between the parties as specified by the settlement document. According to this, the settlement agreement is a sufficient title to file before a court and demand the fulfillment of the obligations agreed in the settlement.

Mediation has become an important tool to solve disputes prior to a judicial proceeding, probably due to the fact that, after Law 640 of 2001, mediation prior to the filing of a formal lawsuit is mandatory for family, civil, and administrative matters.

A mediation hearing prior to filing of the complaint has been used as strategy to verify the arguments and evidence that parties have concerning a dispute. In a mediation hearing, the parties usually come well prepared.

For mediation hearings, the parties can choose the mediator or mediation centre in which they want to file the mediation request, which can be considered a strategic decision in terms of costs as well as the qualifications of the mediator that is going to help solve the controversy.

Mediation has also grown due to the fact that the overcrowded courts take too long to solve a controversy, the difficulties to access justice, and the flexibility in terms of mediation requests compared to the requirements of a formal complaint before a court.

3. Conclusion

From all alternative dispute resolution methods available in Colombia, arbitration and mediation are the most used, and have eased the tremendous congestion at the Colombian courts. Mediation has also grown not only as a result of the compulsory requirement set forth by Law 640, 2001, but also as a fast option to solve legal controversies.

The advantages of alternative dispute resolution mechanisms include the prompt resolution of the conflicts and the possibility to have special mediators or arbitrators specialized in a specific subject matter or expertise.

The main disadvantage of alternative dispute resolution mechanisms is that they usually are more costly compared to litigation at court. Arbitrators' and mediators' fees are relatively high.

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III. Mexico

A. Introduction 20

B. Litigation 21

1. Overview of the Mexican Legal System 21
   a. Supreme Court of Justice 21
   b. The Federal Electoral Court 22
   c. Collegiate Circuit Courts 23
   d. Unitary Circuit Courts 23
   e. District Courts 23
   f. The Federal Judiciary Council 24
   g. Specialization in Commercial Disputes 24
2. Basic Principles of Mexican Procedural Law 24
   a. Adversarial, Inquisitive, and Social System 24
   b. Authority and power of Judges 24
   c. Evidence in the Mexican Judicial System 24
   d. The Burden of Proof 25
   e. Weighing of Evidence 25
3. Distinguishing Characteristics of Litigation 26
   a. Implementation of Judicial Rules 26
   b. Provisional Measures 26
   c. The Privileges of Government 27
   d. Costs of Litigation 27
   e. Judicial Independence 27
   f. Judicial Impartiality 28
   g. The Appeal 28
   h. Procedural Terms 28
4. International Procedures 29
   a. Obtaining and Admission of Evidence Abroad 29

b. Enforcing an International Judgment ... 29

5. Conclusion: Advantages and Disadvantages of litigation in Mexico ... 30

a. Advantages ... 30

b. Disadvantages ... 30

C. Arbitration ... 31

1. General Overview of the Mexican Arbitration System ... 31

a. Historical Background ... 31

b. Influence of Other Laws ... 31

2. Legal Framework ... 32

3. Arbitration Institutions in Mexico ... 33

4. Arbitrability ... 33

5. Arbitration in Mexico ... 34

a. Recommendations for a Friendly Arbitration ... 34

b. Judicial Intervention ... 35

c. Available Remedies Regarding Arbitration Awards ... 35

d. Arbitration Process ... 36

e. Costs ... 36

f. The Arbitrators ... 37

6. Enforcement of a Foreign Arbitration Award in Mexico ... 37

7. Conclusion: Advantages and Disadvantages of Arbitration in Mexico ... 38

a. Advantages of Arbitration ... 38

b. Disadvantages ... 39

D. Other Alternative Dispute Resolution Mechanisms ... 39

1. Mediation ... 39

a. Legal Framework ... 39

b. Efficiency ... 40

2. Conciliation ... 40

a. Legal Framework ... 40

b. Specialized Centers ... 40

c. Efficiency ... 40

3. Conclusions ... 41

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a. Advantages: 41

b. Disadvantages 42

A. Introduction

Mexico is part of the North American Free Trade Agreement; it is the 14th-largest economy in the world and the second-largest in Latin America.[39] Mexico also ranks 15th as an exporter and importer of products worldwide. Its or income per capita is above the Latin American average. The Mexican economy is strong and growing.

The Mexican labor force has technical and competitive skills to carry out several activities, including professional services, product manufacture, quality control, financing, and industrial and technological services, with a particular specialization in the growth of farm products. Mexico is known for its low manufacturing costs of industrial components, making it a competitive market for the development of industrial centers and technology innovation.

Likewise, Mexico is located in a strategic and convenient geographical position that allows the country to enter into commercial transactions with countries around the world. Mexico has entered into free trade agreements with 43 countries.

Mexico is one of the most attractive destinations for foreign investments due to its economic, financial, and political stability.

The Mexican legal system is based on the Political Constitution of the United Mexican States. This Constitution was enacted on February 5, 1917, by the constituent congress during the Mexican Revolution. The Constitution stands as the Supreme Law and acts as the foundation for all laws in effect in Mexico.

The legal system is based on a hierarchy of laws that allows determining the prevailing regulation in cases of contradiction and complementary regulations. The highest hierarchic level is held by the Constitution; international treaties appear afterwards, immediately followed by federal and local laws, respectively.

The Mexican government and state are constituted in the form of a republic with a democratic representative system in the form of a federation. The government's structure is formed by the separation of its three branches: Executive, Legislative, and Judicial.

Justice at the federal level may be rendered through District Courts (*Juzgados de Distrito*), Unitary Circuit Courts (*Tribunales Unitarios de Circuito*), Collegiate Circuit Courts (*Tribunales Colegiados de Circuito*), by the Electoral Court of the Judicial Power of the Federation (*Tribunal Electoral del Poder Judicial de la Federación*), Supreme Court (*Suprema Corte de Justicia de la Nación*), and by the Federal Judiciary Council (*Consejo de la Judicatura Federal*), among others. At the local level, Small-Claims, Peace, and Municipal Courts (*Juzgados Menores, de Paz o Municipales*); Lower Courts (*Juzgados de Primera Instancia*); Superior Courts of Justice (*Tribunales Superiores de Justicia*); and Local Judiciary Councils (*Consejos de la Judicatura Local*), among others, render justice.

Besides litigation (which is carried out before Judicial Courts), Mexican law recognizes alternative dispute resolution ("ADR") mechanisms (in Spanish: "*Mecanismos Alternativos de Solución de Controversias*"). They are tools that are increasingly utilized to solve differences in an amicable manner without resorting to adversarial instances.

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Arbitration, as an example of ADR between parties, is regulated in the Commercial Code based on the United Nations Commission on International Trade Law (UNCITRAL) model. This mechanism has flourished in Mexico due to its advantages and flexibility to enforce its awards abroad. Mexico also has other types of ADR mechanisms, including negotiation, mediation, and conciliation.

In Mexico these mechanisms have been developed with the influence of the Model Law on International Commercial Conciliation and the ADR rules issued by the International Chamber of Commerce, among others. Those tools were aided as well by the creation of the Mexican Institute for Mediation, the World Intellectual Property Organization Mediation rules, and the rules for Conciliation of the Arbitration Centre of the Construction Industry.

Contrary to litigation, these mechanisms provide the parties in Mexico with increased flexibility in the solution of dispute, allowing them to avoid adversarial procedures where they will necessarily be subject to the resolution of a third party.

B. Litigation

1. Overview of the Mexican Legal System

Under the Mexican federal legal system, the Constitution stands above the Federation and the states. With the exception of the Federal District (because such lacks a constitution, but does have a Government Statute issued by the Federal Congress)[40], each state has a constitution wherein the structure of its government is established subject to the Federal Constitution.

The legal system comprises federal laws, local laws, and municipal regulations. The Federal Congress issues federal laws.

The judicial power of the Federation derives from the Constitution, which endows it with the task of safeguarding the constitutional order. The judicial power lies primarily in the Supreme Court, which has the fundamental mission of safeguarding the compliance of the constitutional order. As the ultimate court, it must oversee that general regulations, international treaties, and government acts comply with the Constitution. This task is also endowed to the Electoral Court, Collegiate Circuit Courts, Unitary Circuit Courts and District Courts, as well as to the People's Federal Jury pursuant to section V of article 20 of the Federal Constitution.[41] The Federal Judiciary Council is not exactly a jurisdictional body, but rather a preponderantly administrative body; it has the task of managing the administration of the judicial power of the federation with the exception of the Supreme Court.

a. Supreme Court of Justice

The Supreme Court of Justice in Mexico consists of eleven justices, and functions either sitting *en banc* in full court or in chambers. Justices appointed to this court shall preferably be lawyers who have served with great efficiency, ability, and honesty when rendering justice, or who have distinguished themselves as exceptionally honorable and capable legal professionals.

In accordance with constitutional amendments, the Supreme Court has increasingly distinguished itself as a constitutional court. It possesses a wide array of jurisdictional prerogatives, in addition to legislative and administrative ones.

The Supreme Court, functioning as a full court, has three main groups of powers.

Judicial prerogatives include the following:

- Constitutional disputes regarding the constitutionality of actions or general regulations when such disputes arise among the Federation and a state or the Federal District, the Federation and a municipality, the Executive Branch and the Federal Congress, among the states, a state and the Federal District, the Federal District and a municipality, two municipalities, or among a state and a municipality of another state;
- Unconstitutionality actions filed to evidence possible contradictions between a general regulation and the Constitution;
- Writs of review against judgments issued in constitutional hearings by district judges or unitary circuit courts;
- Writs of *amparo*[42] ruled by the Supreme Court due to the importance and general interest of the relevant case;
- Writs of review against judgments of direct writs of *amparo* that omit ruling matters of unconstitutionality of a federal law. The writ of *amparo* is a trial that has as its main purpose the protection of the rights granted by the Constitution in favor of the individuals located in Mexico. In general, the writ of *amparo* could be filed in the following cases:
    - Against acts carried out by authorities that infringe constitutional rights,
    - Against laws and acts of the federal authorities that infringe or restrict the sovereignty of the states of the Mexican republic, and
    - Against the laws and acts of the states to invade the areas and scope of the federal authorities.

Legislative authorities include:

- General orders, laws, or resolutions;
- Expense budgets; and
- Court precedents (*Jurisprudencia*).

Administrative authorities include:

- Presidential election;
- Granting of permits to its members; and
- Delegation of certain cases for final judgment by collegiate courts.

b. The Federal Electoral Court

Based on the Constitution, the Federal Electoral Court is the highest jurisdictional authority in electoral matters, and is a specialized body of the judicial power of the Federation.

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It functions in a Superior Chamber, as well as in five regional chambers. The Superior Chamber consists of seven electoral magistrates, and shall have its seat in the Federal District.

c. Collegiate Circuit Courts

Collegiate Circuit Courts consist of three magistrates; a court clerk; and additional clerks, court officers, and employees as the expense budget may determine.

It has jurisdiction to rule the following matters:

- Direct writs of *amparo* contesting final judgments, labor judgments, or resolutions that end judicial procedures;
- Remedies against court orders and resolutions issued by district judges, unitary circuit courts, and superior courts;
- Grievances remedies (*recursos de queja*) in the cases established by law;
- Writs of review against judgments issued in constitutional hearings by district judges, unitary circuit courts, or superior courts;
- Conflicts of venue arising among unitary circuit courts or district judges referring to jurisdiction in *amparo* procedures;
- Impediments and excuses in matters of *amparo* regarding disputes between district judges, and in any matter between unitary circuit judges; and
- Constitutional appeals of a summary nature with respect to the violation of rights by a federal court during proceedings provided in the *amparo* law.

d. Unitary Circuit Courts

A Unitary Circuit Court consists of a magistrate and clerks, court officers, and employees as the expense budget may determine.

They have jurisdiction to rule the following matters.

- Writs of *amparo* contesting acts of other unitary circuit courts that do not represent final judgments;
- Appeals of matters ruled in first instance by district courts;
- Remedies contesting court's denial of appeal;
- Judgments of impediments, excuses, and recusals of district judges, except in *amparo* procedures; and
- Disputes arising among district judges subject to their jurisdiction.

e. District Courts

District courts will consist of a judge and clerks, court officers, and employees as allowed by their respective expense budgets.

These types of courts can be of mixed or specialized subject matter jurisdiction, should a special jurisdiction be assigned or not (civil, criminal, administrative, labor). District courts have a double subject-matter jurisdiction.

- In *amparo* matters, they rule in first instance of indirect *amparo* procedures.
- In ordinary federal matters, they rule all procedures of such nature.

f. The Federal Judiciary Council

With the exception of the Supreme Court, this council is in charge of the administration, oversight, and discipline of the judicial power of the nation. It consists of seven director members that remain in office for five years, acting in full council or in commissions.

g. Specialization in Commercial Disputes

Big cities usually have courts specialized in commercial disputes. In the federal level, the district courts in civil matters have a wealth of experience in commercial disputes.

2. Basic Principles of Mexican Procedural Law

a. Adversarial, Inquisitive, and Social System

The "inquisitive" system refers to the fact that the person making the accusation is the same person that judges. Due to the evident lack of justice and equilibrium among the parties, this system does not exist in Mexico.

The current Mexican system instead relies on an "adversarial" system in which two or more parties confront each other in order to reach a solution, with the intervention of a third party that will issue a final resolution. It has the goal of providing legal certainty and implementing efficient methods for justice.

In criminal matters, the oral adversarial system has recently been established, with the goal of improving the judicial system; oral procedures allow greater and closer intervention during the trial, making them quicker and more efficient [43].

b. Authority and power of Judges

A final judgment in litigation is issued by a judge or by a magistrate. Judges, in accordance to their jurisdiction, have diverse responsibilities. An obligation common to all judges is that all resolutions must properly cite specific provisions of statute law and be well-grounded in law and fact, citing cause. The judges have the power to enforce, with or without the assistance of the public force, its own resolutions.

c. Evidence in the Mexican Judicial System

The following are different types of evidence recognized in Mexican law.

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i. Admissions

The statement of a witness receives the name of testimonial evidence; the statement of one of the parties where it recognizes a fact may harm her position is called a confessional admission. In the past, this was known as the "Queen of Evidence" as it carried an enormous probative value.

ii. Documentary Evidence

In procedural law, a document is anything written in conventional or concerted symbols. In Mexican law, it can be classified as a public or private written document. It will be public if a government officer with sufficient authority issues it. A public deed or a certified copy from a court would be examples. Contrarily, a private document would simply be that which is not public.

iii. Expert Testimony

Expert testimony is brought when the specialized knowledge derived from academic preparation, or the practice of an art or craft beyond the practice of law, is needed to aid the judge in the appreciation of certain facts. Expert testimonies will always imply the personal opinion of the expert.

iv. Testimonial Evidence

Probably the most popular of evidence, being as old as humanity itself, is the testimony. Witnesses are third parties who inform the judge of occurrences they perceived through their senses. There are different types of witnesses: eyewitnesses, indirect, and instrumental.

v. On-Site Judicial Inspection

The intention of this is that the judge directly inspects, analyzes, and reviews evidence relating to the facts of the claim presented by the parties (such as a place, a thing, or an object).

vi. Presumptive Evidence

Presumptions are assumptions made from a known fact in order to reach an unknown one. There are two kinds: the legal and the human. The legal presumption has its origin in the law, while the human is the assumption that the judge will make within the procedure and derived from a proven fact in order to deem another fact as proven.

d. The Burden of Proof

Evidence is a burden imposed to parties wishing to prove a fact in order to reach a favorable resolution. Presenting evidence is never an obligation; while a party may be compelled to carry out an obligation, it cannot be compelled to prove something in a judicial procedure.

e. Weighing of Evidence

Weighing of evidence is an exclusive duty of judges in order to resolve a case and issue a judgment. Generally, judges weigh the evidence at the time they issue their judgment. Evidence shall aid judges in their pursuit of the truth within the controversial aspects of the procedure.

There are three systems to weigh evidence:

1. The free assessment of evidence system that grants the court an unrestricted ability to assess the evidence and base the judgment upon it;

2. The predetermined assessment system, by means of which the law specifies how the judge shall assess the evidence to decide the case; and

3. The mixed system in which, although a pre-established assessment exists pursuant to the law, the same law grants the judge the ability to assess evidence in a different manner.

In accordance with the Civil Procedure Code, the judge has the freedom to analyze the evidence offered by the parties, and to determine the assessment of the evidence, and to decide on the weight of such proofs by relying upon the rules to carry out an assessment of the evidence.

3. Distinguishing Characteristics of Litigation

a. Implementation of Judicial Rules

Judicial resolutions are compulsory statements issued by a jurisdictional body. Resolutions are classified according to four types.

1) Decrees: Clerical resolutions.

2) Court Order: Resolutions that favor the continuation of the judicial procedure.

3) Interlocutory Judgments: A judgment on ancillary matters during the judicial procedure. These judgments solve ancillary claims within the procedure or motions of special decree.

4) Final Judgment. A means to solve the judicial procedure by concluding the instance.

b. Provisional Measures

Provisional measures seek to cause that a party do or cease doing something. The party seeking the provisional measures must request it to the court. The provisional measure is considered a remedy due to the fact that a party has the right to request that the judge prevent the other party from doing a particular act or activity. An example of a provisional measure is an attachment prior to judgment. This remedy seeks that the debtor does not release or alienate any of its assets, so the payment of the debt can be guaranteed. In labor matters (by means of voluntary or *paraprocesal* remedies), workers, unions, or employers can request similar actions and interventions before the Conciliation and Arbitration Board (Mexican labor courts).

In the Mexican legal system, provisional measures are limited to the specific cases contemplated in the relevant civil procedural laws and the Code of Commerce. These are not granted frequently, as with the injunctive relief under other jurisdictions.

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c. The Privileges of Government

Within an ordinary litigation procedure, procedural equality should exist among parties, regardless if one of them is the state itself. In practice, though, when an individual confronts the state in litigation, the state has significant advantages over individuals, such as the "principle" that presumes that the authority acts always in good faith.

It is important to stress that judges, magistrates, and justices are the ones deciding; their decisions must fully and duly cite cause and specific provisions of law that are congruent and applicable to the case in question. Hence, the judicial authority deciding over a dispute shall not give special preference to any of the parties, including the authority.

d. Costs of Litigation

All persons have the right to freely access justice, which means that each person has the right to be heard by the judicial authority. This right is linked to the principle of gratuitousness, which refers to the fact that all legal procedures shall be free and gratuitous; there shall be no cost when filing a claim and obtaining a judicial resolution.

Gratuitousness should not be mistaken or confused with the fees of a private attorney in exchange for legal representation. These differ from those "expenses" derived within a judicial procedure or trial; in that sense, the state cannot charge any fees for admittance of a lawsuit or processing a judicial procedure. Also during a judicial procedure, other types of expenses will arise, e.g. the rendering of an expert's testimony.

The state provides support in certain cases — for example, public defenders in case the defendant or plaintiff lacks an attorney in specific cases stated in law. In Mexico, there are some law firms with pro bono projects, aiming to provide legal assistance to non-profit organizations or low-income individuals who cannot afford a private attorney.

In Mexico, there are different payment schemes that are used by private attorneys: advance payment, fixed fees, hourly rates, success fees, and hybrid schemes. Each state within Mexico has its own regulations regarding limits or criteria for fixing legal representation fees. The majority of such fees are fixed based on the value of the case. For example, in labor matters, the plaintiff's attorney collects between 20% and 30% of amount received by the worker at the end of the trial (in case of success).

e. Judicial Independence

The idea of judicial independence is idea fundamental element of the Rule of Law. The rendering of justice must not be subject to the will of the entities holding political power. The perception of citizens regarding judicial independence, specifically of the fact that judges act independently, is one of the essential circumstances to properly assume and appreciate the values implied by the Rule of Law.

Judicial independence helps judiciary systems develop their functions adequately in a democratic society. The credibility of the system, and the legitimacy of judges' decisions, lies in great part in judicial independence.

f. Judicial Impartiality

The principle of impartiality requires that a third party that acts as authority to process and judge the case must not be in favor of a specific party (impartiality), as no person or entity can act as a plaintiff and judge at the same time. He must lack at all times of a subjective interest in the solution of the litigation (impartiality), and must act without being subordinated hierarchically before both parties (independence). Those principles are enshrined in the Mexican Constitution.

g. The Appeal

In an ordinary and vertical remedy, one (or both) of the parties requests a superior court to review the resolution issued by a first-instance court, thereby pursuing the modification or revocation of the initial resolution. The appeal is a normal instrument of procedural defense against definitive judgments. With it, the second instance or review of the litigation or of the process is initiated. All definitive judgments issued by a judge in the first instance of litigation are subject of an appeal, except in the cases where the law expressly states that this remedy is not available. This remedy is widely used across the diverse subject matters of law, and each specific law determines its terms and conditions.

h. Procedural Terms

Procedural terms are the intervals of time within which certain procedural acts must be carried out in order to be valid. As an example, the claiming party in an appeal has a determined time following issuance of the final judgment to use this remedy; should the legal term to do so be exceeded, the appeal will have no validity and will be dismissed.

Procedural terms are classified as legal, conventional, individual, extendible, non- extendible, and fatal.

