The Intricacies of Commercial Arbitration in the United States and Brazil: A Comparison of Two National Arbitration Statutes

By MATTHEW HEAPHY*

As trade within the Western Hemisphere proliferates, transnational trade partners increasingly rely on arbitration as a means of dispute resolution in lieu of litigation. Brazil, the largest economy in Latin America, has historically been slow to adopt arbitration due to a lack of enforcement of arbitration agreements by the courts beyond the remedy of contractual damages and the requirement of judicial ratification of arbitral awards. The perception of Brazil’s cautious approach to arbitration changed with the passage of Law No. 9.307 of 26 September 1996 (“Law No. 9.307”), bringing it closer in line with the pro-arbitration United States Federal Arbitration Act (“FAA”), which codifies federal arbitration law.

* Class of 2003. This Comment would have been impossible without the expertise and insight of Carlos Maximiano Mafra de Laet, Rodolfo Castrionato de Figueiredo e Mello, Professor Jack Garvey, Professor Jay Folberg, Kevin Coughlin, Tara Pennington, Aaron Johnson, and Andrew Shaw; the encouragement of Allison Sherman; and the support of friends and family.


4. See id.


When embarking on arbitration, it is important for the parties to stipulate to the governing law or the means for choosing the law to be applied to resolve issues relating to the arbitration agreement, the merits of the arbitration, procedural questions, and enforcement of the award. The purpose of this Comment is to give a brief overview of arbitration and the two national regimes, to show how they differ and to demonstrate why foreign companies may still be wary of entering into arbitration agreements that could subject them to Brazilian law as opposed to the well-accepted FAA.

Past skepticism about arbitration and a historical lack of support for arbitration in Brazil raise an important question: Can those who rely on arbitration count on Brazil's new law as they would the FAA? By comparing and contrasting the FAA with Brazil's 1996 Law No. 9.307, this Comment attempts to aid those determining how to resolve international disputes by arbitration.

Despite the great strides Brazil has made in adopting a comprehensive arbitration statute, as well as ratifying two important international conventions, several doubts remain regarding the effectiveness of Law No. 9.307 and its impact on the benefits traditionally associated with commercial arbitration. First, the contracting parties could be surprised by some of the idiosyncrasies of the Brazilian statute, which could slow the efficiencies of commercial arbitration and possibly change the course of the procedure. Second, Law No. 9.307 allows for unnecessary involvement of the judiciary and provides wide discretion to judges. Third, Brazil has never fully embraced arbitration in the past and it is unclear whether it will become widely used; as such, a dearth of experienced arbitrators may further discourage parties from using the mechanism. In sum, arbitration regimes such as the FAA will be more attractive to international trade partners wary of the unpredictability of the Brazilian statute and the lack of support from Brazil's judiciary and legal community.

Part I briefly discusses how arbitration works, what its benefits are and what forms of national and international laws have been adopted in Brazil and the United States. Part II focuses on how parties create arbitration agreements and how arbitration is initiated under each nation's regime. Part III discusses the role of the arbitrators as well as how to challenge them and to what extent they can be held liable. Part IV addresses several key procedural matters under each set of

---

I. The Rise of Commercial Arbitration in Brazil and the United States

A. An Introduction to the Benefits of Arbitration

Arbitration is a means for two or more parties to resolve a dispute through agreement rather than litigation by submitting it to one or more persons, known as arbitrators, to hear and decide the disputed matter. Most disputes arising out of a contract, to the extent the parties so agree, are considered to be arbitrable so long as they could be the subject of legal action.

With global trade on the rise, arbitration can be an attractive means of resolving international disputes. Many commentators agree that arbitration is a faster, less expensive, and more flexible method of dispute resolution. It also offers the benefit of confidentiality, the opportunity to select the forum, the law to govern the proceedings, and the ability to select the individuals, such as experts in the field, to decide the matter. Finding an impartial tribunal to resolve a dispute is especially important in an international setting where there exists a danger of national bias.

With such a cooperative model in place, free of jurisdictional debates, contracting parties still rely on national courts to enforce arbitral awards. While several conventions are in place, the most universal treaty is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention").

---

9. See id. § 47.
10. See Helena Tavares Erickson, Litigation Versus Arbitration in the Americas: Advantages and Disadvantages from a New York Perspective, 15-SFG INT’L L. PRACTICUM 4 (2002); see also Harris & Smith, supra note 1, at 54.
11. See Engle, supra note 7, at 324.
13. See id. at 44-45.
tate enforcement of foreign arbitral awards. Both the United States, one of the original signatories of the convention, and Brazil have ratified this treaty, Brazil acceding to the treaty on June 7, 2002.