- Legal terms are those predetermined by law, such as the term to appeal.
- Conventional terms are those that are established during the judicial procedure.
- Individual terms are those established for a particular person or party, such as the term imposed upon the defendant to answer a complaint. There are also common terms that are imposed upon both parties during the judicial procedure.
- Extendible terms, as their name indicates, may be extended in duration by the judge.
- Non-extendible terms cannot be extended.
- Fatal terms are synonyms of non-extendible terms, but must also be understood as those that cannot be suspended.

In litigation, should a specific required document not be filed within the pre-established terms, it will be dismissed or simply not admitted, depending on the case.

It is fairly common that important litigations are lost for the sole reason of missing a deadline or term. Thus, it is always advisable to anticipate terms and file well in advance of the deadline.

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4. International Procedures

a. Obtaining and Admission of Evidence Abroad[44]

When referring to the admission of evidence in litigation procedures carried out abroad, embassies, consulates, and the Mexican Diplomatic Staff shall abide to the provisions of international treaties and conventions to which Mexico is a party.[45]

Letters rogatory are cooperation instruments between two judicial courts through which one requests the other to carry out a specifically required action within the jurisdiction of the latter to obtain certain information. These actions must be necessary to satisfy procedural formalities, to collect evidence required in order to validly resolve the dispute, or to acknowledge the validity of a judgment and enforce resolutions.

The Federal Code of Civil Procedures establishes specific requirements for letters rogatory issued for assistance in the admission of evidence. The letters rogatory to be sent abroad must contain the specific petitions and actions to be carried out abroad Likewise, they shall include the necessary data and information regarding the process and the certified copies and other appropriate documents as required by each case. The letters rogatory in foreign languages shall be translated to Spanish.

The letters rogatory regarding notifications, obtaining of evidence and other matters will not require a validity process.

Regarding the obtaining of evidence, the Federal Code of Civil Procedures establishes the following general rules:

- Federal and state government authorities and public employees are not allowed to show documents or copies existing in official archives under their control, except such particular cases in which it is allowed by the law, and when such action is ordered by Mexican Court as a consequence of letter rogatory.
- Regarding the obtaining of evidence in the abroad litigation process, the Mexico Embassies, Consulates and officers of the Mexican Foreign Services shall follow international treaties and conventions signed by Mexico.
- In no case shall national courts order or carry out general inspections of archives that are not ordinarily publicly accessible.
- Public Federal and States employees are impeded from rendering statements in judicial procedures or introducing testimonial evidence with respect to their activities as authorities.

b. Enforcing an International Judgment

A jurisdictional procedure has the purpose of permitting a judge to solve a dispute by means of the issuance of a final judgment or sentence. The judge has the power to carry out or order the necessary actions in order to enforce a final resolution.

In international law, however, the judge that issued a final judgment lacks legal power over the assets or patrimony of the condemned party located out of the judge's jurisdiction; thus, the judge must request the collaboration of another jurisdictional body in order to acknowledge the validity of the resolution and enforce it within its territory.

Each state has special laws and regulations for this kind of judicial aid. There are international efforts aiming to unify and simplify this form of judicial cooperation.[46]

In Mexico, it is only possible to acknowledge the validity and enforce definitive foreign judgments (as opposed to interim resolutions or injunctive reliefs). Jurisdictional judgments and sentences will only be enforceable in Mexico if they are not contrary to the internal public order.

5. Conclusion: Advantages and Disadvantages of Litigation in Mexico

a. Advantages

- Parties are not required to personally attend all proceedings and hearings during the judicial procedure (as most of the procedural phases in commercial litigation are handled in writing, except for low-value commercial disputes, which can be held orally).
- Only certified attorneys can litigate; this professionalizes the system.
- Most judicial institutions archive procedures and make them available to the parties for their review.
- The jurisdictional system has been professionalized in recent years in order to have more capable officers and judges.

b. Disadvantages

- The written system that still prevails in Mexico (over the oral system) may significantly slow down the procedure's pace, and the procedure may last for several years.
- The cost of litigation is may be high, depending on the attorneys and experts fees.
- In some unfortunate cases, there may be corrupt practices in Mexican judicial system, although there are currently important efforts to sanction and decrease corrupt practices as possible (such as the professionalization of the judicial system).[47]

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C. Arbitration

1. General Overview of the Mexican Arbitration System

a. Historical Background

Arbitration is a major alternative to the judicial courts for solving any type of dispute. In order for arbitration to operate, a national and international legal structure must be available.

Arbitration has been accepted internationally as the preferable instrument to solve disputes. International and Mexican laws alike have acknowledged this phenomenon, and have increased their regulation in connection to arbitration. The Trade Code includes a complete chapter regarding the commercial arbitration and many Mexico States are incorporate official/state arbitration institutes to resolve disputes, such as: the Institute of Alternative Justice of Jalisco, the Center of Alternative Justice of Coahuila, and the Center of Alternative Justice of Federal District (Mexico City), among others.

Arbitration precedes the birth of the nation-state. It was created before the legal figure of the judge was established. At one time, arbitration procedures were carried out *ad hoc*, but there was significant intervention of state judges in arbitration procedures, including reviews of arbitrators.

Because no international regulations existed in the past, the enforcement of arbitration awards was carried out in diverse ways, according to each country's internal regulations. By the end of the 19th century and the beginning of the 20th century, a modernization of arbitration occurred, although an important part of arbitration was still based on national laws.

In the modern legal era, the international panorama has changed dramatically. There is an international convergence in the general legal regulations, as well as in the specific provisions in procedural laws regarding arbitration. This has been greatly due to the influence of other laws.

b. Influence of Other Laws

One of the earliest arbitration laws was the English arbitration law of 1698[48]. The United States enacted its first law regarding arbitration in the form of the Federal Arbitration Act of 1925[49].

Two Hague conventions in 1899 and 1907 began to codify international law in the area. Both are referred to as Hague Convention for the Pacific Settlement of International Disputes. These conventions created the Permanent Court of Arbitration that remains in use to this date.

The 1899 convention was one of the most important results of the First International Peace Conference, which determined that the best manner to promote the peaceful solution of disputes was to establish a permanent institution in the form of an international court available to anyone. This objective was further developed in the second convention on October 18, 1907.

Another important development came from the international business community by establishing the International Chamber of Commerce ("ICC") in 1919. The ICC was directly involved in the promotion and adoption of the Geneva Protocol on Arbitration Clauses in 1923, as well as the Geneva Convention on the Execution of Foreign Arbitral Awards in 1927. These instruments

sought to achieve the international acknowledgment of arbitration agreements and awards. They were also the first instruments that sought to regulate foreign arbitration awards.

The most important catalyst for the development of an international arbitration regime was the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards on June 10, 1958 ("New York Convention").[50]

The United Nations began reviewing the draft for the ICC Convention, and prepared its own draft more in accordance with the Geneva Convention. This project replaced the two Geneva conventions, and is currently the foundation for international commerce arbitration.

As a result of the success of the New York Convention and the development of an increasingly uniform arbitration practice, differences among national laws became more evident. There were three tendencies detected: the first were jurisdictions that minutely controlled and revised the arbitration carried out based on their national laws; the second involved countries that refused to intervene or interfere in the processes; and the third related to jurisdictions that did not have any arbitration regulations in their laws. Therefore, the need to uniform arbitration regulations became more evident.

This need derived in the creation of the UNCITRAL Model Law on International Commercial Arbitration in 1985. This law harmonized and modernized the international arbitration regulations.

2. Legal Framework

In Mexico, it is legally possible to freely submit and solve commercial disputes through arbitration. The Mexican legal framework traditionally included arbitration regulations; its current regulations can easily be qualified as "modern," as they comply with all of the compromises assumed by Mexico in conventions and international treaties.

In 1993, Mexico adopted the UNCITRAL Model Law on International Commercial Arbitration in the Trade Code. [51] Mexico has included minor changes to the integral text of the UNCITRAL Model Law, a decision that represented a milestone in the practice of arbitration in Mexico; with that incorporation, Mexico became a part of the group of nations interested in fostering arbitration and its uniformity.

Hence, the Fourth Section of the Fifth Book of the Code of Commerce must be considered and construed independently from the rest of the Code of Commerce. The genesis of its articles is proper of UNCITRAL and thus, its interpretation must take into account the commission's work when drafting this law.

Pursuant to the Fourth Section of the Fifth Book of the Code of Commerce, disputes of non-commercial matters may be solved through arbitration as long as their nature permits it.

Arbitration is also established in various national laws, including the Federal Law for Consumer Protection, Federal Telecommunications Law, Civil Aviation Law, Airports Law, Public Sector Leases and Acquisitions Law, Organic Law of PEMEX, Organic Statute of the Federal Electricity Commission, and the Federal Law of Financial Institutions. The Fourth Section of the Fifth Book of the Code of Commerce can supply many of these laws regarding arbitration.

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3. Arbitration Institutions in Mexico

Parties can establish the rules by which they wish to regulate the arbitration procedure. The parties can choose pre-established rules, or create new ones. In practice, it is very strange for parties to draft particular regulations for an arbitration procedure. Usually, only certain aspects are expressly drafted; others are regulated through referencing, arbitration rules, or arbitration law.

Some of the institutions commonly used in Mexico for local or international disputes include the following:

- Commercial Mediation and Arbitration Center of the Americas ("CAMCA");
- National Chamber of Commerce of Mexico City ("CANACO");
- Mexican Arbitration Center ("CAM");
- Arbitration Court for Sports; and
- World Intellectual Property Organization ("WIPO").

4. Arbitrability

Determining the arbitrability of a dispute in Mexico is a difficult issue. Except for specific cases, there are no clear rules on which matters may be subject to arbitration.

By general rule, there are four criteria must be met in order to determine that a type of case is subject to arbitration.

1. It should not be expressly excluded by law,
2. It should not concern rights that are not freely disposable.
3. It must not affect public interest.
4. It must not involve rights of third parties, unless all of the parties involved in the conflict submit to arbitration.

There are areas that are expressly excluded by law. The Federal Code of Civil Procedures[52] excludes from arbitration issues related to lands and waters located in the national territory, resources in the maritime exclusive economic zone, government authority acts that relate to the internal regime of the government, and the internal regime of Mexican embassies and consulates.

The Civil Procedural Code of the Federal District states that the following cases are not subject to arbitration:

- Divorce;
- The right to alimony;
- Actions for annulment of marriage; and

- Matters pertaining to the civil status of persons.

There are specific areas and issues where the scope for private arbitration is not clear, including labor, intellectual property, copyright, telecommunications, and tax law.

In labor matters, the federal and local Conciliation and Arbitration Boards (Mexican labor courts) have exclusive jurisdiction. This is an express legal provision and judicial interpretation. Even though conciliation can happen between the parties involved in a labor dispute, it is not formally conciliation, because those matters should be handled before the Conciliation and Arbitration Boards. Contrary to the commercial area, there is no flexibility in labor law provisions.

There are areas and issues that naturally allow disputes to be solved by means of a private method such as arbitration. However, external factors involved in some of these matters may exclude arbitration as the ideal mechanism to solve the dispute, mainly because third parties may be affected.

When determining which matters are subject to arbitration, local law is influenced by two important variables: the social transcendence of a certain area; and the level of confidence that the local legislative branch and judiciary have in arbitration as a trustworthy mechanism to solve disputes.

5. Arbitration in Mexico

In Mexico, there are two requirements for a person to be an arbitrator in a determined issue: independence and impartiality.

Legal theory and arbitration precedents alike conceive independence as an objective factor: One must determine whether a link exists between an arbitrator and the parties, or to the objective issue of the dispute.

Impartiality is understood as a subjective and hard-to-verify factor; concerning the mental state of an arbitrator, the principle seeks to describe the lack of preference towards one of the parties involved in the arbitration, or the position of the arbitrator in the issue being solved.

a. Recommendations for a Friendly Arbitration

As stated, independence and impartiality are fundamental aspects that allow an arbitrator to act in an amicable and fair manner during the arbitration.

The candidate to serve as an arbitrator in a dispute shall reveal any circumstance that could cause any of the parties to doubt his actions during the process. It is essential for the parties to trust the arbitrator. The individual should not be appointed as arbitrator if any of the following circumstances appear[53]:

- A financial interest in the relevant dispute, or linked to one of the parties or any of its representatives;
- Close family ties with one of the parties or any of its representatives;

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- Any other type of personal involvement in the dispute, including personal interests or involvement in previous negotiations; or
- Any adversarial relation with any of the parties.

Communication issues between the parties and the arbitrator frequently cause of misunderstandings during the process. There are three phases where communication may occur with arbitrators:

1. Before the appointment: When an arbitrator is being interviewed, discussions that favor a certain position must be avoided. Likewise, hypothetical questions regarding the position that the arbitrator may adopt during the process must also be avoided.

2. During the arbitration procedure: Once the arbitrator is appointed, it is necessary to avoid individual communication between the arbitrator and the parties, as these communications could eventually represent grounds for a recusal or an annulment lawsuit.

3. After the arbitration procedure has concluded: It is customary to have certain communications with the arbitrator(s) for clarification purposes, as long as these do not pertain to the deliberations, which are considered confidential.

b. Judicial Intervention

As an alternate dispute resolution mechanism freely chosen by the parties, arbitration involves the participation of arbitrators instead of state courts. Although parties seek to avoid involving ordinary judges in the resolution of their dispute, it is not possible to completely separate jurisdictional intervention from the arbitration procedure.

For example, in the appointment phase, a judicial authority may intervene if the parties cannot choose the arbitrator on their own. Additional examples are interim measures or enforcement or annulment of an arbitration award.

c. Available Remedies Regarding Arbitration Awards

There are two remedies available in connection to arbitration awards: annulment and enforcement.

i. Annulment

The objective of this remedy is to destroy the legal effects of an arbitration award when a cause for annulment is evidenced. Should the annulment take place, the arbitration award will become void as of the date that the judge indicates, subject to other specific terms of the annulment resolution. Mexican law[54] provides for a limited list of cases in which an award can be nullified:

- If the party that files the annulment claim provides evidence of the following:
  - That a party at the moment of the arbitration agreement was not legally capable or in case that the agreement was not valid based in the applicable government law chosen by the parties.

- That it was not duly served regarding the appointing of the arbitrator or the arbitrator decisions or in case that the party could not exercise its rights.
- The award is regarding a controversy that was not included in the arbitration agreement or contains decisions that exceed the arbitration agreement terms.
- The integration of the arbitration panel or the arbitration procedure did not follow the terms of the arbitration agreement.

- If the judge confirms that in accordance with Mexican Laws the matter of the controversy is not subject to arbitration, or in case that the award is issued against public order.

ii. Enforcement

Enforcement actions are sought when a party does not voluntarily comply with the provisions of the arbitration award. It is the means by which the terms of the arbitration award are fulfilled through judicial intervention, with or without the use of public force.

d. Arbitration Process

The typical procedure involves the following phases:

- Filing of complaint;
- Answer to the complaint;
- Integration of the arbitration panel (and, in some institutional regulations, issuance of a mission report);
- Schedule for the procedure;
- Amended complaint
- Extended Answer to the complaint;
- Rebuttal (in its case);
- Rejoinder (in its case);
- Hearing(s);
- Closing arguments; and
- Issuance of the arbitration award.

e. Costs

Generally, arbitration costs cover the following:

- Arbitrators' fees;
- Arbitrators' expenses, including travel expenses;

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- Fees for any expert testimony required, or any other additional assistance required by the arbitration court;
- Expenses incurred by witnesses, including travel expenses;
- Legal and representation costs determined in the arbitration award; and
- Administrative institution fees.

The Trade Code[55] establishes four basic rules regarding costs:

1. A methodology to determine the arbitration expenses;
2. The rules for the distribution of costs among parties;
3. The power of the arbitration institution to request the parties to make a deposit in advance to cover procedural expenses; and
4. In-advance payments for arbitration expenses.

f. The Arbitrators

As mentioned, the parties have the right to choose their own arbitrators, or have the court choose them.

Arbitrators should be professional individuals with sufficient experience in dispute resolution. As mentioned, it is also necessary that the arbitrator's independence and impartiality from the parties is ensured.

Arbitration institutions usually state specific rules regarding the election of arbitrators regarding independence, and experience, among other principles.[56]

6. Enforcement of a Foreign Arbitration Award in Mexico

In accordance with article 1462 of the Trade Code an arbitral award, independent of the country in which it was issued, shall be recognized as binding and it must be submitted with a writing request to a judge in order to be enforceable.

The party seeking the enforcement of an award shall attach the original award to its petition. Also, if the award is in a language other than Spanish, the award shall be translated to Spanish.

In accordance with article 1462 of the Trade Code a Mexican Judge can deny the validity and the enforcement of an award (issued in Mexico or abroad) in the following cases:

- When the party against whom the award was issued proves before the competent judge of the country in which validity or enforcement is sought:
    - That a party at the moment of the arbitration agreement was not legally capable or that the agreement was not valid based in the applicable government law chosen by the parties.

- That it was not duly served regarding the appointing of the arbitrator or the arbitrator decisions or that the party could not exercise its rights for any reasons.
- The award regards a controversy that was not included in the arbitration agreement or contains decisions that exceed the arbitration agreement terms. Notwithstanding the aforementioned, the judge can enforce the provisions that are mentioned in the arbitration agreement.
- The integration of the arbitration panel or the arbitration procedure did not follow the terms of the arbitration agreement, or did not follow the law of the country in which the arbitration was performed.
- The award is not binding for the parties or has been declared void or suspended by the judge from the country in which the award was issued or suspended in accordance with the laws of the country in which the award was subject.

- If the judge confirms that in accordance with Mexican Laws the matter of the controversy is not subject to arbitration, or the award is issued against public order.

7. Conclusion: Advantages and Disadvantages of Arbitration in Mexico

a. Advantages of Arbitration

- **Neutrality.** In arbitration, parties have the ability to choose who will solve the dispute in order to ensure professionalism and neutrality.
- **Enforceability.** An arbitration award is enforceable provided that it complies with the minimum requirements for the judge to verify its validity (without analyzing the substance of the case) and proceed with its enforcement. Internationally, it is easier and more expeditious to enforce an arbitration award than a judicial judgment.
- **Flexibility.** Because arbitration is based on the principle of free will, the parties are permitted to design and elaborate on the particularities of the rules of the procedure in question.
- **Promptness.** Judicial procedures can last months or years due to the fact that, among other issues, there are many instances to be followed, derived from suits such as appeals, amparo trials, etc. Moreover, judiciary officers have enormous workloads that translate into delays during the procedure.
- **Confidentiality.** Contrary to public judicial procedures, arbitration procedures are not public.
- **Costs**. Unlike judges, arbitrators are entitled to fees; nevertheless, considering that ordinary judicial procedures take longer, a greater investment often is necessary for judicial proceedings than for arbitration procedures.

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b. Disadvantages

- **Costs.** Depending on the nature and value of the dispute, it is always important to assess whether it is worth to pay arbitrator fees. However, the CANACO has implemented a summarized arbitration procedure through its regulations called "ABC"[57] for low-amount disputes in order to facilitate the access to arbitration for these types of cases.
- **Lack of independent enforceability.** Contrary to ordinary judges, arbitrators lack *imperium* or the ability to enforce their resolutions. Therefore, they will need the assistance of a judge to enforce an arbitral award in case it is not voluntarily fulfilled by the losing party.

D. Other Alternative Dispute Resolution Mechanisms

As mentioned, Mexican law provides additional types of ADR mechanisms. These mechanisms are likewise used to solve differences in an amicable manner. Those mechanisms are:

- Procedures in which an impartial third party aids the parties in order to reach an acceptable and enforceable decision; and
- Procedures ending with a decision or arbitration award that is enforceable in accordance with law.

During recent years, these mechanisms have been developed with the influence of, among others, the Model Law on International Commercial Conciliation, the ADR rules issued by the International Chamber of Commerce, the Mexican Institute for Mediation, the WIPO mediation rules, and the rules for Conciliation of the Arbitration Centre of the Construction Industry.

1. Mediation

Mediation has been incorporated into the Mexican legal system with the creation of alternative centers of justice. Mediation is a process where a third party directs discussions between the disputing participants so they can reach a solution. Participants may sign a contract when an agreement is reached. In this kind of ADR mechanism, the person guiding the discussions cannot propose any solutions.

a. Legal Framework

ADR mechanisms have their legal basis in article 17 of the Constitution, a provision that grants citizens the right to use alternative mechanisms in order to solve their disputes. Federal and local laws alike address ADR. A great number of the states in the Mexican republic[58] have ADR laws, and others have drafts pending to be approved and enacted or analogous regulations within their judiciary branches.

These laws regulate ADR, mediation, or Alternative Justice Centers ("Centro de Mediación o de Justicia Alternativa") managed by the Superior State Courts of each respective state.

Also, other mediation or Alternative Justice Centers issue their own mediation regulations, as well as chambers or other institutions such as CANACO.

b. Efficiency

Mediation favors finding the solution of a problem over determining which party is right or entitled to something (as in litigation or arbitration). This approach allows the parties to increase and improve their communication, and grants them tools to reach a solution.

The main reasons to use mediation are:

- Quickly reaching a solution to the dispute;
- Reaching a solution that is satisfactory to both parties;
- Parties avoid wearing down, thus allowing the communication to continue; and
- Not using adversarial mechanisms such as litigation or arbitration.

2. Conciliation

Conciliation derives from the Latin word *conciliatio*, which translates as the repair of differences between individuals.

This ADR mechanism implies the participation of a third party who listens to the participants and guides them in such manner that they may reach a positive resolution. The conciliator proposes a non-binding solution to the parties; it is merely a suggestion that they can follow or not. As in mediation, if the parties reach a solution, an agreement is signed.

a. Legal Framework

UNCITRAL proposed a Model Law on International Commercial Conciliation in 1999. The purpose of it was to analyze various proposals to improve conciliation laws, regulations, and practices[59].

b. Specialized Centers

There are diverse institutions offering services related to conciliation:

- The Arbitration Center of the Construction Industry;
- The International Centre for the Settlement of Investment Disputes (“ICSID”); and
- The International Chamber of Commerce (ICC)

c. Efficiency

As in mediation, conciliation seeks not to determine which party is right or entitled to something, but instead to solve a problem. This permits that the parties increase and improve their

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communication, and receive tools that will help them in reaching an agreement. Contrary to mediation, however, in conciliation the third party does emit an opinion in the form of solution proposal.

The main reasons to use conciliation are:

- Providing a quick solution to a dispute;
- Finding a satisfactory solution to both parties with the aid of a third party, which provides increased flexibility over arbitration;
- Parties avoid wearing down, thus allowing the communication to continue; and
- Not using adversarial mechanisms such as litigation or arbitration.

3. Conclusions.

The advantages and disadvantages of ADR are similar to those of arbitration, yet some distinctions may be determined based on experience of the author.

a. Advantages:

- **Flexibility.** ADR mechanisms offer great flexibility that allows parties to choose the most appropriate method according to the nature of the issue and the peculiarities of the parties in conflict. It offers a wide array of solutions — not only the payment of a defined monetary amount or the fulfillment of certain commitments, but also in a greater participation that can increase the chances of reaching an amicable and satisfactory solution to the conflict.
- **Quickness.** Depending on the kind of ADR mechanism chosen, ADR mechanisms, usually result in a solution that is enforced with a much greater speed than adversarial mechanisms that can last months or years. Instead of waiting for a third party to issue a definitive judgment, when a solution is agreed upon in ADR, parties have agreed upon terms that are mutually satisfactory to them, and thus are easier and more quickly fulfilled.
- **Costs.** ADR mechanisms are usually considerably less expensive than judicial litigation, and even less expensive than arbitration.
- **Confidentiality.** In adversarial methods such as litigation and arbitration, files usually become public (especially in the former) once the procedure has ended — and in some cases, since its beginning. ADR allows more control over confidentiality. This can be an important advantage in sensitive areas such as intellectual property, detailed financial considerations, or family issues.

b. Disadvantages

- ADR mechanisms are usually not successful when the parties are not open to making concessions due to bad faith, because they have adopted an adversarial position, or simply because the matter is non-negotiable.
- ADR is not efficient when parties only seek to establish obligations without flexibility.
- Achieving the objectives of the parties is not always feasible.

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IV. Panama

A. Introduction 45

B. Litigation 45

1. General Overview of the Judicial System 45

a. Courts' Hierarchy 45

b. Competence and Jurisdiction 45

c. Courts' Specialization in Commercial Disputes and Others 46

d. Role of Precedents 48

2. Basic Principles of Litigation 48

a. Adversarial System vs. Inquisitorial System 48

b. Judge's Powers and Authority 48

c. Production of Evidence in Civil Proceedings 49

d. Enforcement of Court Decisions 52

e. Allocation of Costs and Applicable Interest Rates 53

f. Government Privileges 54

g. Cost of Litigation 55

3. Challenges of Litigating 56

a. Court's Independence and Impartiality 56

b. Appellate Review and Timeframe 56

4. International Issues 57

a. Taking Evidence Abroad 57

b. Enforcing a Foreign Decision 57

c. Jurisdiction over Foreign Parties and Application of Foreign Law 58

5. Conclusion 59

C. Arbitration 59

1. General Overview 59

2. Arbitration Legal Framework 59

a. Panamanian Law of Arbitration 59

b. Rules Applicable to Domestic and International Arbitration 60

c. Procedural Rules ... 60
d. Conventions ... 61
e. UNCITRAL Model Law ... 61
3. Arbitrability ... 61
4. Courts' Position on Arbitration ... 62
a. Arbitration Friendliness and Interventionism ... 62
b. Principle of Kompetenz-Kompetenz ... 63
5. Enforcement of a Foreign Arbitration Award ... 63
6. Arbitration Institutions in Panama ... 63
a. Preparedness and Quality ... 63
b. Costs ... 63
c. Workload ... 63
d. Arbitrators ... 64
e. Timeframe ... 64
7. Conclusion ... 64
D. Other ADR Mechanisms ... 64
1. Conciliation ... 64
2. Mediation ... 65
3. Negotiation ... 65
4. Conclusion ... 65

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A. Introduction

The Republic of Panama is a democracy divided into three branches: the Executive, led by a President appointed for a five-year term and assisted by a Council of Ministers; the National Assembly in charge of adopting laws; and the Judiciary in charge of the serving of justice. There is currently no immediate Presidential reelection. The Presidential election and election of legislators for the National Assembly take place at the same election period. Panama's economy is, in principle, liberal (or center-right) with a developing trend for subsidies for the popular classes. The political landscape is marked by the control of the Executive over the National Assembly, where the majority of the legislators are part of the Executive's political party. There is no central bank issuing local currency; the U.S. dollar is the paper currency. The country has allocated an estimate $2.954 billion for infrastructure work for the period 2011 -012.[60] In addition, the Panama Canal expansion works call for an estimated at $5.25 billion to be spent over the period 2007 -014.[61] In March and May 2010, the country obtained Class "BBB-" investment grade qualifications from Fitch Rating[62] and Standard & Poor's[63] rating agencies, which is actively marketed by the country to attract international private investors and banks.

Panama's dispute resolution mechanisms are essentially divided into the judiciary and ADR mechanisms, notably in the form of arbitration.

B. Litigation

1. General Overview of the Judicial System

a. Courts' Hierarchy

The hierarchy of the Panamanian judiciary is organized as follows. At the lower level (small claims) are the Municipal Courts;[64] next are the Circuit Courts overseeing the majority of complex litigation and appeals of the Municipal Courts.[65]At a higher level are the Courts of Appeals for the Circuit Courts or Superior Tribunals,[66] followed by the Chambers of the Supreme Court of Justice serving as Courts of Appeals for the Circuit Courts and Courts for special proceedings.[67] And at the highest level, generally overseeing constitutional action, is the Plenary Assembly of the Supreme Court of Justice.[68]

b. Competence and Jurisdiction

Competence in the Panamanian judiciary is generally awarded in consideration of the following elements:

- The geographic circumscription;
- The amount in dispute, and/or;
- The nature of proceedings.[69]

The Municipal Courts are competent to try matters occurring within the Municipalities of the Provinces (the Republic of Panama has nine Provinces) where the amount in dispute does not exceed $5,000.[70] The Municipal Courts are also competent to try special cases such as occurs with the proceedings for eviction without consideration of the monetary amounts (or quantum).

The Circuit Courts are organized into "Judicial Circuits" and generally have jurisdiction in a Province with the exception of the Province of Panama (where the capital is located), which is organized into three Judicial Circuits thus reducing the scope of geographical competence.[71] The Circuit Courts are competent to try cases exceeding the quantum of $5,000, as well as special proceedings such as bankruptcy and property boundaries disputes.[72]

The Courts of Appeals are organized into "Judicial Districts" formed by two or three Provinces. There are four Judicial Districts in Panama,[73] and these are competent to decide writs of appeals against decisions of the Circuit Courts.

The Supreme Court has four Chambers. The First Chamber deals with civil matters, in particular the extraordinary writ of cassation against decisions of the Civil Court of Appeals, and Appeals of the Maritime Courts.[74] The Second Chamber deals with criminal law matters, namely the extraordinary writ of cassation, as well as appeals of Criminal Courts of Appeals decisions acting as trial courts.[75] The Third Chamber is competent to process claims for the annulment of administrative resolutions either affecting individual subjective rights or affecting the general population, as well as the extraordinary writ of cassation on Labor law matters.[76] The Fourth Chamber is competent to review and process letters rogatory from foreign courts, special petitions for foreign assistances (e.g., taking of evidence abroad), and writs of *exequatur*.[77]

Jurisdiction is adjudicated in consideration of the relevant legal statutes governing a determined situation. The major jurisdictions of the Panamanian judiciary are:

- Civil law matters,
- Criminal law matters,
- Family law matters,
- Labor law matters,
- Consumer protection, trade and competition law matters,[78]
- Maritime law matters, and
- Special administrative courts dealing with special matters such as taxation law matters and public contracting claims (although they are not formally part of the judiciary).

c. Courts' Specialization in Commercial Disputes and Others

The Panamanian judiciary has two specialized Courts of Commerce (originally part of the First Civil Circuit for the Province of Panama) at the Civil Circuit level, in addition to a Court of Appeals overseeing consumer protection, trade and competition claims, commercial disputes, and intellectual property ("IP") claims.[79]

The Consumer Protection Authority, organized consumer associations, and consumer rights protection entities have standing to file declaratory claims for breach of the Competition Law, even

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if they actually have not suffered damages.[80] Individual consumers (or competitors) also have standing to file a claim for breach of the Competition Law, provided they *have* suffered damages.

Class actions are not common in Panama. This may be, in principle, due to the costly and complex nature of such proceedings, and the fact that they need to comply with the mandatory prerequisites of the Competition Law as they relate to the organizing of consumer classes, as well as the need to produce *prima facie* evidence of standing for admission of the claim by the court.[81]

The Panamanian judiciary has two active international Maritime Courts with jurisdiction over all the territory of the Republic of Panama; its territorial waters, which extend 12 miles beyond the coastline; its navigable waters, rivers, and lakes; and the waters of the Panama Canal, in accordance with the United Nations Convention on the Law of the Sea.[82] The Maritime Courts have jurisdiction over claims arising from maritime trade occurring beyond Panamanian jurisdiction, in the following cases:

- In cases of *in rem* claims against a vessel or its owner, and the vessel is arrested within the jurisdiction of the Republic of Panama;
- When the Maritime Court has attached other property belonging to a defendant even if he is not domiciled in Panama (similar to "foreign attachment" in U.S. federal courts);
- When the defendant is located within the jurisdiction of the Republic of Panama and has been personally served with process within the Panamanian jurisdiction;
- When a vessel involved is registered in Panama, or Panamanian substantive law is deemed applicable by virtue of the contract in dispute or by operation of law; or
- The parties expressly or tacitly agree to submit themselves to the jurisdiction of the Maritime Courts of Panama.[83]

There are no specialized bankruptcy courts in the Panamanian judiciary. Bankruptcy proceedings are supervised by the civil circuit courts. Panama does not have special insolvency proceedings or special protection against bankruptcy. The Panamanian system allows a creditor of a single commercial obligation (which is for a sum certain, due and payable) to request the bankruptcy of its debtor, which would result in all of debtor's obligations becoming due.[84] Secured creditors (with a given mortgage or pledge security) have the benefit of foreclosing outside of bankruptcy proceedings.[85]

General matters related to, or resulting from commercial transactions (e.g., failure to honor a promissory note or check, breach of loan agreements, or financial facilities) are usually tried before the civil circuit courts. Special proceedings exist for the enforcement of secured and unsecured commercial and financial obligations alike. Such proceedings are known as special proceedings of execution (or "executory" proceedings) and usually require the creditor to support his claim through documents evidencing that the credit is due and enforceable, for a sum certain.[86] Such documents are listed in the Code of Civil Procedure[87] and certain special laws,[88] and include, among others, negotiable instruments (such as checks, notes, and bills of exchange), Panamanian public or notarial deeds, documents acknowledged before a Public Notary, a certified public accountant ("CPA") certified bank statement of balance owed, or final decisions rendered by the courts or arbitration panels. Mortgage and pledge (e.g., in the case of banking obligations) foreclosure proceedings are part of such special proceedings of execution, allowing the creditor to

obtain a first-instance expedited judgment ordering the setting aside of the secured assets for judicial sale.[89]

d. Role of Precedents

The Panamanian judiciary is of civil law background. As opposed to case-law systems, precedents in the Panamanian judiciary are of a non-binding nature; nevertheless, they do have a relative and limited relevance. According to the Code of Civil Procedure,[90] three decisions on cassation on a same point of law will be considered "probable doctrine" and should be used by the courts to decide analogous matters.

This said, judicial decisions (precedents) are used regularly by litigants to fill voids in the law and/or to support their statements of claims and arguments. The courts also use these precedents to support their decisions. For instance, for many years, the statute of limitations for certain negotiable instruments (the promissory note or "*pagaré*") was determined and applied through precedents (two currents existed, one of five and another of three years).

Precedents, however, are of a final, binding and obligatory nature in certain circumstances. This is the case for Supreme Court rulings on constitutionality actions and on the legality of public administration resolutions. Precedents are also followed by the Supreme Court of Justice on its own decisions with regard to the formalities for admission of the extraordinary writ of cassation.

2. Basic Principles of Litigation

a. Adversarial System vs. Inquisitorial System

Civil proceedings have historically been adversarial in the Panamanian judiciary. As a general rule, the burden of proof is borne by the claimant. The claimant has to prove through evidence both the quantum and the facts of the claim.

In turn, historically inquisitorial criminal procedure has undergone major changes in the last two years. A new system has been adopted: The "accusatory system" incorporates elements of the adversarial system, thus requiring a more active role of the claimant, who previously could rely on the State Attorney-led prosecution to demonstrate the existence of criminal liability by the defendant.

Elements of the Inquisitorial system can also be found in jurisdictions where a "weaker party" exists, such as in the family and labor-law jurisdictions.

b. Judge's Powers and Authority

i. Contempt of the Court

In special circumstances, the judge can order the arrest of an individual who fails to comply with the orders of the court.[91] The individual may be detained for a period not to exceed one month. After this period, he will be released and provided with a 10-day term to comply with the order, and to submit evidence to such effect.[92] If he fails to comply, he may be again detained for a period of up to eight months.[93] Contempt sanctions are usually applied in the family law

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jurisdiction, in particular when an individual fails to provide alimony or pension payments. Contempt sanctions are also applied in civil matters in the construction sector, for example, where an order to suspend construction of a project has been issued.

The judge can impose fines on witnesses who, having been subpoenaed, fail to appear before the court. The fines per occurrence are in the range of $20 – $50.[94] The judge also can also order the arrest of the parties (or their counsel) in cases of disrespectful behavior to the court.

ii. Request the Production/Taking of Further Evidence

The judge can request, of his own initiative, the production/ taking of further evidence to determine the facts stated by the parties to assist him in the application of the law.[95] According to Supreme Court decisions, however, this capacity of the judge should not be used to correct deficiencies on claimant's burden of proof.[96] The judge has the authority to order third parties to produce or submit documents in their custody to the court.

iii. Independent Decision-Maker

Judges in the Panamanian judiciary have a special discretionary capacity to be applied when conducting their analysis of the evidence against the facts supporting the claim and the applicable law.[97] This is known as the principle of "critical analysis," and sustains the judge's capacity to order the taking of further evidence in an effort to have a clear understanding of the facts of the claim and the determination of the applicable law.

Except for objections on the existence of payment and statute of limitations, which mandatorily have to be raised by the defendant, the judge has a duty to declare the existence of causes of nullity that would result in dismissal of the claim, even if the party that would benefit from such declaration has failed to raise such objection.

iv. Limitation

The Judge is limited by the "*ultra petita*" principle.[98] This means he cannot grant the claimant more than what he has requested (e.g., where expert reports show damages are for a greater amount than the quantum of claim, the judge cannot award the greater amount).

c. Production of Evidence in Civil Proceedings

Civil proceedings governed by the Code of Civil Procedure are used as reference in cases of voids in proceedings of other jurisdictions, and therefore set the general standard on matters of procedure and production of evidence.

i. Production of Prejudicial Evidence

A potential claimant can request the production of prejudicial evidence, generally in the form of one or more of the following:

- Special requests for review of accounting books and other relevant documents (this is known in Spanish as "*diligencia exhibitoria*");
- Testimonies;
- Judicial inspections and expert reports; or

- Reconstruction of events.[99]

One requirement to obtain an order for the taking of prejudicial evidence is that the petitioner produce "*prima facie*" evidence on the immediate need to take the evidence (e.g., because it may be destroyed, impossible to obtain, or impractical to obtain at a later stage in the proceedings).[100] Other elements that may have to be considered, depending on the nature of the evidence to be taken, are the need to demonstrate a juridical interest in such evidence, and the existence of a substantive relation or connection to the cause of action.[101]

ii. Access to Evidence in Civil Proceedings

Only timely offered evidence related to the subject matter of the dispute will be considered admissible.[102] General requests for production of documents are not admissible; in accordance to the burden of proof principle, it is the petitioner's duty to produce the document, so rarely will the opposing party be required by the judge to produce a document at request of his adversary. If the material document relevant to the dispute is held by the opposing party or a third party, the petitioner will be required to furnish proof that such document is in possession of his adversary or he will otherwise have to recur to judicial inspections. In addition, privilege (e.g., attorney/client) and confidentiality rules apply (e.g., access to accounting records and financials not deemed relevant to the dispute) that restrict the degree of information that can be obtained through inspections.

iii. Submission of Evidence and Document Formalities

The ordinary proceedings do contemplate a special term for the submission of evidence.[103] Nevertheless, in traditional civil proceedings, generally all evidence has to be offered with the complaint or the answer to the complaint. More recent commercial proceedings (e.g., IP litigation, antitrust action, and consumer protection) stemming from the civil proceedings contemplate special hearings for the offering of evidence.

iv. Formal Requirements

As a general rule, documents have to be submitted in original counterpart,[104] and signatures and contents have to be acknowledged by the counterparty during evidence-taking sessions.[105] Only when it is not possible to submit the original can the parties submit notarized copies or simple copies. Documents granted or executed abroad have to be legalized either through Panamanian consulate[106] or through the Apostille (per the Hague Convention Abolishing the Requirement for Legalization for Foreign Public Documents of 1961).[107] As a general rule, documents in foreign language must be provided with their Spanish translation prepared by a local certified public translator, although it is also possible to make a special request to the court to order an official translation.[108]

v. Taking of Evidence

Upon review of the evidence offered, the judge will only admit evidence that complies with the formalities established by law discussed here. The term to take evidence ranges from 8 – 30 days. The court will set a calendar with dates for receiving testimonies and cross-examinations, for appointment of experts, interrogation on their reports and conclusions, dates for inspections, and the like. The parties have a duty to produce the evidence they have submitted within said periods of time. Evidence not submitted for reasons beyond the litigants' control can be resubmitted at the

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appellate level (e.g., taking of a testimony of a summoned witness who does not show up at the Court).[109] Evidence that is timely requested but not received within the term set to practice evidence (e.g., report of a public office or institution), can be introduced to the case file, and will be considered as "timely taken" even after the relevant term has expired.[110] Once the term for taking evidence has concluded, the parties will move to closing statements.[111]

With regard to witnesses admitted by the court, leading questions will not be admitted,[112] and all queries have to be related to the subject matter of the case. Testimonies are to be taken before the judge; video testimonies, affidavits, and other means of providing statements will usually neither be accepted nor considered to have the effect of court-taken testimony.

Witnesses may be denounced as "suspect" in the following cases:

- Family members;
- Spouses;
- Employees in favor of their employer;
- Close friends or known enemies;
- Counsel or other agents for their principal;
- The curator or tutor on behalf of the minor or pupil;
- The seller of the asset in dispute;
- A partner in the business dispute;
- Debtor against creditor, and vice versa;
- A party with an interest in the outcome of the proceedings;
- A person of dubious reputation or condemned for perjury; or
- Individuals who, in the judge's opinion, may find themselves in situations similar to those already mentioned or who may have a biased view on the matter.

Despite an objection on the grounds that the testimony may be suspect, the judge may nevertheless order the taking of the testimony as part of his critical analysis and duty to determine the facts of the case.[113] In many cases, suspect testimony has favored the objecting party[114]; witnesses who being conscious of the fact that they are rendering testimony under oath will prefer to relate the facts, or their understanding of events, as they have occurred.

Participation of expert witnesses is accepted on matters that cannot be determined or understood directly by the judge (e.g., an expert on Panamanian civil law will not be admitted by the court, as the judge is considered able to interpret and apply Panamanian law; note that determining the degree of physical impairment or emotional distress will require intervention of experts).[115] Experts have to personally study the matter submitted to their analysis in the form of a questionnaire prepared by counsel; [116] this would bar corporate entities, such as auditing firms, from serving as experts. Experts will be responsible for submitting a report with conclusions to be submitted to the court within a date set in the calendar for the taking of evidence. The experts will be examined and cross-examined on their conclusions by counsel to the parties, and they may also ask questions to the other experts.[117] All experts are considered agents of the court, and not of any given party.