B. A Brief Overview of Arbitration in the United States

Arbitration in the United States, which was at one time unsupported by a judiciary unwilling to cede jurisdiction, was backed by Congress in 1925 and codified in the FAA. The FAA now consists of three chapters, to be discussed below; the first governs arbitration of matters involving interstate commerce, while the second and third implement the New York Convention and the Inter-American Convention on International Commercial Arbitration ("Panama Convention"), respectively.

The United States Supreme Court has repeatedly endorsed the use of arbitration between private parties. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Court held that "Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate." The terms of the FAA limit arbitrable matters to the confines of the Constitution, specifically to the matters of interstate and foreign commerce and admiralty.

Since the passage of the FAA, courts in the United States have been increasingly deferential to arbitrators and have worked to uphold arbitral awards based on contractual consent and judicial economy. United States courts acknowledge that arbitration awards, which can only be reviewed for manifest disregard of the law, will be upheld even where there are mistakes of law because of the difficulty

15. See Davis, supra note 12, at 46.
17. See Erickson, supra note 10, at 4.
21. Id. at 405.
22. See id.
of reviewing a record created under the simplified procedures of arbitration.\textsuperscript{25} The strong federal policy in favor of upholding awards and deferring to arbitrators' decisions in the context of international business transactions\textsuperscript{26} makes the United States model appealing to businesses who rely on the finality and predictability of arbitral decisions. Without such a record of judicial support and deference in Brazil, however, it is important to ask how Law No. 9.307 could be applied in resolving an international or domestic dispute.

C. A Brief Overview of Arbitration in Brazil

Traditionally, arbitration has not played a central role in dispute resolution in Brazil.\textsuperscript{27} Prior to the passage of Law No. 9.307, Brazilian courts would not enforce agreements to arbitrate because they were considered contractual promises for which damages were the only remedy. In addition, the former Brazilian law required confirmation of awards in order to be effective and valid.\textsuperscript{28} For these reasons, arbitration was not a clear preference to litigation for resolution of commercial disputes.\textsuperscript{29}

Recently, Brazilian courts have been more supportive of arbitration. The Supremo Tribunal Federal, Brazil's highest court, has upheld the arbitration law despite a constitutional provision that prohibits stripping Brazilian courts of jurisdiction.\textsuperscript{30} Brazil's 1988 Constitution states that "the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power."\textsuperscript{31} The court has affirmed the law, stating that a person has a right to waive the judicial review of disputes.\textsuperscript{32} In addition, the Supremo Tribunal Federal has affirmed the constitutionality of Article 7 of the law, which provides for a judicial mechanism to compel arbitration.\textsuperscript{33}

\textsuperscript{26} See Erickson, supra note 10, at 5–6.
\textsuperscript{28} See Lemes, supra note 3, at 17.
\textsuperscript{29} See id. at 17.
\textsuperscript{30} See id. at 19.
\textsuperscript{32} See Lemes, supra note 3, at 19.
\textsuperscript{33} See id. at 20.
In comparison with United States, arbitration has been used so rarely in Brazil\textsuperscript{34} that parties ought to question the effectiveness of the Brazilian regime. With little case law on arbitration\textsuperscript{35} in a country where opposition to legal precedent is widespread,\textsuperscript{36} the text of Law No. 9.307 is the most important source of arbitration law in Brazil and merits careful examination.

II. The Scope and Validity of the Agreement to Arbitrate

A. Arbitrability of Disputes

Under Brazilian law, arbitration can only be used to resolve disputes "relating to arbitrable patrimonial rights,"\textsuperscript{37} which arguably refer to alienable property rights, both tangible and intangible. Labor matters are generally under the exclusive jurisdiction of the domestic courts, though some arbitration agreements in the context of collective bargaining agreements are enforceable.\textsuperscript{38}

Under the FAA, matters of commerce can be arbitrated, with the exception of some employment contracts.\textsuperscript{39} As the Commerce Clause of the United States Constitution\textsuperscript{40} is read broadly,\textsuperscript{41} most civil matters are considered arbitrable in the United States. The United States Supreme Court has allowed arbitration agreements to be upheld in employment contracts,\textsuperscript{42} even if such agreements are a contingency for employment.\textsuperscript{43}