The parties are authorized to appoint up to two experts to render evidence on any given matter, and the judge will appoint an expert on behalf of the court. Expert fees, in principle, are paid by the respective appointing party, and the court-appointed expert fees are usually paid by the party primarily interested in the expert analysis.[118] Expert fees and expenses can be recovered by the prevailing party against the losing party.

Experts have to meet requirements of their profession (e.g., licensing qualifications) and field of expertise; further, and as a general rule they have to be locally qualified before the Panamanian jurisdiction. On rare occasions, experts from foreign jurisdictions have been admitted by the Panamanian courts subject to the petitioner demonstrating there are no locally qualified experts in the field.[119]

vi. Other Jurisdictions

In contrast with the highly formal civil jurisdiction, other jurisdictions have adopted more-flexible systems for evidence production and submission. Such is the case of the maritime jurisdiction, which grants a party the right to request from his adversary the production of documents and information,[120] as well as the taking of out-of-court depositions and witness interrogations in terms similar to U.S. discovery.[121] In this jurisdiction, the formalities of documents are considerably reduced. The Maritime Courts regularly admit as evidence simple copies of documents, the contents of which have not been formally objected to by the adversary (without further requirement for the acknowledgment of signature and contents by the author).

The consumer protection, trade and competition law jurisdiction also has more-flexible rules of evidence than the ordinary civil courts. Hearings and pre-trial conferences are becoming increasingly relevant in these trade related jurisdictions. In contrast to the civil jurisdiction, where closing statements are normally submitted through written briefs, closing statements in these jurisdictions are submitted orally at the conclusion of the trial hearing.

d. Enforcement of Court Decisions

Once a final judgment has been rendered, the defendant will have six days to comply with the relevant decision.[122] If the defendant fails to comply, claimant may request the judicial enforcement of the decision by the court.[123] If the decision orders the payment of monetary sums, then the claimant may request the garnishment of defendant's bank accounts, and the court may order the post-judgment attachment of assets, including credits and even the administration of the defendant's business.

Attached assets will be sold through judicial sale (public auction). For this purpose, an invitation to the public has to be published on a local newspaper for three consecutive days.[124] For judicial sale of real property, a mandatory 15-working day term following the last publication has to be observed before judicial sale can be held (judicial sale date).[125] The judicial sale is to be held from 8:00 a.m. through 5:00 p.m. of the judicial sale date.[126] Bids can be submitted until 4:00 p.m. on that day. Between 4:00 p.m. and 5:00 p.m., the participants will be able to competitively increase their bids until the highest offer is received.[127] The highest bidder will be provisionally awarded the attached asset(s). In order to participate as a bidder, a bond in the amount of 10% of the base sum for judicial sale has to be consigned with the court.[128] The creditor who has been favored by the judgment does not need to consign a bond, and can bid for his credit as recognized in the relevant court decision.[129] The judgment creditor can be awarded the asset(s) even if he is the only bidder.[130]

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Final adjudication will be awarded the moment the offer is paid (the general rule is two working days after provisional adjudication).

The asset(s) will be sold if an offer equal to two-thirds of the base price of the judicial sale is obtained.[131] If such offer is not obtained, a new judicial sale date will be called for, and a bid for one-half of the base price will be admitted. If an offer is not obtained in the second attempt, then a third bid date will take place the following day, and the asset will be sold for the highest amount offered at such time.

As to non-monetary decisions, the court may in certain cases "step into the shoes" of the judgment debtor and specifically enforce the judgment. It may order the demolition of buildings and, to such effect, instruct the local police authority to enforce the order (e.g., common in evictions). In certain cases where the defendant is required to personally comply with the order, the court may declare the defendant in contempt of the court and apply contempt sanctions, such as temporary arrest, if the condemned party fails to abide by the judgment.

It is also possible to commence special proceedings for enforcement of the judgment, to join other proceedings of enforcement initiated by third parties, or to even request the bankruptcy of the debtor (e.g., in civil obligations after three separate proceedings of enforcement, and in commercial obligations if one commercial debt which is for a sum certain, and which is due and payable, is not timely and fully honored).

e. Allocation of Costs and Applicable Interest Rates

i. Bar Tariff

The Panamanian Bar Tariff was adopted through a resolution of the General Assembly of the Panama Bar on February 19, 2000.[132] The Bar Tariff serves two main purposes: to set the default "minimum" fees to be applied when counsel and client have not executed a legal services agreement; and to serve as reference when the court has to set the mandatory legal fees in consideration of the proven quantum or declaration.

Concerning litigation, the tariff is progressively set in consideration of the nature of the proceedings and quantum. The legal fees of the tariff are set by applying a percentage to the quantum acknowledged by the court decision in a range of 25% – 7.5% (decreasing as the quantum increases). There are also default retainer fees to be applied in matters where no quantum is involved, as well as a default hourly rate of $150 for matters not expressly addressed by the tariff.

ii. Losing Party Pays

The court has the duty to apply the Bar Tariff when rendering judgment. Such amounts will be part of the final quantum to be paid by the defendant. The court may, however, release the losing party from paying the mandatory legal fees if it concludes — and so states in its decision — that such party acted in "evident good faith"[133] (e.g., because the parties settled the dispute, because the dismissed claimant had the right to submit the claim, or because the defendant abided by the allegation of claimant and did not delay the proceedings).

Legal fees are also applied when a party that submits an appeal, objection, motions for early dismissal, or other challenges or special petitions fails to have such motion granted.[134] Although such legal fees are usually nominal when compared to the judgment legal fees (e.g., $200), failure

to pay such fees may have relevant and adverse implications in the proceedings: The losing party, at the request of its adversary, may be prevented from being heard until the court set fees and costs are paid[135] (this includes the ability to lodge appeals and other pleadings). Considerable pre-judgment legal fees may also be applied when the court determines that a party has abused its right of defense or is otherwise actively seeking to delay the proceedings through motions lacking legal basis.

iii. Applicable Interest Rate

The court will acknowledge interest accrued until the rendering of judgment. Interest will continue to run until payment is received by the claimant. If the defendant fails to pay in a timely manner, then (at the request of claimant during the stage of collection or enforcement) the court will issue resolutions updating the amount of interest accrued, in addition to awarding legal fees arising in the course of enforcement of the judgment.

In contractual disputes, the court will apply any contractually agreed interest rate. In extra-contractual claims (e.g., damages from tort) or cases where the parties have not agreed to an interest rate, the court will apply the default statutory interest rates, which are currently deemed to be 6% in civil matters[136] and 10% in commercial matters.[137] In principle, statutory interest starts to run from the moment the claim is served on the defendant and the litigation is deemed to have formally begun, although there are other Supreme Court decisions that have acknowledged that such interest would start to run from the moment of filing of the complaint, regarldess of whether it has been served on the defendant.[138] Also, compensatory interest at the commercial default rate (10%) can be applied to unpaid contractual interest. The Supreme Court (Civil Chamber) has ruled that such interest represents damages, and not compounded interest.[139]

f. Government Privileges

There are certain privileges granted to the Panamanian State (including its autonomous institutions and municipalities) in litigation. The State cannot be condemned to pay legal fees (or "costs"), and its assets cannot be the subject of precautionary measures, except for pre-trial petitions for the taking of evidence.[140] State Attorneys have a duty to file appeals against any adverse decision; even if an appeal has not been submitted, the decision will still have to be consulted at the superior judicial level.[141]

Special proceedings to collect against the State are complex. Once the claimant has obtained a final judgment against the State, that claimant can request the court to send a certified copy of the decision (order to pay) to the Executive Branch, through the Ministry of Economy and Finance or the representative of the relevant institution, in order for such representative to instruct payment, if he has the capacity to do so.[142]

If the representative does not have the capacity to instruct payment, then the representative will have to send the order within the 30 days following its receipt either to the Council of Ministers, or to the relevant municipality or institution for processing. If a year lapses without payment having been received by the claimant, the court will have to petition the President of the Supreme Court to request either the President of the Republic, the mayor of the relevant municipality, or head of the relevant corporation to take appropriate measures to comply with the order.

If payment has not been made after three years since the judgment was rendered, the judgment creditor may request the court to instruct the National Bank of Panama to set aside the sums at the

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court's instruction from the relevant institution's account.[143] The National Bank of Panama has a month to comply with such order. Once it confirms that funds are "available" (which will eventually depend on budgeting approvals by the Executive Branch and the National Assembly), the court should order payment to the creditor from the segregated funds in question.

g. Cost of Litigation

i. Court and Legal Assistance Fees

In the criminal jurisdiction, gratuitous legal assistance is available for those individuals who are the subject of prosecution and cannot afford the services of a private practitioner.[144] These services are provided by public defenders from the State's Institute for Legal Defense.

Although legal assistance on matters other than criminal proceedings is not regulated, there are various legal assistance offices active in Panama, acting on a pro bono basis or on minimum fee arrangements.

In civil and commercial cases, when the defendant cannot be personally served with process (e.g., his domicile is not known by the claimant or he otherwise fails to appear before the court), the court will appoint a default party defender.[145] The absentee party defendant's fees for the entire proceeding will range between $200 – $500, and will have to be provided by claimant. Failure to pay the default party defender's fees may lead to dismissal of the case.

ii. Gratuitous Principle

In its Chapter on the Judiciary, the Panamanian Constitution provides that access to justice is gratuitous.[146] This essentially means that briefs can be submitted in simple (non-stamped) paper, and that no other taxes are to be paid for accessing the courts. The same applies to the submission of appeals and the filing of constitutional actions, where the petitioner is generally not required to consign funds in order for his submission to be received and considered. The gratuitous principle also applies to labor claims, where the employee cannot be condemned to pay legal fees.

There are certain relevant limitations to this principle, such as when a third party to the proceedings lodges an appeal that may affect the interests of the claimant and defendant, as well as in maritime proceedings where the condemned defendant will have to consign or place a bond for the quantum (including legal fees) of the judgment in order for her appeal to be heard by the Civil Chamber of the Supreme Court, This is currently the appellate court for judgments from the Maritime Courts at trial level. Also, as discussed, a party may be prevented from being heard if he fails to consign legal fees resulting from the dismissal of an adverse ruling to a challenge, motions, or other ancillary petitions.

With regard to the evidentiary value of documents (e.g., a promissory note, a contract, and other documents that may be subject to stamp taxes), as a result of the application of the gratuitous principle, the absence of stamp taxes or other tax formalities will not prevent the court from considering the document's relevance in demonstrating the existence, validity, and enforceability of the claimed obligation.

Injunctive relief generally is not gratuitous. Injunctions and petitions for pre-judgment attachments are subject to surety bonds that will have to be consigned at the court's instructions, to ensure against damages that may be caused to the defendant in case the claimant fails to obtain a

favorable judgment.[147] Surety bonds usually range between 20 – 50% of the requested quantum or the amount requested in attachment (lesser than or not to exceed quantum). Certain special proceedings allow gratuitous injunctions ("freeze orders"), as may occur with the proceedings for challenging shareholders' resolutions adopted in breach of the law, the articles of incorporation, and bylaws,[148] as well as in administrative proceedings where the claimant can request the staying of the relevant administrative act (e.g., adjudication of a public bid) pending resolution of the litigation or challenge.

3. Challenges of Litigating

a. Court's Independence and Impartiality

Supreme Court Judges are appointed by the Executive Branch and confirmed by the Legislative Assembly.[149] As part of their appointment, the Supreme Court Judges will be required to renounce their political party or affiliation; nevertheless, their independence is often questioned due to the usual political affiliations between Supreme Court Judge appointees and the designating President of the Republic, as the head of the Executive Branch. This independence is further questioned when the confirming legislature is of the same political party or in alliance with the President. The same applies to the Attorney General and Counsel General of the Republic (as the chief investigative officer for criminal prosecutions) and the Attorney General for the Administration (as the chief investigative officer and counsel in defense of the complaints and actions against the administration and challenging the legality of administrative actions).

The career stability of judges and personnel has not been successfully implemented. This has also affected the judiciary's independence and impartiality, as judges and court system personnel can be subject to political pressures that put the stability of their tenures at risk. The judiciary's independence and impartiality is, therefore, not absolutely free of political influence.

The Panamanian judiciary also has been affected by cases of corruption. It should be noted, however that steps have been taken in recent times to attack this scourge. Counsel have successfully lodged criminal complaints against judges acting in breach of the law, and the higher courts have taken a more active role in supervising lower court judges' behavior, and they have ordered separations and removals of such court judges from office.[150]

This said, judges will normally exercise independent and impartial judgment in private, civil, and commercial disputes without political overtones.

b. Appellate Review and Timeframe

It is difficult to estimate the timeframe for proceedings in Panama. Civil proceedings may last anywhere from 3 to 10 years or more before they are finally resolved. In criminal proceedings, certain detainees have served more than their time in preventive detention before sentencing.[151] The labor jurisdiction has caps on the amount of months of wages that may be claimed by employees requesting reinstatement. The timeframe will greatly vary depending on the parties' (in particular the defendant's) capacity and will to delay the proceedings, namely through the use of pre-judgment remedies such as motions for early dismissal followed by their appeals, in addition to the seeking of protection of constitutional rights allegedly breached by court orders.

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Assuming there are no (or limited) special motions or objections to the proceedings, the timeframe for trial in civil proceedings is generally within the range of 18 – 24 months. Appellate review is also in the range of 18 – 24 months, and the extraordinary writ of cassation will usually require 24 – 36 months.

4. International Issues

a. Taking Evidence Abroad

In the absence of a treaty otherwise addressing the issue, in order to request the taking of evidence abroad, the court will be required to ask the Ministry of Foreign affairs to send letters rogatory to the judiciary of the relevant country. As an alternate option at the request of the petitioner, the court can ask the Ministry of Foreign Affairs to instruct the Panamanian Consul in the country where the evidence is to be gathered to take, accept, or hear the same.[152] Also, if the litigating parties are in agreement, they can commission qualified counsel in the foreign jurisdiction to gather the evidence.[153] The transcripts of depositions, documents, or reports gathered or produced abroad will have to be legalized through the Apostille (1961 Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents) or by a Panamanian Consulate in order to be validly submitted to the court.

Because evidence to be taken abroad has to be effectively gathered during the proper evidentiary period within the Panamanian proceedings, and because the processing of such requests may prove time-consuming, the parties may request an extraordinary extension of this period to gather evidence abroad.[154]

Evidence gathered in cases tried abroad can also be introduced in cases tried before the Panamanian judiciary. Such evidence will be considered admissible and complete if the opposing party has also intervened in its production in the foreign proceedings.

b. Enforcing a Foreign Decision

Subject to the issuance of a *writ of exequatur* by the Supreme Court of Panama (Fourth Chamber), a final judgment will be recognized as conclusive and enforceable in the courts of the Republic of Panama without re-trial or reconsideration of the merits of the case if the following requirements are met:

- The *writ of exequatur* will be subject to the foreign court granting reciprocity to the enforcement of judgments of courts of the Republic of Panama, which is presumed to be the case;
- The party against whom the judgment was rendered, or its agent, was personally served in such action;
- The judgment arises out of a personal action against the defendant;
- The obligation in respect of which the judgment was rendered is lawful in the Republic of Panama, as the courts of Panama will not apply or give effect to any provision of foreign law that violates the public policy of Panama;

- The judgment is properly authenticated by diplomatic or consular officers of the Republic of Panama or pursuant to the Apostille, and
- A copy of the final judgment is translated into Spanish by a licensed translator in the Republic of Panama.[155]

The term "enforceable" means that the obligations assumed by the party against whom enforcement is sought are of a type which the courts of Panama will enforce. It does not mean that those obligations will necessarily be enforced in all circumstances in accordance with their terms. In particular, enforcement may be limited by applicable bankruptcy, insolvency, fraudulent transfer, banking intervention, reorganization, forceful liquidation, moratorium and other similar laws affecting creditors' rights generally, or by concepts of materiality, reasonableness, good faith, and fair dealings.

Often, U.S. Divorce Court decisions are declared non enforceable in Panama, if the cause of divorce is considered to violate the special causes of divorce of the Panamanian Family Code (e.g., a minimum two-year wait for mutual consent or separation). Violation of proper service of process (the due process principle) is also a cause for denial of exequatur for the enforcement of a foreign decision.

Exequatur proceedings are held with the participation of the Attorney General, who will present his recommendation on the enforceability of the decision in Panama, as well as with the intervention of the party against whom enforcement is required.

It is possible to request the implementation of pre-judgment remedies in aid of enforcement, such as attachments in-aid of execution and injunctions, subject to bonding requirements. Once the *writ of exequatur* has been granted, claimant will have to initiate executory or summary judgment proceedings before the Circuit Courts to obtain enforcement.

c. Jurisdiction over Foreign Parties and Application of Foreign Law

i. Foreign Parties

As a Constitutional principle, all nationals and foreign citizens in Panama are subject to the Panamanian Constitution and the national laws and regulations.[156] In order to do business in Panama, foreign corporations are required to establish a branch or subsidiary in Panama, and to submit to the jurisdiction of the Panamanian judiciary.

In civil matters, the parties are expressly authorized by the rules of civil procedure to preemptively determine the competent court that will resolve their eventual disputes, without regard to their domiciles or place of residence.[157] This would allow foreign parties (even those residing abroad) to choose the Panamanian jurisdiction as a "neutral" venue for the resolution of their disputes, without a need to otherwise have a formal or substantive connection to Panamanian jurisdiction.

ii. Foreign Law

The Panamanian legal system allows the application of substantive foreign law (e.g., applicable law of the contract is foreign) in local proceedings. Foreign law is a matter of evidence. The parties will be required to prove substantive foreign law through different means, such as legal opinions issued by qualified foreign counsel, legalized copies of decisions from the foreign courts, and extracts of the relevant statutes.[158]

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5. Conclusion

Advantages of litigating:

- Effective access to pre-judgment remedies, such as preventive attachments ("*secuestros*") and injunctions (subject to bonding requirements);
- Foreign law may be applied by local judges; and
- Except for limited circumstances, the access to the Panamanian judiciary is gratuitous.

Disadvantages of litigating:

- Civil proceedings are time-consuming, and there are no immediate results;
- Lack of specialization on complex matters (e.g., bankruptcy, securities, trade and commerce claims) which may result in contradictory decisions;
- Risk of political influence and corruption in cases with political overtones; and
- Lack of trained personnel and sufficient equipment leading to clerical and even substantive or procedural errors.

C. Arbitration

1. General Overview

Although arbitration has been a generally accepted mechanism for the resolution of commercial and private disputes since the early 1980s, it was not until the year 1999 that the first special law of arbitration, Law Decree No. 5 on Arbitration, Mediation and Conciliation, was passed.[159] Law Decree No. 5 remains the applicable arbitration law.

During the years 2001 – 2003 the Panamanian Supreme Court issued a serious of decisions that raised serious doubts as to the practicalities of arbitration in Panama, especially within the context of international commercial arbitration. Due to Constitutional and legislative amendments made in 2006,[160] however, the trend in favor of arbitration is growing significantly. This topic will be discussed in more detail in the section on the courts' position on arbitration.

2. Arbitration Legal Framework

a. Panamanian Law of Arbitration

Law Decree No. 5, Panama's law on Arbitration, Mediation and Conciliation (the "Panamanian Law of Arbitration"), was enacted in 1999. The law was inspired by the UNCITRAL Model Law and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[161]

Issues covered by the Panamanian Law of Arbitration include the following:

- Arbitration in law or equity (if the type of arbitration is not defined by the parties in the arbitration clause or afterwards, the arbitration will be considered to have been agreed in equity [*ex aequo et bono*]);[162]
- Institutional or ad-hoc arbitration;[163]
- International and domestic arbitration;[164]
- Concept and validity of the arbitral agreement;[165]
- Constitution of the arbitral tribunal;[166]
- Rules regarding the arbitral award;[167] and
- Recognition and enforcement of domestic and foreign arbitral awards.[168]

b. Rules Applicable to Domestic and International Arbitration

Article 5 of the Panamanian Law of Arbitration governs the issue of whether an arbitral proceeding is international. According to this article, a commercial arbitration is international if its subject matter or legal business contains sufficiently relevant foreign elements or connections to characterize it as such, or if the forum's conflict of law rules qualify it as international.

Additionally, for the purpose of the Panamanian Law of Arbitration, a commercial arbitration shall also be considered international if at least one of the following conditions is met:

- The parties to the arbitration agreement have, upon execution of such agreement, their place of business or offices in different countries;
- The place of arbitration agreed upon in the arbitration agreement or in accordance with its terms is located outside of the country in which the parties have their place of business;
- The place where the obligations that arise from the legal relationship must be performed lies outside the country in which the parties have their place of business;
- The place with which the dispute has the closest relationship is located outside of the country in which the parties have their place of business; or
- The subject matter of the arbitration has a civil or commercial international nature and/or relates to more than one State and/or consists of the rendering of services, the sale or disposition of assets, or the transfer of capital which generates cross-border or extraterritorial effects.[169]

c. Procedural Rules

According the Panamanian Law of Arbitration, the procedural rules applicable to a particular arbitration will depend on the special rules chosen by the parties or in accordance with the applicable regulations.[170] In the absence of an agreement regarding the applicable procedural rules, the arbitral tribunal shall have the power to decide which rules will be applicable to a particular arbitral proceeding.

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d. Conventions

Panama enacted the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") through Law No. 5 of October 25, 1983. The grounds for refusing recognition and enforcement under the New York Convention, as listed in Article V, have been also incorporated into the Code of Civil Procedure[171] and the Panamanian Law of Arbitration.[172]

In addition to the New York Convention, Panama is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Washington Convention")[173] and a party to the Inter-American Convention on International Commercial Arbitration adopted through Law No. 11 of October 23, 1975.[174] This convention is also known as the "Panama Convention."

e. UNCITRAL Model Law

Even though Panama has not formally adopted the Model Law of the United Nations Commission on International Trade Law ("UNCITRAL, the Panamanian Law of Arbitration was inspired by and follows the guidelines of this model law.

3. Arbitrability

As a general rule of the Panamanian Law on Arbitration, matters that are not considered discretionary or of free disposition cannot be submitted to arbitration. This includes matters dealing with public interest, as well as the protection of individuals governed or entitled to the protection of special laws. Public policy would include the State's right to adopt taxes and its rights to exercise sovereign domain, such as the termination of a public concession (although arbitration to seek indemnification for unjustified termination of a government contract or concession is generally available under bilateral treaties and under certain special laws).

As it relates to consumer protection laws, the Panamanian courts have declared void arbitration clauses inserted into standard insurance contracts with consumers.[175] The principle is that in such relations, the consumer's bargaining or negotiating power is substantially reduced; generally, the insurance contract is considered a contract of adhesion. In recent times, the Law on Consumer Protection has adopted a special arbitration regime known as "consumer matters arbitration" in an effort to allow consumers interested in pursuing their claims through arbitration to access this procedure.[176] As of this writing, this special regime has yet to be regulated.

In labor relations, a special arbitration regime is also available for the resolution of disputes related to collective bargaining agreements (e.g., union and severances claims) that may be implemented to resolve protests that could otherwise lead to or cause a strike.

Bankruptcy claims also cannot be arbitrated, as one effect of the declaration of bankruptcy is that the debtor will lose his capacity to manage and dispose of his assets. Such management will pass to the court-appointed bankruptcy trustee for the benefit of all the creditors (all payments made, and all actions taken by a bankrupt debtor with respect to the bankruptcy estate after the date of the declaration of bankruptcy, are null and void).

According to the rules of Civil Procedure, all pending proceedings (with the exception of secured creditors' claims) will have to be continued before the bankruptcy court, with the participation of the bankruptcy trustee in lieu of the debtor.[177] In theory, this could include pending arbitration proceedings (although there are no clear precedents on the matter).

In addition, the bankruptcy court can relate back the effective bankruptcy date if there is evidence that the debtor became insolvent or generally stopped making payments to his creditors on debts for a sum certain and due and payable before the date of filing of the bankruptcy petition with the court. The relation-back period may not exceed 4 years, plus an additional 30 days for certain suspect transactions (e.g., voidable preferences and fraudulent conveyances).[178] The purpose of this related-back date would be to minimize the effectiveness of certain transactions that could be considered suspect or defrauding creditors' rights, as would be made once the debtor is deemed insolvent and generally unable to pay its debts. Such would be the case of payments made by the bankrupt debtor after the effective bankruptcy date on obligations not yet due and payable, gratuitous payments representing an undue benefit or preference to an existing creditor, or the granting of a pledge or mortgage to secure antecedent debts. An arbitration clause or agreement could also be affected by this suspect period, if it were part of a voidable transaction as already described.

4. Courts' Position on Arbitration

a. Arbitration Friendliness and Interventionism

Generally speaking, Panamanian courts currently are pro-arbitration; however, the intervention of Panamanian courts in arbitral proceedings has been substantial in the following issues:

- The principle of *Kompetenz-Kompetenz*, as will be discussed;
- Actions for protection of constitutional guarantees (in Spanish, "*amparo de garantías constitucionales*"); and
- The stage of setting aside or annulling the arbitration award.[179]

Regarding the actions for protection of constitutional guarantees, the Supreme Court of Justice has issued many decisions stating that the arbitrators are public servants[180] and that these types of constitutional actions therefore are available against resolutions issued by the arbitrators within the context of arbitration proceedings. In opposition to this view, in a recent decision in *Palliser Holdings, Inc. v. Las Brisas de Amador, S.A.*,[181] the Supreme Court of Justice held that arbitrators are not public servants and, therefore, the action for protection of constitutional guarantees is not available in these cases.

When setting aside an arbitral award, Panamanian courts will take into consideration the circumstances specified in the Panamanian Law of Arbitration,[182] which are similar to the standards for enforceability of a foreign arbitral award under the New York Convention. In addition to those listed in the New York Convention, Panamanian courts will set aside an award if it violates Panama's public policy or laws, or if the award was obtained under fraud, violence, or bribery. Under Panama law, the parties are not entitled to waive their right to seek the annulment of the arbitral award before the award has been rendered by the sole arbitrator or arbitral panel. The proceedings to set aside an arbitral award in Panama shall be conducted before the Fourth

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Chamber of the Supreme Court of Justice.[183] The timeline for these proceeding are generally within the range of 12 – 18 months.

b. Principle of Kompetenz-Kompetenz

The original text of the Panamanian Arbitration Law expressly stated that the arbitrators were able to decide upon their own competence. Three years after the enactment of the law, however, the Panamanian Supreme Court of Justice declared unconstitutional the article governing the principle of *Kompetenz-Kompetenz*. In 2004, the Panamanian Constitution was amended to expressly recognize arbitration as a valid system for the resolution of disputes alternative to the courts, and to settle the issues that the arbitral tribunal itself was entitled to decide on its own competence.[184] In addition to this Constitutional amendment, article 17 was reinstated to the Panamanian Law of Arbitration, through Law No. 15 of 2006, to reenact in the law the principle of *Kompetenz-Kompetenz*.[185]

5. Enforcement of a Foreign Arbitration Award

As a general rule, final, non-reviewable foreign awards issued by an arbitrator or an arbitral panel should be enforceable by the Panamanian courts without review of the merits, prior recognition thereof through the writ of exequatur before the Supreme Court of Panama, and provided that the award meets the standards for enforceability of a foreign arbitral award under the New York Convention.

6. Arbitration Institutions in Panama

a. Preparedness and Quality

Panama has two qualified and well-known centers in the field of arbitration. First, the Center for Conciliation and Arbitration of Panama (in Spanish "*Centro de Conciliación y Abritraje de Panamá*" or "CeCAP"), sponsored by the Chamber of Commerce, Industries and Agriculture of Panama (in Spanish "*Cámara de Comercio, Industrias y Agricultura de Panamá*") handles commercial or civil disputes, or contractual disputes with the State. Then there is the Center for Solution of Conflicts (in Spanish "*Centro de Solución de Conflictos*" or "CESCON"), sponsored by the Panamanian Chamber of Construction (in Spanish "*Camara Panameña de la Construcción*") for disputes related to the construction and infrastructure sector.

b. Costs

The administrative costs, fees of arbitrators and secretary of the arbitral tribunal are set by the Arbitration Institutions[186] in accordance to the amount in dispute.

c. Workload

Both CeCAP and CESCON handle domestic and international arbitration.

d. Arbitrators

Both administrative institutions manage lists of arbitrators, and will provide information on arbitrators and their fields of expertise upon request.

e. Timeframe

According to the regulations of the CeCAP, if the parties have not otherwise agreed, upon a time period for the award to be rendered, the period to issue the arbitral award is of four months after the constitution of the arbitration panel.[187] CESCON regulations state that the arbitration panel shall issue the arbitral award within a period of three months once the period to submit closing arguments has elapsed.[188]

7. Conclusion

Advantages of arbitrating:

- In comparison to civil proceedings, arbitration proceedings are faster;
- The parties may choose arbitrators specialized in the subject matter of the dispute;
- Confidentiality,
- The resolutions issued by the arbitral panel are non-appealable and the only available remedy against the arbitral award is the petition for nullity with limited causes; and
- A foreign arbitral award would be usually easier to enforce than a foreign judgment due to the high number of signatory countries of the New York Convention.

Disadvantages of arbitrating:

- Risk of political influence and corruption if a request for annulment is made by any of the parties (e.g., if the government is a party to the arbitration);
- Actions for protection of constitutional guarantees have been admitted in certain cases; and
- Certain matters cannot be arbitrated.

Note that the first two disadvantages also apply to litigation in the court system.

D. Other ADR Mechanisms

1. Conciliation

The conciliator will work with each of the parties to understand their issues and seek their objectives, as well as assist them in making concessions as part of the effort to reach an agreement. Conciliators have to be certified, and can be part of private entities (approved by the Ministry of Government) or public institutions. As occurs with mediation, matters that can be settled,

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negotiated, or voluntarily dismissed can be submitted to conciliation. The conciliation agreement is also enforceable through the court system.

In addition, the conciliation agreement can also be elevated to the rank of an arbitration award. Conciliation can be requested by the parties during the course of ordinary proceedings before judgment. Conciliation is also available in public contracts where arbitration is available. Dispute resolution centers, such as CeCAP and CESCON, have certified conciliators and have adopted special rules incorporating (or recommending in their standard arbitration clauses) a default conciliation stage the parties have to go through prior to commencing arbitration. The judiciary has also an ADR program that incorporates certified conciliators.

Conciliation is effective in family law and criminal matters, as well as in labor disputes and consumer protection claims.

2. Mediation

Mediation is the most flexible ADR mechanism, set to allow the parties to have a direct discussion of their unresolved issues with the participation of a certified mediator. Mediation sessions can be of a private or public nature, depending on whether the mediator is appointed by the state (e.g., by the Judiciary Mediation and Conciliation Program) or instead by a mediator of a private institution or other certified professional. Matters that can be submitted to mediation are those which allow for settlement, voluntary dismissal of legal action, and others of free disposition by the parties in dispute.

Mediation sessions require the execution of a non-disclosure agreement, and the contents of the session cannot be used in evidence by any of the parties in litigation. Although mediation agreements are enforceable against the relevant party through the court system, (e.g., through summary proceedings), the effectiveness of this ADR mechanism is often questioned as, in general, the parties most often fail to reach a formal settlement of the dispute.

3. Negotiation

Negotiation is not an expressly regulated ADR mechanism; nevertheless, it is used frequently in the resolution of commercial disputes in the private sector. A high number of civil and commercial claims are settled through negotiation in Panama. As part of a strategy to gain leverage, or in order to preserve its rights (e.g., statute of limitation), a party may choose to commence litigation and then await its adversary's response in order to identify its position and weaknesses before engaging in negotiations. The parties that choose to negotiate will normally request a stay of the proceedings for a period ranging from 1 – 3 months that may be extended for similar periods. In principle, one must have the capacity to voluntarily withdraw a complaint, to waive rights, or to settle a claim in order to engage in negotiations for the resolution of a dispute.

4. Conclusion

Other ADR mechanisms in Panama are effective whenever there is a genuine interest in resolving a dispute out of court, and when the parties' positions are not too far apart. ADR mechanisms are effective in the resolution of family and labor law disputes and for certain criminal claims, as well as in consumer protection matters. In the absence of a genuine interest to resolve the dispute, ADR

mechanisms may be time-consuming and may create even more animosity between the parties while not leading to a solution.

Conciliators and mediators may not be prepared to assist in the resolution of complex cases or multi-party claims; for the resolution of such conflicts, arbitration would probably be the better option.

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V. Brazil

A. Introduction 68

B. Litigation 69

1. Introduction 69
2. General Overview of the Brazilian Judiciary 70
3. Distinguishing Characteristics of Litigation in Brazil 73
4. Challenges of Litigating In Brazil 75
5. Distinguishing Characteristics on Providing Legal Services in Brazil 76
6. Conclusion: Pros and Cons of Litigating in Brazil 76

C. Arbitration 77

1. Introduction 77
2. Legal Framework 78
3. Arbitrability 79
4. Conclusion: Pros and Cons of Arbitrating in Brazil 83

D. International Issues in Dispute Resolution 84

1. Introduction 84
2. Enforcing Foreign Judgments and International Arbitral Awards 84

E. Other ADR Mechanisms 88

F. Conclusion 89

A. Introduction

Since the late 1990s, Brazil has experienced steady and solid economic growth, marked by the privatization of several fundamental sectors of the economy (such as energy and telecommunications), as well as the development of modern regulations related to the financial market that allowed the acquisition of local and state public-owned banks by private institutions. The "Real" economic plan, implemented by the government in 1994, created a new and stronger currency (the Real or "R$"), controlled inflation (that reached almost 1,200% per year in the 1980s), stabilized the exchange rate in relation to the U.S. dollar, and set the basis for social reforms that lifted millions of people out of poverty.

In 2011, Brazil had a GDP of $ 2.3 trillion[189] (representing a 2.7% increase in relation to 2010) and established itself as the sixth-largest economy in the world, with a real economic growth of 7.5%. Last year, more than $ 1.3 trillion was traded in the Sao Paulo Stock Exchange ("BOVESPA"), the largest in Latin America. In addition, more than half of the companies listed in the Fortune 500 have offices and/or do business on a regular basis in Brazil. Finally, in 2010, the country obtained an "AAA" investment grade from the most-accredited rating agencies in the world, such as Standard & Poor's, Moody's, and Fitch Ratings.

In addition to allowing the blossoming and growth of countless national enterprises, this favorable business environment soon started to attract foreign investors. Several multi-national companies from a variety of industry sectors began to arrive in Brazil or (in the case of those who were already on the ground) pay more attention to their Brazilian branches and subsidiaries. Most of the leading banks, law firms, and accounting firms in the world also established themselves in Brazil. By interacting with local businesses, they have been helping to push the Brazilian market — notably the service providers — to the highest level of excellence on the global stage.

Free and direct elections, a variety of political parties representing all segments of society, an independent judiciary, and an active bar have conferred credibility to the market and have also passed confidence to foreign and domestic investors.

The World Soccer Cup and the Olympic Games, to be held in Brazil in 2014 and 2016 respectively, clearly illustrate the growing strength of the Brazilian economy and the massive volume of investment that the country will attract in the coming years. Between 2007 and 2010, during the first phase of the so-called "plan for growth acceleration," the federal government invested approximately $350 billion into infrastructure projects. During the plan's second phase, an additional $500 billion is to be invested through 2014.

However, this frenzy creates all sorts of conflicts between the market players: investors, consumers, contractors, suppliers, the government at all levels, non-governmental associations, unions, and others. This section of the InfoPAK addresses the opportunities available for resolution of such disputes in Brazil.

Before analyzing such dispute resolution mechanisms, however, it is necessary to provide a brief background about the framework in which they are inserted within the Brazilian legal system.

Brazil is a constitutional democratic state, and like other countries in Latin America, it adopts the civil law system and the Roman-style codified legislation.

Although it is heavily influenced by its Portuguese roots, the Brazilian legal system incorporates elements from some of the most traditional European civil law states, such as Germany, France, and Italy. This is evidenced in relation to the fundamentals of civil, contractual, constitutional, and procedural law.

It is possible to find some nuances of influence from the common law system in Brazilian law. Some specific rules related to precedents resemble the *stare decisis* doctrine, and the Brazilian class actions law has been inspired by its U.S. counterpart.

The Federal Constitution, enacted in 1988, is the primary legal authority. It is the seventh constitution since the country's independence from Portugal (1822) and it already has 68 amendments. On one hand, the text is celebrated for providing clear and solid individual rights and protection against the government (Brazil had been under a military dictatorship until 1984). On other hand, the text has been criticized[190] for being excessively detailed in several matters that should be exclusively regulated by ordinary law.

Subordinate to the Federal Constitution in the rank of legal authorities are ordinary laws and statutes, codified or not. Examples of codified legislation are the Codes of Civil and Criminal Procedure, Civil Code, Tax Code, and Labor Code. Non-codified legislation also plays a highly important role, as particular areas of law are normally dealt with in specific legislation (e.g., telecommunications, oil & gas, public bids and concessions, corporations and environmental issues).

The federal, state, and local governments have concurrent authority to legislate over a wide range of subjects. Nevertheless, as a general rule, the most relevant legislation is federal (exceptions include tax and environment issues, in which state law can be as relevant as federal law). State constitutions are not relevant in most cases.

Except in very limited situations, precedents — which can easily be accessed for free at any Court of Appeal's website — are not binding[191], and all judicial decisions are subject to statutory provisions. The potential variety of interpretations of statutes by the courts may lead to insecurity, and ultimately affects predictability. Brazilian courts of appeals, however, pay very close attention to precedents following the principle of *jurisprudence constant*. Complete disregard for previous cases are becoming more and more rare, especially in states like Rio de Janeiro and São Paulo, which have a high concentration of commercial disputes.

B. Litigation

1. Introduction

Understanding the litigation system of a foreign country is always a difficult task. The rules of civil procedure, which invariably set the basis to the whole dispute resolution legal framework in a given country, are permeated by the social, cultural, and political values present in that country. In this sense, the more one understands the culture of a certain country, the easier it will be to

understand and really comprehend its litigation system. This is no different with Brazil. The way in which the Brazilian state organizes how disputes should be resolved within its borders reflects the way the government understands its own role in society.

As a starting point, the country adopts a unified code of civil procedure[192] for all its 27 states as well as the Federal District. All relevant non-codified legislation related to litigation is also federal and applicable throughout the country. Despite Brazil's gigantic size (it is slightly bigger than the continental U.S.), the country has one single body of law to regulate the resolution of all disputes that arise within its borders.

This section aims to provide insightful and practical information about the most relevant features of the Brazilian litigation framework, along with the various advantages and disadvantages to consider when addressing conflict disputes in Brazil.

2. General Overview of the Brazilian Judiciary

a. Jurisdiction

As in most countries, the Brazilian court jurisdictions are divided into state and federal. The federal court system is comprised of the Electoral, Military, Labor, and General Courts for disputes involving the federal government and federal agencies as parties (hereinafter called simply "Federal Courts"). The general rules of subject matter and personal jurisdiction are set forth in the Federal Constitution. These rules are complemented by ordinary laws, codes of civil procedure (civil and criminal), and labor codes.

The Electoral Courts have jurisdiction limited to cases related to election misconduct, eligibility of candidates, campaign funding, and similar issues. The Military Courts retain jurisdiction to rule on cases arising out of relationships within the armed forces, such as insubordination and the abuse of power. Although part of judiciary power, Electoral and Military courts have some characteristics of administrative courts, and are not relevant for business disputes.

The Labor Courts have jurisdiction to hear cases involving labor issues in general, such as wages, strikes, employment compensation, and labor casualties and accidents. The Labor Courts' jurisdiction is not limited to employment relationships, but also includes labor relationships of any kind, including those that do not have a direct employment contract. These courts are completely separate from the federal and state courts. The judges serving on them and the specific body of prosecutors working on such cases are specialized in labor and employment law.

Nationwide, the Labor Court system has approximately 600 trial courts (first instance courts), and each court normally has several judges. The state capitals (such as Sao Paulo, Rio de Janeiro, and Porto Alegre) have one trial court each, as do the larger cities in the countryside. For smaller cities, one trial court normally has jurisdiction over a few, or even several. In addition, there are 24 Labor Courts of Appeal covering the country, normally one per state (the exceptions are Sao Paulo, which has two, and three pairs of states in northern Brazil that share one court of appeal each).

Federal Courts are competent to hear a wide variety of cases. The most common are those involving the federal government and its entities, federal tax and crimes (as defined by ordinary

laws), and foreign sovereignties and international organizations protected by public law (such as the World Bank and Inter-American Development Bank.).

The system of Federal Courts is comprised by approximately 240 trial courts around the country, with several judges serving on each. Like the Labor Courts, these trial courts normally have jurisdiction over more than one city, except in state capital and big cities in the countryside. At the appellate level, there are five Federal Courts of Appeals, one for each of the five official geo-political regions of the country (South, Southeast, Central-East, Northeast, and North).

Finally, there are the State Courts, which have jurisdiction to hear all cases that do not fall under the jurisdiction of the Federal, Labor, Military or Electoral Courts. Those include commercial, corporate, state tax, contracts in general, torts, family, criminal, and bankruptcy issues. For this reason, State Courts have the so-called residual jurisdiction. Business disputes are most widely contested in State Courts.

There are more than 3,000 state trial courts nationwide, most of them with several judges. In the countryside, these courts have jurisdiction over more than one city. Each state and the Federal District have one Court of Appeal.

As a general rule, the State, Federal and Labor Court of Appeals hear appeals over both questions of law and questions of fact. Their jurisdiction is wide in reviewing nearly all aspects of the decisions rendered by the courts of the first instance.

On the upper level of these courts of appeal, the Superior Labor Court ("TST") hears appeals from the Labor Courts of Appeals, and the Superior Court of Justice ("STJ) hears appeals from State and Federal Courts of Appeal alike. The TST and the STJ have limited jurisdiction to hear appeals only regarding questions of ordinary law (constitutional issues must be heard by the Supreme Court). The State, Federal, and Labor Courts of Appeals have the final word in questions of fact and evaluation of evidences.