While there appear to be few differences in the matters that can be resolved under the two nations' statutes, variations exist as to how each set of laws deals with non-arbitrable issues. In Brazil, arbitrators must refer controversies of non-arbitrable rights to the competent court, during which time the arbitration process is suspended until the non-arbitrable issues are resolved.\textsuperscript{44} Under United States law, matters that cannot be arbitrated fall under the jurisdiction of the judici-

\textsuperscript{35} See id. at 226.
\textsuperscript{37} Law No. 9.307, supra note 5, at art. 1.
\textsuperscript{38} See Lemes, supra note 3, at 20.
\textsuperscript{40} See U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{43} See id. at 109–10.
\textsuperscript{44} See Law No. 9.307, supra note 5, at art. 25.
ary. Without an express provision in an arbitration agreement calling for the suspension of the arbitral process, the likelihood of a delay under United States law due to resolution of non-arbitrable rights is much smaller than under Brazilian law.

In comparing the roles of the judiciary in determining the arbitrability of a matter under the two countries' laws, the suspension provision under the Brazilian law may present an unnecessary delay to arbitral proceedings. On the other hand, such a non-arbitrable right is unlikely to arise in the context of international commerce, in which case suspension of the arbitral proceedings is improbable. Still, a complete halt to the proceedings—until the issue has been resolved and is no longer subject to appeal—could indefinitely delay the matter and eliminate the usual benefits of lower costs, efficiency, and speed that one associates with international arbitration.

B. The Agreement to Arbitrate

While the Brazilian and United States laws are structured differently, the practical effect of each law is the same: a party can use the state and federal courts to enforce an agreement to arbitrate.

Under Brazilian law, an arbitration agreement consists of both an arbitration clause and an arbitral submission. First, in order to arbitrate disputes that arise between contracting parties, the contract must contain or have incorporated an arbitration clause (clausula compromissoria). Second, the parties must submit the dispute to arbitration by means of an arbitral submission (compromisso arbitral) if there is no agreement in the arbitration clause as to how the arbitration will commence. Such an agreement can be made in reference to institutional rules or to procedures determined by the parties.

If a party refuses to initiate arbitration, the other party can request service of process for a special hearing in order to enforce the agreement. In such a case, the judgment of the court serves as the arbitral submission, eliminating the need for an actual submission agreement between the parties. One aspect of such a special hearing is that the judge is required to try to conciliate the dispute; only if

45. See id. at art. 25.
46. See id. at art. 3.
47. See id. at art. 4, § 1.
48. See id. at art. 3.
49. See id. at art. 6.
50. See id. at art. 7.
51. See id. at art. 7, § 7.
such a mediation is unsuccessful does the judge attempt to convince
the parties to enter a submission by mutual accord. While it seems to
be a small procedural step in a complex process, this provision effec-
tively requires the judiciary to become involved with the merits of the
dispute prior to institution of the arbitration with the apparent pur-
pose of avoiding submitting a dispute to arbitration. This could un-
necessarily distract the parties from the arbitration, add unnecessary
expenses, and delay the resolution of the matter by non-judicial
means.

Under United States law, an arbitration agreement comes in the
form of either an arbitration clause within a contract or an agreement
to submit an existing dispute to arbitration. If there is a valid arbitra-
tion agreement of either type, a claiming party can enforce this agree-
ment in court.

There is some question as to whether Brazil's dual requirements
for an arbitration agreement—a clause and a submission—comply
with the New York Convention, which Brazil has ratified. The New
York Convention calls on each nation to recognize an arbitration
agreement as an agreement in writing which "shall include an arbitral
clause in a contract or an arbitration agreement." This issue would
only arise when an award is made in a state other than Brazil and the
Supremo Tribunal Federal refuses recognition of the award on the
basis that the agreement was invalid under Brazilian law, if it were the
parties' choice of law, for not having completed a proper submis-
sion. There are similar provisions under the Panama Convention,
which could be used as a basis to challenge the national law in similar
cases.

The practical reality in a commercial setting, however, is that
most arbitration clauses will refer to how arbitration is to commence
or to institutional rules which so provide. This shortcoming of the Bra-
zilian statute, therefore, would only arise in rare cases where unsophis-
ticated parties did not make such a specification and initiated
arbitration without a submission. For those accustomed to the simplic-
ity of the FAA, this aspect of Law No. 9.307 is one of several provisions
on which a Brazilian court could dwell and make the arbitration pro-
cess less efficient.