The highest court in Brazil is the Supreme Court ("STF"), which hears appeals from the State, Federal and Labor Court of Appeals and from the TST and the STJ. Appeals to the STF must be made on constitutional grounds only. Questions of fact are finally decided by the State, Federal, and Labor Courts of Appeals and questions of infra-constitutional law are decided in the final instance by the TST and STJ.

b. Structure

All cases filed in the first instances as Federal, State and Labor Courts are heard and decided by one single judge in a bench trial. Jury trials in Brazil are available only for four types of crimes against human life (homicide, attempted homicide, abortion, and assistance to suicide). Business-related disputes, even if they involve criminal matters (normally tax and environmental issues), are never heard by a jury in Brazil.

In the second instance (federal, state and labor), appeals are normally heard by a panel of three judges. In certain situations, a second panel, composed of at least five judges within the same court, can review the decision rendered by the first three-judge panel (usually when the first-instance decision is overruled by a majority of 2-1 reverting the lower court judgment). In the STJ

and TST, the proceedings are nearly the same except that the grounds upon which a decision rendered by the court can be reviewed by a second panel are different and more limited.

In the STF, appeals are ordinarily heard by a panel of five justices, and (except in very limited and rare situations) cannot be reviewed by the court.

In cases in which one of the parties requests an interim measure to the court of appeals or to the STJ, TST, or STF, the judge or justice to which the case was assigned (responsible for the drafting the first vote) can rule on the request, granting or denying it. If the request for an interim measure is granted, then the opposing party can request the appeal to be heard by the panel, which can overrule that singular decision. If the request for an interim measure is denied, the appeal will automatically be sent to be heard by the panel.

c. Composition

All first-instance judges (including Federal, State or Labor courts) are selected by public examination. There are no appointments by the Executive (President, governors, or the like) or elections.

These public examinations are considered extremely competitive, and normally consist of several phases (including background screening, academic performance, multiple question exams, essays, and oral examinations). The general requirements to sit for such examinations are to have a degree in law and at least three years of experience as a legal professional (e.g., practicing law as attorney or serving as judge's or prosecutor's clerk).

In the Court of Appeals, four-fifths of the judges are promoted from the first-instance courts, and the remaining fifth are appointed by the state governors (in the State Courts) or the President (in the Federal and Labor Courts) from a pool of lawyers or prosecutors with at least ten years of experience. The proceedings normally start with a list of six names prepared by the State or Federal Bar, or the state or federal General Prosecutor's office. Then, the list is sent to the court of appeal, which strikes three names out and forwards the remaining three to the governor or to the President to appoint the judge. Whether the appointee will be an attorney or a prosecutor is a matter of balance. The goal is to maintain the same number of appointments of attorneys and prosecutors.

The STJ and the TST are composed in the same way as the federal and labor Court of Appeals: four-fifths of the judges are promoted from the State, Federal and Labor Courts of Appeal, and the remainder are appointed by the Executive following the same criteria.

In the STF, all justices are appointed directly by the President, selecting from Brazilian citizens who are at least 45 years old, have a degree in law, an immaculate reputation, and demonstrate extensive legal knowledge. The Senate has to approve the appointee.

Once judges take office either by public examination (in this case after a two-year probation period) or by appointment, they hold tenure for life, with a mandatory retirement age of 70.

Judges — and prosecutors, who are also selected by means of public examination and have life tenure until the mandatory retirement age of 70 — are considered well paid, and enjoy benefits such as a 60-day vacation per year and a irreducible salary.

Generally, judge´s tenure can only be terminated after a final decision by the National Council of Justice ("CNJ") in a proceeding that must respect the due process of law.

3. Distinguishing Characteristics of Litigation in Brazil

Litigation in Brazil is complex and comprised of a wide range of proceedings. These proceedings vary greatly, and each of them has its own requirements and characteristics. All of them, however, are variations of one of three main types of proceedings in Brazil: provisional, ordinary, and enforcement.

The provisional proceeding aims to guarantee and protect the result of a future or parallel ordinary proceeding. The typical provisional proceeding deals with interim measures, such as preservation of documents or freezing of assets. This proceeding is normally more expeditious, with shorter deadlines than the others.

The ordinary proceeding aims to obtain a judgment on the merits of the dispute, such as condemnation of damages for breach of contract, an order for specific performance of an obligation, or a declaration that some taxes are not due. It is a lengthy proceeding with several opportunities for the parties to present their cases and produce evidence.

The enforcement proceeding is used to enforce obligations stated in documents over which no merit discussion is permitted, such as a contract signed by two witnesses or negotiable instruments (e.g. a bond or a promissory note). The defendant in an enforcement proceeding still may raise a defense on the merits, but the grounds are very limited and there is a presumption that a document that meets the legal requirements of enforceability should be immediately enforced.

The following characteristics are common to all the three types of proceedings.

a. Inquisitorial Approach

One of the distinguishing characteristics of the Brazilian litigation system — and of any civil law country in general — is the inquisitorial approach adopted by the courts in conducting all judicial proceedings. Unlike an adversarial approach, an inquisitorial approach requires the court being actively involved in investigating the facts of a case. According to the Brazilian code of civil procedure, the courts have a duty to closely oversee all the procedures, leaving little room to the parties to agree on procedural issues. This inquisitorial approach becomes clear when one analyzes the following specific features of the litigation system in Brazil.

i. Service of Process

The plaintiff normally files its complaint directly with the court, which will serve the defendant either by mail or personally by a clerk. The plaintiff only has to furnish the court with the appropriate address in which the service will be performed.

ii. Preliminary Hearing

The judge has authority to schedule a preliminary hearing to try to settle the case, even if the parties are not willing to do so. This preliminary hearing is important because, even if no

settlement is agreed upon — what happens most of the time — the judge can establish the issues over which evidence production is necessary.

iii. Production of Evidence

The court has authority to determine which evidence shall be produced. The judge can even order the parties to produce additional evidence if dissatisfied with the evidence produced. As there is no discovery in Brazil, parties generally cannot subpoena each other to request documents or take depositions. Each party is responsible for producing the documents necessary to support its own case. Although the court can order a party to produce a given document, typically it only happens in extraordinary circumstances and upon a reasoned request of the opposing party[193].

In cases that require expert opinions, the court can appoint its own expert whose decision normally is adopted by the judge. The parties can appoint their own experts, however they are considered assistant experts. Although they can present their own opinions, their role is to comment and challenge, if necessary, the opinion of the court expert.

iv. Trial Hearings

Trial hearings typically last no more than one day, mostly because there is a limit of three witnesses per party for each fact to be proved in ordinary proceedings. The witnesses are heard by the court under oath. There is no cross-examination. The judge conducts the interrogatories and has to authorize each question made by the parties' counsel.

v. Ex Parte Meeting with the Judge

Parties' counsel are allowed to have ex parte meetings with judges and justices. It is a proceeding notably held when there is a request for emergency relief. Judges are required by law to have an "open door policy" and shall receive lawyers in their offices upon request, regardless of whether the opposing party is present.

b. Allocation of Costs, Applicable Interests, and Late Payment Penalty

The general rule in litigation before the Brazilian courts is that "the loser pays." According to the code of civil procedure, the party that loses the dispute must bear all court fees and attorneys' fees to the opposing party's counsel in an amount between 10% and 20% of the amount in dispute. If the dispute has no direct financial value, the judge must equitably arbitrate an amount to be paid to the winner's counsel.

This rule is as flexible as is the outcome of the case. If both parties partially lose, they bear the court fees and pay the opposing party's attorneys' fee in proportion to what they have lost.

In cases in which a high value is involved, courts nevertheless are sometimes reluctant in awarding attorneys' fees on a percentage basis, even against the letter of the code of civil procedure (there are precedents of the STJ[194].)

The attorneys' fees that must be paid by the losing party are independent of the fee agreement that the winning party may have with its counsel. Although the parties sometimes agree with their counsel that the attorneys' fees paid by the opposing party will be deducted from the fees originally contracted, this is not common practice.

In addition, an interest rate of 12% per year automatically applies to all judgments. The interest is usually applied from the date of default (if there is one) or from the date in which the damages were inflicted or the losses suffered. This rate of 12% per year is higher than most of the investment options available in the market, so it may have a persuasive effect on the debtor to pay the judgment as soon as possible.

The code of civil procedure provides for a 10% penalty that should apply if the losing party does not pay a judgment rendered in an ordinary proceeding within 15 days from the date of judgment in *res judicata* (no longer appealable).

c. Government Privileges in Court

The government at all levels in Brazil (federal, state, and local), and public entities in general, benefit from some procedural privileges in relation to private parties.

The code of civil procedure sets forth strict deadlines to the parties' submissions, such as statement of defense, evidences, and appeals. These deadlines, however, are longer for government and public entities. For example, private parties have 15 days to present their statement of defense against a complaint filed under the ordinary proceeding, while the government has 60 days. The government receives double the time for all other deadlines (e.g., 30 days to file a final appeal instead 15).

In addition, the government does not pay court fees and is represented by a body of lawyers selected by public examination. These attorneys are employees of the government and must be personally notified about any court order, while counsel for private parties are normally notified through the publication of the court's order in an official journal.

In the state capitals and other big cities, all disputes involving the government and public entities are heard by judges specializing in public and administrative law.

4. Challenges of Litigating In Brazil

The main challenge of litigating in Brazil is the overloaded court's dockets (especially in the state courts) that can lead to lengthy and costly proceedings.

Although it is difficult to provide an accurate estimate, it is not unusual for cases to take more than five years to be decided on in big cities such as Rio de Janeiro and Sao Paulo. A final appeal in the Court of Appeal in such states can take more three years to be heard. Considering that appeals to STJ and STF can be filed, it is reasonable to expect that a complex case may be litigated for more than 10 years.

Although this is not a general rule (most cases are decided in a shorter period of time), the possibility of decade-long litigation should be carefully considered, especially if there are other options available, such as arbitration, or the parties are willing to engage in negotiation proceedings. A long-lasting litigation normally demands high costs in court and attorneys' fees, let alone the indirect cost for a party that has to operate while it litigates amounts that sometimes reach hundreds of millions of dollars.

Another challenge is imposed by the country's continental dimension. The code of civil procedure establishes strict rules of territorial jurisdiction. Therefore, absent parties' consent, it is complicated to remove a case that is filed in a small court in the north of the country, for example, to a big city where more-sophisticated attorneys and related services (e.g. experts, translators, and investigators) are located.

In small towns in the northern and northeastern states, it can be difficult to find professionals who speak foreign languages and are familiar with litigating high-profile cases. Considering that a domestic trip in Brazil can take up to ten hours by plane, this situation may substantially increase the costs of a given case. Although big firms in Brazil usually have a wide network of co-counsel in all parts of the country, the additional costs related to distance should be taken into account for a party considering, or forced, to litigate in Brazil.

Some practitioners in Brazil also criticize what they call an excessive number of appeals available to the parties, which can be used as a way to delay or truncate the proceedings. Although the code of civil procedure in its section 17 provides some sanctions[195] to parties that abuse their rights to appeal, such sanctions appear to be insufficient. A malicious party can delay a final decision by at least a couple of years by filing groundless appeals.

5. Distinguishing Characteristics on Providing Legal Services in Brazil

As per the legal market, Brazil has a group of 10 to 15 large full service firms that are highly sophisticated and well-prepared to handle any kind of dispute or transaction, either domestically or internationally. All these firms have attorneys who furthered their education abroad (mostly in the U.S., Europe, and other Latin American countries) and/or have had experience working for foreign firms or companies around the world. These firms have between 150 to 400 lawyers, are generally headquartered in Sao Paulo or Rio de Janeiro, and invariably have offices in Brasilia, the federal capital, and some in other important cities, such as Porto Alegre (South) and Recife (Northeast).

In addition, there are several medium-sized boutique firms focused on specific practices such as tax, environmental, government contracts and intellectual property that are equally well positioned to assist foreign clients in certain types of legal issues.

Complementing the services provided by Brazilian firms, there are nearly 20 foreign firms established in Brazil. Most of them are from the U.S. and U.K. and have their offices in Sao Paulo. According to the Brazilian Bar's regulations, these firms cannot practice Brazilian law and are considered "consultants in foreign law." For this reason, their practices are mainly focused on corporate matters under the laws of their original jurisdictions (New York and U.K. in most cases.). Their involvement with dispute resolution in Brazil is usually limited to international arbitrations. When they must go to national courts, they work with local large firms.

6. Conclusion: Pros and Cons of Litigating in Brazil

Litigating in Brazil, as anywhere else, has advantages and disadvantages. The Brazilian courts can be a suitable option for some types of disputes, and completely inappropriate for others. In many situations, to litigate before a national court (either in Brazil or abroad) is not an option. Nevertheless, it may be the only remedy available to try to obtain the legal relief sought by a party.

In cases in which there is an option for resolving disputes (e.g., between litigation and arbitration), choosing between the options should be made on a case-by-case basis.

In general, however, the advantages of litigating in Brazil are:

- The general impartiality and independence of the judges;
- The familiarity of the courts in big centers with high-profile/international disputes;
- The availability of fast-track proceedings for small claims;
- A pool of highly sophisticated law firms with qualified attorneys experienced in litigation; and
- Lower costs in comparison to arbitration, and with litigation in other foreign jurisdictions.
- On the other hand, the main disadvantages of resolving a dispute in a Brazilian court are:
- The risk of a long timeframe to finally resolve the dispute;
- The high default interest rate (for the debtor);
- The lack of sophistication of the courts in the countryside, notably in some less-developed regions;
- The lack of technology resources, notably in the state courts, where there are no electronic files and all cases are filed in hardcopy; and
- The possibility of delays by a party that is uninterested in resolving the case.

C. Arbitration

1. Introduction

Arbitration is the most widely used alternative mechanism to resolve disputes in Brazil. The code of civil procedure (from 1973) and the civil code (either the current from 2002[196] or the former from 1916[197]) — as well as previous legislation — set arbitration as a legal ADR mechanism. Nevertheless, it was only in 1996, when the Brazilian Congress passed the Brazilian Arbitration Law ("BAL")[198], that arbitration started to be used more frequently.

Several concerns about the constitutionally of the BAL were raised in its first five years, which made parties reluctant to submit their disputes to arbitration. In 2001, however, the STF ruled that the BAL was entirely constitutional and, therefore, that arbitration was a valid alternative mechanism to resolve disputes.

Since then, the number of arbitrations in Brazil has been increasing each year, and the country has often been chosen as a seat for international arbitrations. The courts have become more familiar with the subject, and the initial hostility toward arbitration has now dissipated. Although some state courts (notably in some less-developed areas of the country) are not keen on arbitration, it is possible to identify a nationwide pro-arbitration policy. Decisions denying effect to the BAL or

ignoring the international conventions to which Brazil is party to are invariably overruled by the STJ.

This arbitration-friendly environment allowed this ADR method to blossom in Brazil. The country now has reliable and experienced arbitral institutions, highly sophisticated lawyers and arbitrators, and a clear policy favoring arbitration.

2. Legal Framework

Although several statutes deal with arbitration to some extent (e.g., the civil code, the law of corporations, the consumer code, and the laws of public-private partnerships), the core arbitration regulations in Brazil are those of the BAL and the code of civil procedure. Those other statutes, however relevant (especially in terms of arbitrability), relate to specific subject matters, while the BAL and the code of civil procedure are always applicable to matters related to arbitration.

The BAL is clearly inspired by the Spanish Arbitration Law from 1988[199] (revoked and replaced by a new law in 2003[200]) and adopts, with very slight modifications, the standards of the Model Law of the United Nations Commission on International Trade Law ("UNCITRAL") from 1985. It is a short and concise law, with 44 articles split into seven chapters, that deals with all aspects of arbitration.

The binding effect of arbitration agreements is acknowledged by the code of civil procedure. In its section 267, the code of civil procedure determines the immediate dismissal of claims filed in state courts arising out of or in relation to contracts with arbitration clauses.

Brazil adopts a unified system for domestic and international arbitration alike, which means that any arbitration seated in Brazil (regardless whether it is domestic or international in nature), is regulated by the BAL, the code of civil procedure, and other applicable statutes depending on its subject matter.

By way of definition of what constitutes an international arbitration, the BAL expressly states that an award is to be considered domestic if it was rendered within the Brazilian territory, regardless of the nationality of the parties, the applicable law, or the language of the arbitration. The difference between a domestic and an international award in Brazil is of fundamental importance, as domestic awards can be directly enforced while international awards must be previously recognized by the STJ.

Internationally, arbitration in Brazil is regulated by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[201] ("New York Convention") ratified by and enforced in Brazil since 2002, and the 1975 Panama Inter-American Convention on International Commercial Arbitration[202] ("Panama Convention") ratified by and enforced in Brazil since 1996. Because the BAL is in accordance with the UNCITRAL Model Law and was drafted in accordance with both the New York and the Panama Conventions, the BAL does not contradict but instead implement them — even though the New York Convention was not enforced in Brazil and the Panama Convention had been enforced for only one year when the BAL was enacted.

The domestic regulations (BAL, code of civil procedure, and other statutes) and the NY and Panama Conventions relate exclusively to commercial arbitrations in Brazil. Currently, there is no investment arbitration in Brazil. The country is not a member of the 1966 Washington Convention

on the Settlement of Investment Disputes between States and Nationals of Other States, nor has it ratified any of the more than 20 bilateral investment treaties that it has signed (that therefore are not in force). Disputes against the government (regardless of whether federal, state, or municipal) and public entities must be resolved before the Brazilian courts, except when there is a public contract (normally a public-private partnership or a concession agreement) which contains an arbitration clause. In this case, although arbitration is possible, it must be seated in Brazil, under Brazilian law, and conducted in Portuguese.

3. Arbitrability

A threshold issue is "arbitrability," which describes the disputes that can be lawfully submitted to arbitration in a given jurisdiction. In Brazil, the core concept of arbitrability is set forth by the BAL: persons legally capable to enter into contracts can use arbitration to resolve disputes over negotiable economic rights.

Although any dispute over negotiable economic rights brought by legally capable persons can be arbitrated in Brazil, the problem of arbitrability is more complex. A finding of inarbitrability can be used as a defense against the enforcement of an arbitration agreement or arbitration award, and the BAL is relatively liberal in terms of arbitrability and does not specifically rule over any subject matter. Therefore, in order to make clear the concept of the arbitrability, it is helpful to explore how disputes involving some highly relevant fields of law can (or cannot) be arbitrated.

Before that, however, it is important to highlight some main issues that are intrinsically linked to the arbitrability of disputes in Brazil, and in opposition, to the inarbitrability hypothesis.

Although there are some highly persuasive precedents on the subject (notably the Supreme Court's opinion for the constitutionality of BAL), the main related source of law is still the BAL and the Brazilian Federal Constitution. Nevertheless, the latter does not expressly refer to arbitration, and the initial concerns about the BAL's constitutionality are now virtually eradicated among Brazilian courts. The courts' rulings, however, have been shaping the arbitrability of disputes that have arisen in several fields of law, such as labor and employment, consumer, securities, public-private partnerships, and bankruptcy.[203]

There is just one situation in which arbitration is mandatory in Brazil. Corporations listed in the *BOVESPA* that wish to participate in segments of companies with higher standards of corporate governance (called *Novo Mercado and* Second Level of Corporate Governance Practices) should submit their disputes regarding such segments to arbitration. Apart from this hypothesis, there is no mandatory arbitration in Brazil.

Finally, both the actual Brazilian Civil Procedure Code[204] and a new bill that is under review in the Brazilian Congress[205], expressly establish that an arbitration clause is cause to dismiss any claim brought over a dispute previously agreed to be arbitrated.

The BAL does not refer to any specific field of law. Considering that relevant peculiarities can lead to inarbitrability of a dispute depending on the subject matter which it arises from, the following items focus on the inarbitrability hypothesis. The issue of inarbitrability is a bifurcated one, as it can arise from two different situations: the dispute's subject matter, and contractual flaws in the arbitration agreement.

a. Inarbitrability as a Result Subject Matter

Neither BAL nor the Brazilian Constitution has a list of subject matters that cannot be submitted to arbitration. The general rule is that any dispute between legally capable persons over negotiable economic rights can be lawfully arbitrated.

Nonetheless, a careful analysis of specific legislation and recent court rulings over disputes involving arbitration agreements shows that some subject matters that otherwise seem to be unquestionably eligible for arbitration cannot actually be, or apply only in a limited way.

i. Labor and Employment

At first glance, nothing in the BAL or in the Brazilian Constitution bars a labor dispute from being arbitrated if the parties agree to do so. This conclusion, however, should be carefully considered. The analysis of the arbitrability of labor and employment disputes should be split into those involving individuals and those involving union disputes.

Disputes between labor unions and employers undoubtedly can be arbitrated. The Brazilian Constitution expressly states in its article 144, first paragraph[206], that disputes between unions and employers can be arbitrated. Besides that, the Law no. 7.783/89 also allows the use of arbitration for disputes arising from the rights of strikes[207].

The situation is different regarding individual labor disputes. In this case, it is possible to distinguish two scenarios: disputes over terminated labor relationships and disputes over ongoing labor relationships.

The first one can normally be submitted to arbitration, as the rights disputed are related to economic compensation only, and thus are considered negotiable by the courts.