52. See id. art. 7, § 2.
55. See Law No. 9.307, supra note 5, at art. 38, II.
56. See Panama Convention, supra note 18, at art. 5, § 1(a).
C. Initiating Arbitration

The most common way to begin the arbitration procedure in Brazil or the United States is for the parties to affirmatively request it through private initiative.

Under United States law, there is a specific provision that allows a party to use arbitration as a defense to a court action brought by another party. The court will stay the proceedings until arbitration is had under the terms of the agreement.57 This is designed to provide the parties with a venue to resolve their dispute if it cannot be resolved through arbitration. There is a similar provision in the Brazilian Codigo de Processo Civil which refers directly to the arbitration statute.58

In some cases in Brazil, one of the parties to an agreement containing an arbitration clause may not be able to invoke the agreement. If the arbitration clause is in an adhesion contract, only the weaker party may invoke arbitration. If the stronger party wishes to invoke arbitration, the weaker party must expressly consent to arbitration in an attached writing or in bold type, providing a signature or special endorsement.59 By contrast, United States courts are more likely to allow the stronger party to enforce an arbitration clause. Under United States law, either party may invoke arbitration unless the contract is unconscionable.60

D. The Validity of an Arbitration Agreement

In both the United States and Brazil, the arbitration clause is separable from, and independent of, the contract in which it is found, so that the clause is not invalid even if the contract is.61

Under the competence-competence principle, the arbitrators themselves determine whether they have jurisdiction to decide a dispute.62 The Brazilian law endorses this principle,63 leaving the question of arbitrability to the arbitrators. It does not, however, specify the sources of law for invalidating the agreement.64

58. See C.P.C., art. 520, VI (Braz.).
59. See Law No. 9.307, supra note 5, at art. 4, § 2.
60. See Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002), cert. denied, 122 S. Ct. 2929 (2002).
61. See Law No. 9.307, supra note 5, art. 8; see also Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 476 (9th Cir. 1991).
62. See Lemes, supra note 3, at 18.
63. See id.
64. See Law No. 9.307, supra note 5, at art. 8.
In the United States, an arbitration clause or submission is valid, irrevocable and enforceable unless there is a basis under contract law for invalidating it.\(^6\) Recently, the Supreme Court made clear that the arbitrators may decide the validity of the arbitration clause, provided that deciding the issue is within the scope of the arbitration agreement.\(^6\) An arbitral decision may be independently reviewed, however, if it is not within the scope of the agreement.\(^6\)

### III. The Role of the Arbitrators

#### A. Selection of the Arbitrators

The power of each party to select an arbitrator is critical to the success of this form of dispute resolution. This is because it enables each side to influence the composition of the tribunal whose expertise is likely to be more specialized than that of judges. While the parties do not always select the arbitrators, each nation’s law provides guidelines for the selection process.

Under Brazilian law, each party selects an odd number of arbitrators.\(^6\) If there is an equal number, the arbitrators can either select another one or the parties can request a competent court to select another arbitrator. The parties are free to determine the procedure for choosing an arbitrator or choose the rules of an institution.\(^6\) The general rule when there is no agreement on the selection of the arbitrators is that a Brazilian court may appoint a sole arbitrator once it has heard the parties.\(^7\) A court is required to appoint a sole arbitrator only when the respondent fails to appear at the submission hearing and only after the judge has ruled on the contents of the agreement.\(^7\)

The United States law is not as restrictive if there is more than one arbitrator, leaving it up to the parties to determine how many arbitrators to appoint. In cases where there is more than one arbitrator, each party will typically select one and then a third will be appointed by the arbitrators themselves. When an agreement cannot be reached as to the appointment or replacement of arbitrators, an aggrieved party can petition a court of competent jurisdiction, request-

---

67. See id.
68. See Law No. 9.307, supra note 5, at art. 13.
69. See id.
70. See id. at art. 7, § 4.
71. See id. at art. 7, § 6.
ing compliance with the agreement.\textsuperscript{72} If a trial is required, and it is determined that there is a valid agreement to arbitrate, the court has the power to appoint one or more arbitrators in accordance with the valid agreement.\textsuperscript{73}

Both nations' laws encourage parties to agree upon the procedure for selecting arbitrators prior to entering an arbitration agreement in order to avoid judicial appointment if the parties disagree. The statutes are similar in that they allow a judge to appoint one or more arbitrators when there is no agreement. The greatest difference is how a Brazilian judge must appoint a sole arbitrator if the defendant failed to appear at the agreement enforcement hearing.\textsuperscript{74} A default judgment would be entered by only one court-appointed arbitrator if the party fails to participate in the proceedings. While most parties would not envision defaulting on an arbitration agreement, such a provision requiring a judge to appoint a sole arbitrator to resolve the dispute may give pause to an international trade partner considering whether Brazilian law will govern.