The arbitrability of ongoing labor relationships, however, is not as simple. Although arbitration scholars have been writing for the acceptance of arbitration for individual labor disputes[208], the Brazilian Labor Courts have taken the opposite position[209]. Other than disputes between companies and high executives (who are deemed to have the same bargaining power), the Labor Courts have adopted the position that labor issues are not subject to arbitration.

ii. Consumer Issues

According to the BAL, article 4, second paragraph, the arbitral clause in adhesion contracts is valid only if it is prominently displayed in bold letters, or in a separated and specific document signed by the adhering party.

Considering that most consumer contracts are adhesion contracts, it would be reasonable to infer that consumer issues can be arbitrated in Brazil, as the majority of arbitration scholars has been doing[210]. The Brazilian Superior Court of Justice, however, has not shared the same view. Recent court opinions[211] have ruled against the insertion of arbitral clauses in adhesion consumer contracts, even if the standards of the BAL are strictly met. These opinions reason that consumer rights are part of a wider so-called consumer public policy established by the Brazilian Consumer Code, and therefore cannot be submitted to any other authority but the judiciary.

iii. Securities

The arbitration of security matters is widely accepted in Brazil. Companies, investors, and shareholders have been increasingly relying on arbitration to resolve disputes involving securities issues.

The Brazilian Corporate Law ("BCA")[212] - expressly establishes, in article 109, third paragraph, that any corporation can include an arbitration clause in its articles of incorporation.

The issue here is simple: Persons and institutions involved in securities transactions in Brazil have to be *legally capable*, as the securities market essentially deals with *negotiable economic rights*. The two threshold requirements set forth in BAL are met by ordinary securities disputes.

The most used venue for securities arbitration in Brazil is the so-called "Market Arbitration Chamber" ("MAC"), created by the BOVESPA in June 2001 to initially arbitrate only disputes between companies (and its directors and fiscal board) that voluntarily enroll in a list of companies with higher standards of corporate governance. Very soon, however, the MAC also expanded its scope to arbitrate disputes between any kind of company, regardless of whether it is listed at BOVESPA, as long as the dispute involves securities and/or corporate issues.

iv. Public-Private Partnership

On December 12, 2004, the Law n°. 11.079[213] was enacted by the federal government in order to regulate public bids and public-private partnerships in all federative levels (federal, state, and municipal). According to article 2, the law disciplines administrative contracts used by private investors, nationals, and foreigners in order to use their expertise and technology to benefit Brazilian public interest.

The law expressly allows disputes arising from contracts signed under its scope to be submitted to arbitration. Two conditions, however, are imposed:

- It requires that the arbitration should be conducted in Brazil, and
- It is also required to be in Portuguese.

As long as these two conditions are observed, any dispute arising from a public-private contract can be arbitrated in Brazil.

When the law states that the arbitration proceedings take place in Brazil, it means that the award has to be rendered within the national borders[214]. The proceeding (or part of it such as depositions or expert examinations) can take place abroad, so long as Portuguese is used.

The rationale behind these requirements is to make sure that the arbitral award will be enforced in Brazil without having to be recognized by any court, and that the arbitrators will be able to understand and interpret the legislation in its original version, without translation.

v. Bankruptcy

The new Brazilian Bankruptcy Act ("BBA")[215] updated and simplified the previous one[216] to focus more on recovering insolvent companies, to the degree possible, rather than closing them. For this reason, the new law is also called "companies recovery act."

Neither the BAL nor the BBA forbid arbitration of disputes arising from bankruptcy proceedings or involving bankrupted companies. In practice, however, the structure of the bankruptcy proceedings (notably the usual multitude of creditors) could severely jeopardize the objectives of the BBA in cases where arbitration was instituted.

Normally, bankruptcies are considered a matter of public policy in Brazil, as they deal with job positions, taxes, and the credit chain that sustains the market. For this reason, the main ruler of bankruptcy proceedings will always be a judge. The final bankruptcy decree — or "company recovery opinion" — has to be rendered by a court.

In theory, private disputes between creditors, or between creditors and the company, could be arbitrated. The problem is that the court would have to stay its own proceedings in order to wait for the arbitration decision before going ahead with the larger bankruptcy proceeding.

Recent precedents, as well as the majority of arbitration scholars, have not registered any case concerning arbitration in bankruptcy proceedings. Because use of arbitration is not forbidden, however, it can be considered in a particular case depending on its circumstances.

b. Inarbitrability as a Result of Contractual Flaws

The contention of inarbitrability can be premised upon the lack of an agreement to arbitrate, or a contract deficiency in an existing agreement.

Normally, a dispute's inarbitrability as a result of contractual flaws in the arbitration agreement refers more to the contract's validity than to arbitration regulations themselves. In other words, if a contract is carefully drafted (which means, among other requisites, being executed by legally capable persons), then any dispute arising from it that relates to negotiable economic rights will be able to be submitted to arbitration.

If the parties of a contract have not agreed to arbitration, it is logical that disputes arising from the contract cannot be submitted to arbitration. The arbitration agreement, however, does not necessarily need to be signed in the original contract (as established in BAA, article 4[217]), such that the agreement need not be established prior to the dispute arising. The BAL, article 9[218], also allows parties to arbitrate disputes that arise from a contract that does not provide an arbitration clause, so long as they sign an independent arbitration agreement (normally called submission agreement) in which they agree to submit that specific dispute to arbitration.

Notwithstanding the possibility of signing an ulterior arbitration agreement, it does not matter when (e.g., whether prior or after the dispute arises) or which instrument (e.g., an original contract or specific agreement) parties have decided to use arbitration; the threshold requirement is that they have agreed to arbitrate their controversy.

A deficiency in an existing agreement does not necessarily lead to a dispute's inarbitrability. Most of the contractual flaws in arbitration agreements can be fixed to avoid the dispute's inarbitrability.

The classic example is the so-called "empty arbitral clause." In this case, although the agreement may refer that disputes arising from the contract should be arbitrated, the clause does not specify any guidelines to the arbitration proceeding (e.g., the arbitral institution to be used or, if it is *ad hoc* arbitration, the method to appoint arbitrators and proper rules). In this event, the party interested

in initiating the arbitration has to notify the counterparty to schedule a date and time to sign an arbitration agreement which will establish the guidelines to the arbitration proceedings[219].

This issue is sensitive, as an empty arbitral clause can lead to a long and costly and public judicial litigation (in Brazil, all lawsuits are public, with very few exceptions). A well-drafted arbitration clause that provides all information necessary to initiate the arbitration proceeding (the so-called "full arbitration clause") can avoid these risks. The BAL, article 10[220], states that an arbitration clause should contain:

- Parties' names, profession, marital status, and addresses (number I);
- Arbitrators' name, profession, and addresses (number II);
- Arbitration institution, if any (number II);
- Scope of arbitration (number III); and
- The country where the award should be rendered (number IV).

The requirement to express the parties' marital status in an arbitration clause applies only to parties that are individuals, and can be relevant in disputes over real estate properties, for example. Depending on the assets and legal framework chosen by the married party, the spouse should be brought to the arbitration.

Indicating the country where the award should be rendered is also fundamental. An award is considered international when rendered outside of Brazilian territory. It does not matter where the *arbitration proceedings* have taken place; what is relevant is where the award was *rendered*. For example, an arbitration can be conducted entirely before an institution in the U.S., Asia, or in Europe, however, if the award was rendered (signed) in Brazil, it is considered a domestic award.

The difference between the enforcement of a foreign and a domestic award can be significant. Foreign awards should be recognized by STJ. The recognition proceeding can take time and be costly, as it is a litigation process, although with a specific and more-expedited procedures.

As a general rule, the remedy available for a party that wants to override any contractual flaw in the arbitration agreement (or to judicially challenge the arbitration award) is the injunction claim set forth in BAL article 7.

In addition, BAL, article 8, provides for the independence of the arbitral clause in relation to the contract in which it is inserted (separability doctrine). This provision is relevant in affirming an arbitration policy in Brazil, as it delegates the duty of evaluating and ruling on a contract's validity to the arbitrators. In doing that, the BAL prevents a party from evading arbitration by bringing a claim before the courts alleging contract invalidity (what otherwise can be advantageous in delaying a final decision to the controversy for as long as possible).

4. Conclusion: Pros and Cons of Arbitrating in Brazil

Considering the sophistication of the Brazilian market and arbitration-friendly policies adopted by Brazilian courts, the advantages of arbitrating in Brazil are similar to those generally recognized anywhere else: confidentiality, specialization of the decision makers (arbitrators), faster

proceedings in comparison with court litigation, and usually simpler proceedings (compared to the intricate rules of civil procedure).

The main disadvantage of submitting disputes to arbitration in Brazil is that, depending on the court from which assistance may be needed, the party may have to go to a Court of Appeal or, in some less-developed states, to the STJ to get the proper enforcement assistance. Although the risk is not high, there is a chance that a judge not familiar with arbitration will decide to retain jurisdiction over a dispute that, according to an arbitration agreement, must be submitted to arbitration.

The higher costs of arbitration in comparison to litigation in Brazil, also makes it less suitable for some types of disputes.

In general, however, arbitration is always a better option. Although the assessment of which dispute resolution mechanism is better for a given case can only be made in light of the specific situation, the advantages of arbitration by far overcome its disadvantages.

D. International Issues in Dispute Resolution

1. Introduction

Foreign investors in any jurisdiction have a special interest in the recognition and enforcement of foreign judgments and international arbitration awards. Brazil adopts a unified system, which means that foreign judgments and international arbitration awards alike follow the same proceedings of recognition and enforcement, which is relatively simple in comparison with other countries.

2. Enforcing Foreign Judgments and International Arbitral Awards

Some countries require reciprocity for recognition of judgments from the country of the party seeking to enforce the foreign judgment. Other countries reserve the right to review the merits of the case, or refuse to enforce judgments unless there is a convention or treaty regarding the matter. In Brazil, however, foreign judgments and international arbitral awards are granted the same status and enforceability accorded to a domestic judgment after their recognition by STJ.

The force that these judgments receive after recognition is grounded on the principle of legal protection and legal certainty.

A valid judgment (either in national courts or by arbitral tribunals) creates the expectation that parties' rights and obligations are decided by such judgment, and Brazil strives to uphold these expectations as long as no paramount national principles are offended.

The status that arbitral awards receive with respect to national judgments gives the arbitration process credibility, thus stimulating its use. Confidence in arbitration benefits international businesses people and contributes to the effectiveness of arbitration.

Determining whether an arbitral award is national or international depends upon the place where it has been rendered. There is no need for any recognition of the arbitral award in the place where it has been issued, but only in Brazil, the place where its enforcement is sought.

Foreign judgments are generally subject to STJ's Resolution n. 9/2005 and to the dispositions of the Brazilian Code of Civil Procedure. Nevertheless, international arbitral awards are also subject to the New York Convention and the BAL.

As explained earlier, a foreign judgment or an international arbitral award may be accepted as valid, binding, and enforceable under Brazilian law. Yet before this may happen, the STJ has to recognize the judgment or award.

a. Recognition

The statement of claim for a request of recognition needs to be directed to the President of STJ, stating the cause of action (the necessity of the judgment or award to have force in Brazil) and the relief sought (the recognition of the judgment or award).

The interested party must attach the original or a certified copy of the foreign judgment or arbitral award and any other relevant documents, all duly sworn and translated. In the case of arbitral proceedings, the party also needs to attach the original or a certified copy of the arbitral agreement in order to demonstrate the jurisdiction of the arbitral tribunal on that dispute.

Besides that, STJ's Resolution n. 9/2005[221] sets forth four general requirements for the recognition of a foreign judgment or international arbitral award. For the purposes of the recognition:

- A competent authority must have rendered it;
- The process must have been served to the parties, or there must be legal recognition of default;
- It must no longer be subject to appeal; and
- It must be certified by a Brazilian consul and must be accompanied by its sworn translation.

Also, Article 6 requires that awards that offend Brazil's sovereignty or public order shall not be recognized.

With regard to international arbitral awards, the New York Convention also applies, bringing Brazil in line with the international arbitral community.

The opposing party may challenge the recognition request, yet such a challenge relies only on the documents' authenticity, the non-fulfillment of legal requirements, and the decision's intelligence. Should the opposing party contest the recognition request, the STJ's Special Court will decide the dispute.

In any case, the Public Attorney's Office shall give its opinion on the proceedings in order to verify any formal inadequacies or violations to public policy.

b. Enforcement

After recognition has been granted, STJ forwards the proceeding to the competent federal court for enforcement.

The law applicable to the enforcement proceedings is the Brazilian Code of Civil Procedure. The rules are the ones applicable to any domestic judgment.

c. Interim Measures

According to STJ Resolution n. 9 (04/05/2005), in order to ensure the effectiveness of judicial decisions and arbitral awards (foreign decisions) that are under the process of recognition before the Superior Court of Justice, parties may request interim measures.

This resolution represents an important improvement in the way Brazilian Courts approach foreign decisions. Before the resolution, especially when the STF was responsible for recognizing foreign decisions (which was the case previous to the Constitutional Amendment 45/04), the prevailing understanding was that, since the foreign decision would only have effects in Brazil after its recognition, no interim measures should be available for the parties requesting the recognition.

The possibility of obtaining interim measures is now undisputed, as established by paragraph 3 of Article 4 of Resolution n. 9, which encompass not only the possibility of judicial measures to ensure the future results of the foreign decision being recognized (*medidas cautelares*), but its own effects (*tutela antecipada*).

For the interim measure to be granted, the party should demonstrate prima facie (i) the risk of perishing the rights awarded by the foreign decision being recognized (*periculum in mora*), and (ii) the presumption of sufficient legal basis (*fumus boni iuris*). If these conditions are met, the interim measure should be granted.

The interim measures may be requested before, together with the recognition request, or after it, depending on the moment it is deemed necessary and on the attendance of the conditions for it to be awarded. The measure should be requested to the justice responsible for the case, or to the court's president if a reporting justice has yet to be appointed.

Although this is an effective way to ensure the practical effects of the decision being recognized, there have not been many interim measures rendered by STJ since 2005. The standards required by the court to recognize conditions for the interim measure to be granted are very strict, and in most cases parties do not dedicate enough attention to demonstrate the existence of the *fumus boni iuris* and the *periculum in mora*. As a result, the interim measures are generally denied.

d. Defenses Available

The request for recognition of foreign decisions can be presented by one or both parties, if the intent to recognize is common. In the latter case, there will be no need to summon the other party to challenge the request. In most cases, however, only one party is interested in recognizing the decision. In these cases, after the request is presented — assuming there is no need to analyze requests for interim measures — the other party is summoned to challenge within 15 days. This does not allow the opportunity to discuss the merits of the case again. The matters to be discussed

in the recognition procedure are very limited. The grounds to resist enforcement of a foreign arbitration award in Brazil are essentially related to formal requirements. Article 5 of the Resolution n. 9 indicates that these requirements are:

- The decision must have been issued by competent authority;
- The parties must have been summoned to join the proceeding where the decision was rendered or "in absentia" (default judgment) has been legally established;
- The decision has become final; and
- The foreign decision must be authenticated by a Brazilian consulate and accompanied by a sworn translation to Portuguese.

The jurisdiction of foreign courts is a basic requirement for approval of a foreign judgment. This will be analyzed under the law of the country where the decision was rendered and also in accordance with international rules of competence.

The regular service of the parties *before* the court proceeding (litigation) where the foreign decision was rendered is of utmost relevance in practice. If the defendant is domiciled in Brazil and its address is known, Brazilian law only accepts the service of process by a letter rogatory. As a result, the application shall be dismissed if the service of process occurs by publication, by mail, through the author's counsel, or consular authorities. In arbitration proceedings, however, the service may happen as defined by the parties, discharging the need for a letter rogatory.

The lack of a formal service will be disregarded if the defendant has accepted the foreign decision and did not contest the recognition request, or if is proven that, although not notified, the party spontaneously attended the proceeding in which the foreign decision was rendered.

The decision must be final. Therefore, requests presented without proof of *res judicata* shall not be recognized unless specific conditions of the case are met to conclude that the foreign decision is the final judgment.

Finally, a certified copy of the foreign decision and its translation into Portuguese by an authorized translator in Brazil must be attached to the request. Otherwise, the decision will not be recognized.

Besides these formal issues, Article 6 of Resolution No. 9 also presents grounds to prevent foreign decisions to be recognized by stating that the decision will not be certified if it offends the Brazil´s sovereignty or public policy. Usually, this is the case whenever the foreign decisions deal with subjects that, under Brazilian law, are to be decided exclusively by Brazilian judges (e.g. family law).

If a defense is presented, the case is distributed between one of the justices of the court. Otherwise, the decision is rendered by the court's president.

In any case, the Public Attorney's Office will have ten days to render its opinion regarding the recognition.

e. Appeals Available

The possibilities of appealing on recognition proceedings are very limited. There is one appeal to submit singular decisions to a panel, as well as an appeal for clarification on decisions.

As stated under Article 11 of the Resolution n. 9, any decision rendered by the president of the court or the reporting justice responsible for the case may be challenged within five days by an internal appeal (*agravo regimental*), which is intended to submit a singular decision to a panel of justice (*Corte Especial*). Therefore, any decision adopted singularly — including interim measures and the recognition itself — are subject to confirmation by a court´s panel.

The possibility of a motion for clarification (*embargos de declaração*) is stated by the Brazilian Code of Civil Procedure. This appeal is not intended to change the merits of the decision, but rather to clarify or avoid any contradictions. The deadline for this appeal is also five days, and the appeal will also be ruled by a court´s panel of justices.

f. Timeframe and Costs

It is difficult to predict timeframes for proceedings in Brazil. In recognition proceedings, the length of time will depend mostly on the existence of a defense by the requested party.

When the recognition is not challenged, the proceedings are usually quite fast, and the recognition of foreign decisions occurs between three months to one year from the request. When the recognition is challenged, however, the lengh of the proceeding will significantly increase, and the homologation can take from one to three years.

The lengh of the procedure will depend in large part on how the request was presented, whether all the necessary documents were submitted, what matters were raised against the recognition, if appeals were filed, and how long the court took to adopt all the procedural steps necessary to reach a decision. Therefore, the work of the lawyer responsible for the case is pivotal.

Since the STJ has not yet stipulated rules regarding costs for recognition proceedings, the court currently does not charge judicial fees for these proceedings. Whereas foreign companies and individuals are required to deposit 10 – 20% of any value being disputed in ordinary litigation in Brazil, STF and STJ established that this contingency fee is not required for recognition proceedings.

Therefore, the costs incurred for recognition proceedings are basically the attorneys' fees (usually established based on the value in dispute) eventually deemed to the other party in dispute, one's own lawyer's fees, and the costs incurred to prepare the necessary documentation.

E. Other ADR Mechanisms

ADR mechanisms are normally defined as arbitration, mediation, conciliation, and negotiation. Arbitration, as explained in the previous section, is well developed in Brazil, and has been widely used to resolve business disputes for at least 11 years.

The other ADR methods have not been implemented as often as arbitration proceedings. Although the most prestigious arbitration institutions in Brazil have negotiations rules, for example, such

rules are not frequently used. Even when the parties have agreed to a multi-tiered arbitration clause providing for a certain period of negotiation prior to arbitration, it is not always followed, and arbitration ends up being used directly.

Mediation and conciliation, although used by certain companies for settlement of internal disputes, are not popular ADR methods in Brazil either.

F. Conclusion

A country with a booming economy and sophisticated market demands effective, expedited, and reliable dispute resolution mechanisms. Although there is much to be done to increase the efficiency of the Brazilian courts in general, both local and foreign parties alike can find highly qualified legal assistance in Brazil to help navigate through the intricacies of the litigation system.

On balance, the advantages and disadvantages of all ADR methods in Brazil is positive, and should not negatively influence either domestic or foreign investors' decisions about investing in the country.

VI. About the Authors

Lloreda Camacho & Co. (Colombia)

Lloreda Camacho & Co. was founded in 1941 and is a full service law firm that caters specially to foreign and multinational clientele doing business in Colombia. Our firm is focused towards a preventive law service, helping our clients planning their business from a legal standpoint, and thus, not only we render a very high quality service, but we structure a strategic counseling for the development of our client's business in Colombia. Our client base is constituted mostly by the parent companies of multinational companies with subsidiaries or branches in Colombia. Our law firm's areas of practice include among others corporate and commercial law, tax law, labor and immigration law, foreign investment and exchange control law, financial law, project finance and infrastructure, litigation, administrative and state contract law, contractual and tort law, health and sanitary law, transportation law, insurance law, civil law, commercial law, intellectual property matters and competition and consumer law. We count on correspondent offices and alliances worldwide, which allow us to offer superior global services in different jurisdictions.

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Our talented lawyers offer our clients the assurance that their matters will be handled with appropriate sensitivity. And with the experienced support of more than 44 specialized lawyers in 28 practice areas, our litigation and arbitration clients know they can benefit from our multidisciplinary approach even when facing their most complex and sensitive cases. Chambers Latin America 2012 recognized our capabilities in this practice area, awarding the firm a Band 1 ranking.

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Crowell & Moring LLP is an international law firm with approximately 500 lawyers representing clients in litigation and arbitration, regulatory, and transactional matters. The firm is internationally recognized for its representation of Fortune 500 companies in high-stakes litigation, as well as its ongoing commitment to pro bono service and diversity. The firm has offices in Washington, DC, New York, Los Angeles, San Francisco, Orange County, Anchorage, London, and Brussels.