In Brazil, once the arbitrators have been selected, a majority of the arbitrators elects the president of the tribunal. If there is no majority to elect the president of the tribunal, the eldest member of the panel serves as the president.\textsuperscript{75} In rare instances, the outcome of an arbitration could be made based on the ages of the arbitrators. This is because Law No. 9.307 provides that where there is no majority for the arbitral decision, the vote of the president—the eldest member—prevails.\textsuperscript{76} There is no such provision in the FAA that would allow the outcome of a dispute to be based on age of the arbitrators.

\textbf{B. Challenging Biased Arbitrators}

As with the selection of the arbitrators, the FAA and Law No. 9.307 also take different approaches to challenging biased arbitrators.

Under the Brazilian law, there is an affirmative duty on the part of the arbitrators to disclose any material fact which would suggest a justifiable doubt as to independence and impartiality. If such a relationship exists so as to compromise an arbitrator's impartiality or independence, there is cause for disqualification.\textsuperscript{77} An arbitrator can

\textsuperscript{72. See 9 U.S.C. § 4 (1999).}
\textsuperscript{73. See id.}
\textsuperscript{74. See Law No. 9.307, supra note 5, at art. 7.}
\textsuperscript{75. See id. at art. 13, § 4.}
\textsuperscript{76. See id. at art. 24, § 1.}
\textsuperscript{77. See id. at art. 14.}
only be disqualified, however, for a motive arising after his selection, unless he is not nominated by the parties or the motive did not become known until after his selection. This challenge must be made at the earliest possible opportunity directly to the arbitrator or to the president of the tribunal. There is no provision in the Brazilian law stating that failure to raise such a claim at the earliest possible time would constitute waiver.

If an arbitrator is disqualified, he is substituted with an alternate, if specified. If no alternate is specified, the Brazilian law indicates that the rules of an arbitral body, if indicated, apply. If there is no such specification and if the parties cannot agree on the substitution of the arbitrator, the aggrieved party may request a hearing to enforce the arbitration agreement so long as the parties expressly state that they will accept no substitute. At that point, the judge is required to try to reconcile the dispute before appointing an arbitrator himself.

The United States law takes a much different approach to disqualification of arbitrators. The United States law favors vacating an award in lieu of an interlocutory appeal where it is found that an arbitrator is not qualified or is biased. Unlike under Brazilian law, parties who wish to argue for disqualification do not have a specific provision for doing so under a federal statute. Most United States courts have held that questions of arbitrator disqualification are committed to the arbitrators themselves and are subject to judicial review only after an award has been made. The FAA does not specify how arbitrators should decide such challenges, as the Brazilian law does. Some United States courts have recognized the availability of an interlocutory appeal where the arbitral proceedings will be stayed until the issue is decided. Only in rare cases have courts removed or replaced arbitrators before an award has been rendered.

The process for disqualification in the United States favors speed and continuity because it rarely involves the judiciary, whereas Brazil-

78. See id. at art. 20.
79. See id. at art. 15.
80. See id. at art. 16.
81. See id. at art. 16, § 1.
82. See id. at art. 7.
83. See id. at art. 16, § 2.
84. See id. at art. 7, § 2.
ian law allows for the courts to be involved in the replacement of disqualified arbitrators. The Brazilian approach may be fairer to the parties but it does not take into account the efficiency of the dispute resolution mechanism or the independence of the process. As with the other differences between the FAA and Law No. 9.307, the involvement of the courts in replacing disqualified arbitrators could seriously delay the process and deter international trade partners from subjecting themselves to Brazilian law.

C. Scope of Arbitrators’ Liability

Under Brazilian law, arbitrators are considered equivalent to public functionaries for the purpose of criminal law. Law No. 9.307 does not, however, address whether arbitrators are immune from civil suit. Breach of their duties as public functionaries can lead to nullification of the award.

While no specific statutory provision exists in the United States, case law states that arbitrators are “clothed with an immunity that is analogous to judicial immunity” and “have been deemed protected from civil suit under the doctrine of ‘arbitral immunity.’” Any illegal acts could, however, provide a basis for vacating the arbitral award.