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VII. Endnotes

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22 Sentencia T-125/12 (Feb. 23, 2012), http://www.corteconstitucional.gov.co/RELATORIA/2012/T-125-12.htm.

23 Outline of the Convention at http://www.hcch.net/upload/outline20e.pdf and Status Table of Contracting Countries (member and non-members as the case of *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=82.

24Recurso de Casacion (Dec. 31 1896), http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=17755.

25 Civil Procedure Code (Title XXXIII, Third Book): http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=17755

26 Commerce Code: http://www.secretariasenado.gov.co/senado/basedoc/codigo/codigo_comercio.html.

27Decree 2279 of 1989: http://www.sic.gov.co/siyc/memoria/decreto/1989/decreto_2279_1989.html#1 and Law.

28 Diario Oficial No. 43.335 (Jul. 8 1998), http://www.secretariasenado.gov.co/senado/basedoc/ley/1998/ley_0446_1998.html.

29 CONSTITUCION POLITICA DE COLOMBIA 1991, http://www.banrep.gov.co/regimen/resoluciones/cp91.pdf.

30 Constitutional Court, Judgment C-226 of 1993 M.P. Alejandro Martinez Caballero

31 CONSTITUCION POLITICA DE COLOMBIA 1991, http://www.banrep.gov.co/regimen/resoluciones/cp91.pdf.

32Diario Oficial 39752 (Mar. 21, 1991), http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=6546.

33 Diario Oficial No. 43.335 (July 8, 1998), http://www.secretariasenado.gov.co/senado/basedoc/ley/1998/ley_0446_1998.html.

34 Diario Oficial No. 43.380 (Sep. 7, 1998), http://www.secretariasenado.gov.co/senado/basedoc/decreto/1998/decreto_1818_1998.html.

35 Civil Procedure Code, Articles 693, 694, and 695, http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=17755.

36 Sentencia T-058/09, http://www.corteconstitucional.gov.co/relatoria/2009/T-058-09.htm.

37 Articles 20 and following, Law 640 of 2001: http://www.secretariasenado.gov.co/senado/basedoc/ley/2001/ley_0640_2001.html#20.

38 Diario Oficial No. 43.380 (Sep. 7, 1998), http://www.secretariasenado.gov.co/senado/basedoc/decreto/1998/decreto_1818_1998.html.

39 Statistical data referenced in this introductory section can be found by the proclamations of the Mexican Department of Foreign Affairs (Secretaría de Relaciones Exteriores), available online at http://www.sre.gob.mx/index.php/the-mexican-economy-at-a-glance

40 The Federal Congress is the body of government where the legislative branch lies. It is divided in two chambers: the Chamber of Representatives (known in Mexico as Deputies) and the Chamber of Senators.

41 Federal Constitution, Article 20, Section V "…The parties have equal procedural to support the prosecution or the defense, respectively".

42 The writ of amparo is one of the most important institutions in the Mexican judicial system. By means of its procedural guarantee, citizens can protect their federal constitutional rights.

43 On June 18, 2008 was published in the Official Journal of the Federation an Decree amended the articles 16, 17, 18, 19, 20, 21 and 22; fractions XXI and XXIII of Article 73, the fraction VII of Article 115 and paragraph XIII of paragraph B of Article 123, all of the Mexican Federal Constitution regarding the implementation of the oral system.

44 The Federal Code of Civil Procedures, in articles 559 to 563, states the general requirements for the admission of evidence abroad.

45 For example, the Inter-American Convention on the taking of evidence abroad (done in Panama on January 30, 1975), signed and ratified by Mexico and other Latin American countries, established that rogatory letters derived from civil or commercial matters for the purpose of taking evidence or obtaining information abroad and addressed by a judicial authority of one of the States Parties to the Convention to the competent authority of another, shall be executed in accordance with the following: 1. The procedure requested is not contrary to legal provisions in the State of destination that expressly prohibit it; 2. The interested party places at the disposal of the authority of the State of destination the financial and other means necessary to secure compliance with the request.

46 This international efforts are the Following: (i) Inter-American convention on jurisdiction in the international sphere for the extraterritorial validity of foreign judgments: signed in Montevideo on may 8, 1979; (ii) Additional protocol to the Inter-American convention on the taking of evidence abroad signed on 1975; (iii) Inter-American Convention on Letters Rogatory and Additional Protocol to the Inter-American Convention on Letters Rogatory, signed at Montevideo; (iv) Inter-American Convention on Proof of and Information on Foreign Law; (v) Inter-American Convention on extraterritorial validity of

foreign judgments and arbitral awards : signed in Montevideo, Uruguay, May 8, 1979 at the Second Inter-American Specialized Conference on Private International Law.

47 The professionalization of the judicial system is one of the principal efforts to combat corruption. Likewise, the Council of Federal Judiciary is in charge to carry out specific actions to combat the corruption of judicial employees and to admit and carry out administrative procedures against public employees.

48 In England, the domestic arbitration as the first step came from a law the English parliament passed in 1698, according to which neither party could unilaterally revoke the arbitration agreement.

49 The New York Arbitration Act of 1920 followed by the United States Arbitration Act (known as the Federal Arbitration Act) of 1925 and gave validity to the binding arbitration agreement, which consolidated domestic arbitration in the United States.

50 Aimed to discuss an international convention to facilitate the enforcement of judgments in international arbitration proceedings.

51 Fourth Section of the Fifth Book, articles 1415 to 1480 of the Mexican Trade Code.

52 Article 568 of Federal Code of Civil Procedures.

53 Francisco González de Cossío, Arbitraje, Ed. Porrúa, México 2011.

54 Trade Code articles 1457.

55 Trade Code, Title 4th, chapter 7th, articles 1452 to 1456.

56 Trade Code, article 1427 mentioned the general rules for the appointment of arbitrators as follows: I. - Unless otherwise agreed by the parties, the nationality of an individual shall not be an obstacle to act as arbitrator. II. - Parties may freely agree on the procedure for the appointing of arbitrators. III. – In case that the parties do not reach an agreement the following general rules shall be followed: a) In arbitration with only one arbitrator, if the parties do not appoint the arbitrator, he or she will be appointed by the judge. b) In arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators appointed shall appoint the third.

57 The ABC of the CANACO is seeking to extend the use of arbitration to resolve commercial disputes derived from low amounts through a simple and low cost mechanism. See http://www.arbitrajecanaco.com.mx/index.php?option=com_content&task=view&id=102&Itemid=91.

58 The following states have laws regarding ADR: Yucatan, Nuevo León, Jalisco, Federal District (Mexico City), among others.

59 In accordance with the official website of UNCITRAL the organization adopted on 24 June 2002 a "Model Law on International Commercial Conciliation," providing uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html.

60 Report to the Nation issued by the Ministry of the Presidency of Panama in 2011.

61 See Proposal for the Expansion of the Panama Canal, Panama Canal Authority (Apr. 24, 2006), http://www.pancanal.com/eng/plan/documentos/propuesta/acp-expansion-proposal.pdf.

62 *See* Panama, Fitch Ratings, http://www.fitchca.com/noticias.php?id_pais=7&id_sector=1.

63 *See* Standard & Poor´s mejora calificación de riesgo de Panamá, Ministry of Economy and Finance, Republic of Panama (July 2, 2012), http://www.mef.gob.pa/portal/2012-Comunicados/2012-Standard%20PoorsmejoracalificacionderiesgodePanama.html.

64 Article 174 and subsequent of the Code of Civil Procedure.

65 Article 159 and subsequent of the Code of Civil Procedure.

66 Article 127 and subsequent of the Code of Civil Procedure.

67 Article 92 and subsequent of the Code of Civil Procedure.

68 Article 86 and subsequent of the Code of Civil Procedure.

69 Article 235 of the Code of Civil Procedure.

70 Article 174, section B of the Code of Civil Procedure.

71 Article 148 of the Code of Civil Procedure.

72 Article 159 of the Code of Civil Procedure.

73 Article 65 of the Code of Civil Procedure. The four Judicial Districts are formed by the following Provinces: (i) the First Judicial District: Provinces of Panama, Colon, Darien and the reserve of San Blas; (ii) the Second Judicial District: Provinces of Cocle and Veraguas; (iii) the Third Judicial District: Provinces of Chiriqui and Bocas del Toro; and (iv) the Fourth Judicial District: Provinces of Herrera and Los Santos.

74 Articles 92-93 of the Code of Civil Procedure.

75 Articles 94- 96 of the Code of Civil Procedure.

76 Article 97 of the Code of Civil Procedure.

77 Article 100 of the Code of Civil Procedure.

78 Article 124 of the Law No. 45 of October 31, 2007 on Consumer Protection and Defense of Competition (“Law No. 45 of 2007”).

79 *Id.*

80 Article 125 of Law No. 45 of 2007.

81 For example, a class action suit against the oil importing companies was dismissed due to the absence of evidence supporting the claim (lack of validation of invoices for services rendered by the agent).

82 Enacted in Panama through Law No. 38 of June 4, 1996.

83 Article 19 of the Code of Maritime Procedure.

84 Article 1534 of the Commercial Code.

85 Article 1591 of the Commercial Code.

86 Article 1612 of the Code of Judicial Procedure.

87 Article 1613 of the Code of Judicial Procedure.

88 Law No. 52 of March 13, 1917 on Negotiable Instruments; Law Decree No. 1 of July 8, 1999 modified by Law No. 67 of September 1, 2011 (“The Security Act”); Law No. 31 of June 18, 2012 on the Horizontal Property Regime.

89 Article 1737 of the Code of Judicial Procedure.

90 Article 1162 of the Code of Judicial Procedure.

91 Article 1933 of the Code of Judicial Procedure.

92 *Id.*

93 *Id.*

94 Article 932 of the Code of Judicial Procedure.

95 Article 793 of the Code of Judicial Procedure.

96 See, e.g., Judicial decision dated March 12, 2012, writ of cassation in the case of Nani Investment, S.A. v. DEV Ramchand Khamlani.

97 Article 781 of the Code of Judicial Procedure.

98 Article 475 of the Code of Judicial Procedure.

99 Article 815 of the Code of Judicial Procedure.

100 *Id.*

101 This is the case for the special request for review of accounting books and other relevant documents. This requirement is established in article 817 of the Code of Judicial Procedure.

102 Article 783 of the Code of Judicial Procedure.

103 In ordinary proceedings, once the response to the claim is submitted, the parties to the proceedings have to observe a 15 working day mandatory stay, and then the process will move to the evidentiary offering stage. In the evidentiary offering stage the parties will have five working days to offer evidence, then three working days to offer counter evidence and finally, three working days to submit objections to the evidence and counter evidence. The special term for submission of evidence in ordinary proceedings is detailed in article 1265 of the Code of Judicial Procedure.

104 Article 833 of the Code of Judicial Procedure.

105 Article 856 of the Code of Judicial Procedure.

106 Article 877 of the Code of Judicial Procedure.

107 The Apostille Convention was enacted in Panama through Executive Decree No. 29 of February 8, 1991.

108 Article 877 of the Code of Judicial Procedure.

109 Article 1275 of the Code of Judicial Procedure.

110 Article 796 of the Code of Judicial Procedure.

111 In the case of ordinary civil proceedings (being the most common type of civil proceedings), the plaintiff will have the first five days to submit its closing argument and then the defendant will have the following five days to submit its closing arguments.

112 Article 941 of the Code of Judicial Procedure.

113 Article 917 of the Code of Judicial Procedure.

114 It is usual for judges to order the taking of the testimony of the CEO of the company who has offered the evidence. Although one could imagine that the CEO of the company would benefit the interests of its own company during the examination and cross-examine, that is not usually the case in practice.

115 Article 966 of the Code of Judicial Procedure.

116 Article 973 of the Code of Judicial Procedure.

117 Article 974 of the Code of Judicial Procedure.

118 Article 977 of the Code of Judicial Procedure.

119 *See,* e.g., judicial decision dated April 17, 2006, administrative action filed on behalf of Bahía Las Minas Corp before the Third Chamber of the Supreme Court.

120 Article 228 of the Code of Maritime Procedure.

121 Article 240 of the Code of Maritime Procedure.

122 Article 1036 of the Code of Judicial Procedure.

123 Article 1038 of the Code of Judicial Procedure.

124 Article 1710 of the Code of Judicial Procedure.

125 Article 1708 of the Code of Judicial Procedure.

126 Article 1711 of the Code of Judicial Procedure.

127 Id.

128 Article 1715 of the Code of Judicial Procedure.

129 Id.

130 Article 1723 of the Code of Judicial Procedure.

131 Article 1716 of the Code of Judicial Procedure.

132 Supreme Court of Panama Accord No. 49 of April 24, 2001, published in Official Gazette No. 24305 on May 21, 2001.

133 Article 1071 of the Code of Judicial Procedure.

134 Article 1072 of the Code of Judicial Procedure.

135 Article 1080 of the Code of Judicial Procedure.

136 Article 993 of the Civil Code.

137 Article 223 of the Code of Commerce.

138 See e.g., Judicial decision dated July 16, 2003, appeals in the case of Banco Mercantil del Istmo v. M/N Asturias; Judicial decision dated February 2, 2004 in the administrative case of Moisés Martínez and Baldomero González v. IDAAN.

139 See, e.g., judicial decision dated December 27, 1999, in the case of Carlos Garin Montero and Jaime Garin Montero v. Banco Exterior, S.A.

140 Article 1939 of the Code of Judicial Procedure.

141 *Id.*

142 Article 1047 of the Code of Judicial Procedure.

143 Article 1048 of the Code of Judicial Procedure.

144 Article 10 of the Code of Criminal Procedure.

145 Article 1019 of the Code of Judicial Procedure.

146 Article 201 of the Panamanian Constitution.

147 Article 531 of the Code of Judicial Procedure.

148 Article 418 of the Commercial Code.

149 Article 203 of the Panamanian Constitution.

150 *See*, e.g., judicial decision dated October 24, 2005 in the criminal complaint of Sociedad Administración y Reformas, S.A. v. The Seventh Criminal Circuit Judge of the First Judicial Circuit of Panama.

151 *See* http://www.elsiglo.com/mensual/2012/07/24/contenido/539324.asp; http://www.laestrella.com.pa/online/impreso/2011/05/03/mora-judicial-darienita-alcanza-niveles-criticos.asp

152 Article 804 of the Code of Judicial Procedure.

153 *Id.*

154 In no case the extraordinary extension shall exceed a term of two months.

155 Article 1419 of the Code of Judicial Procedure.

156 Article 17 of the Panamanian Constitution.

157 Article 248 of the Code of Judicial Procedure.

158 Article 800 of the Code of Judicial Procedure.

159 Law Decree No. 5 of July 8, 1999 whereby the Regime of Arbitration, Conciliation and Mediation is established published in Official Gazette No. 23837 of July 10, 1999 (“Law Decree No. 5 of 1999).

160 In the year 2006, both Article 202 of the National Constitution and Law Decree No. 5 of 1999 where amended to favor arbitration as an alternative dispute resolution mechanism. The Law Decree No. 5 of 1999 was amended through Law No. 5 of May 22, 2006.

161 Preamble of the Law Decree No. 5 of 1999 submitted before the General Assembly of Panama on March 15, 1999. González Arrocha, Katherine and Sánchez Ortega, Liliana, Arbitraje Comercial Internacional en Panamá: Marco Legal y Jurisprudencial, published in “El Arbitraje Comercial Internacional en Iberoamérica: Marco Legal y Jurisprudencial”

162 Article 3 of the Law Decree No. 5 of 1999.

163 Article 4 of the Law Decree No. 5 of 1999.

164 Article 5 of the Law Decree No. 5 of 1999.

165 Article 7 of the Law Decree No. 5 of 1999.

166 Article 12 and subsequent of the Law Decree No. 5 of 1999.

167 Article 25 and subsequent of the Law Decree No. 5 of 1999.

168 Article 38 and subsequent of the Law Decree No. 5 of 1999.

169 Article 5 of the Law Decree No. 5 of 1999.

170 Article 18 of the Law of Arbitration, Conciliation and Mediation.

171 Article 1421 of the Code of Judicial Procedure.

172 Article 41 of the Law of Arbitration, Conciliation and Mediation.

173 Law No. 13 of January 3, 1996.

174 Law No. 11 of October 23, 1975.

175 See Judicial decision dated June 1, 2005, appeals in the case of Agrowest, S.A., Dos Valles, S.A. and Comexa, S.A. v. Maersk Sealand.

176 Article 114 of Law No. 45 of 2007.

177 Article 1791 of the Code of Judicial Procedure.

178 Articles 1581-1582 of the Commercial Code.

179 González Arrocha, Katherine and Sánchez Ortega, Liliana, Arbitraje Comercial Internacional en Panamá: Marco Legal y Jurisprudencial, published in "El Arbitraje Comercial Internacional en Iberoamérica: Marco Legal y Jurisprudencial".

180 *See,* e.g., judicial decision dated February 8, 1994, published in the Court Record dated February, 1994, page 44.

181 Judicial decision dated August 24, 2010, action for protection of constitutional guarantees against a resolution issued by the arbitral tribunal in the case of Palliser Holdings, Inc. v. Las Brisas de Amador, S.A. See also Judicial Decision dated April 27, 2009, action for protection of constitutional guarantees against a resolution issued by the arbitral tribunal in the case of Panama Ports Company v. Gabriel Jesus Alvarado Carrillo.

182 Article 34 of the Law of Arbitration, Conciliation and Mediation.

183 Article 35 of the Law of Arbitration, Conciliation and Mediation.

184 Article 202 of the Panamanian Constitution.

185 Law No. 5 of May 22, 2006.

186 For CeCAP, see http://cecap.com.pa/index.php?option=com_content&view=article&id=108&Itemid=127; for CESCON, see http://www.cescon.org/tarifas.php.

187 Article 31 of the Regulations of the CeCAP.

188 Article 46 of CESCON´s Regulations.

189 Information available at the website of the Instituto Brasileiro de Geografia e Estatística – IBGE. http://www.ibge.gov.br/home/. Visited on July 30, 2012.

190 Such as taxes, labor relationships, environmental, and criminal issues.

191 The Constitutional Judiciary Reform of 2004 introduced the concept of "binding repertoire" or "sumula vinculante" under which the Brazilian Supreme Court has been given jurisdiction, under special circumstances and subject to the general repercussion of the precedent and the vote of at least 2/3 of the Court, to enacted binding precedents, which must be followed by all branches of government.

192 Federal Law 5.869 of January 11, 1973 as amended.

193 As provided under section 356 et seq of the Brazilian code of civil procedure, where plaintiff must meet the burden of pin-pointing the documents it intends to have access to and give the grounds for its request for delivery of the documents under control of the opposing party or any other third party.

194 Revision of attorney's fees by the STJ amount extremely low or excessively high, precedents: STJ - RESP 209687-MS (RDR 15/382), RESP 450163-MT,RESP 404113-SP (LEXSTJ 182/152, RSTJ 183/362),RESP 660071-SC, AGRG NO AG 350671-MG

195 Brazilian Civil Procedure Code, article 17 numbers I to VII.

196 Law No. 10.406 of January 10, 2002.

197 Law 3.071 of January 1, 1916.

198 Law No. 9.307 of September 23, 1996.

199 Law No. 36 of December 5, 1988.

200 Law No. 60 of December 23, 2003.

201 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.

202 Panama Inter-American Convention on International Commercial Arbitration of January 30, 1975.

203 For a discussion of recent trends in Brazil regarding arbitration, particularly the Brazilian courts' position towards arbitration, see "Arbitration Q&A: Brazil," Practical Law Company (June 2012), available at http://www.acc.com/search.cfm?term=brazil%20arbitration&resultsfor=plc.

204 Brazilian Civil Procedure Code, article 267, number VII.

205 Brazilian Civil Procedure Code, article 467, number VII.

206 Brazilian Federal Constitution of October 5, 1988, article 144, first paragraph.

207 Law No. Law no. 7.783/89 of June 28, 1989.

208 *See* CARMONA, Carlos Alberto, Arbitragem e Processo: Um Comentário à Lei 9.307/96, São Paulo, Atlas, 2009, 3º ed., p.39.

209 TRT 4ª Região - 0131200-95.2009.5.04.0029 RO.

210 See, for example, LEMES, Selma Ferreira. O Uso da Arbitragem nas Relações de Consumo. Available at http://www.mundojuridico.adv.br. Visited on August 27th, 2012.

211 TJRJ - 0019648-38.2008.8.19.0209.

212 Law n. 6.404, of December 15th, 1976

213 Law n°. 11.079 of December 12, 2004.

214 *See* CÂMARA, Alexandre Freitas, Arbitragem: Lei nº 9.307/96, Rio de Janeiro, 2009, 5ª ed. Lumen Juris, p. 142.

215 Law n. 11.101, of February 9, 2005.

216 Law-Decree 7.661, of June 21, 1945.

217 Law 9.307, of September 23, 1996, article 4.

218 Law 9.307, of September 23, 1996, article 9.

219 Law 9.307, of September 23, 1996, article 6.

220 Law 9.307, of September 23, 1996, article 10.

221 Resolution No. 9 of the Presidency of the STJ, of May 4, 2005.