This difference between United States and Brazilian laws leaves open the question of whether an arbitrator could be held civilly liable for his acts as an arbitrator. If this were possible, individuals would be less willing to serve as arbitrators in Brazil or under Brazilian law, further detracting from the practical implementation of Law No. 9.307.

IV. Procedural Matters

A. Choice of Law

One of the most appealing aspects of arbitration as a method of dispute resolution is that the parties are able to bargain for and choose the law that will govern the arbitration. Courts will rarely deny the parties’ selection of governing law.

Brazilian law specifically provides for party autonomy in the selection of the substantive law to be applied in the arbitration, provided

---

88. See Law No. 9.307, supra note 5, at art. 17.
89. See id. at art. 32, VI; see also infra, Part V.F.
that there is no violation of good custom or public policy. It is the undefined nature of public policy and the unchecked discretion of judges that creates the most concern regarding this aspect of Law No. 9.307.

United States courts generally enforce choice of law provisions in arbitration agreements, unless there is no substantial relationship between the law and the parties or the transaction and there is no other reasonable basis for the choice. Alternatively, the choice of law will not be enforced if application of the selected law would be contrary to the public policy of a state which has a materially greater interest than the chosen state in the particular issue. The public policies that may be capable of invalidating choice of law agreements in the United States "include discrimination prohibitions, usury restrictions, fair competition protections, constitutional guarantees, and protections for economically inferior parties."

B. Evidence

In collecting evidence and especially hearing witnesses, both nations enlist the assistance of their national courts when the evidentiary requests of the arbitrators go unanswered. As opposed to other instances where the judiciary becomes involved in an arbitration, a court's assistance in procuring evidence from a recalcitrant party in either country is likely to speed along the process rather than delay it.

In Brazil, arbitrators have the power, *ex officio* or upon request of the parties, to depose the parties, hear witnesses, carry out expert investigations and seek out other proofs. The arbitral tribunal can request a court of competent jurisdiction to compel cooperation. If a party refuses to be deposed, the arbitrators can request the court to call in the refusing witness, upon proof of the arbitration agreement. In addition, the arbitrators may obtain a court order compelling a witness to appear before the arbitral tribunal.

In the United States, arbitrators have similar powers. The law specifically states that arbitrators can require any witness to produce any

93. See infra Part V.H.
95. See id. at § 187(2)(b).
98. See id. at art. 22, § 2.
material document as well. Arbitrators carry out the procedure in much the same way as a United States District Court and the witnesses receive the same fees as though they were appearing in such a court. If witnesses refuse to cooperate with a summoning tribunal, arbitrators can petition the District Court to compel appearance. Failure to cooperate can lead to the same punishment as contempt of court.

C. Interim Measures

While arbitrators are vested with quasi-judicial power in collecting evidence in both Brazil and the United States, arbitrators’ roles regarding interim measures vary significantly.

Under Law No. 9.307, arbitrators may request coercive or provisional measures from the court originally competent to hear the case. It is unclear at this point how willing Brazilian courts will be to enforce such interim measures on behalf of arbitrators. It is clear, however, that the Brazilian law does not vest in the arbitrators any independent power to order interim measures.

While there is no explicit provision in the FAA, some United States courts have concluded that the New York Convention precludes parties from petitioning courts for provisional measures because this convention requires courts to refer the case to arbitration. Courts show great deference to arbitrators who grant interim measures and typically only vacate such measures when there is a manifest disregard of the law or there is another ground for vacating an award.

As in other areas of Brazil’s arbitration law, Law No. 9.307 shows an unwillingness to vest power in the arbitrators and continues to rely on the national courts for matters which are left to the arbitrators under the FAA. When courts become more involved and their role goes beyond mere assistance to the substance of a dispute, the benefits of arbitration—particularly speed and certainty—lose their appeal.

100. See id.
103. See Sperry Int’l Trade, Inc. v. Gov’t of Isr., 689 F.2d 301, 306 (2d Cir. 1982).
V. The Arbitral Award

A. Basic Requirements

Once an arbitral tribunal reaches a decision, there are several requirements that must be satisfied under each nation’s statute for a decision to constitute an arbitral award.

In Brazil, the arbitral award must be made within six months of the institution of arbitration or the substitution of an arbitrator, if the parties have not stipulated as to the resolution period. The parties can also stipulate to extension of this period.104 No explicit time limitation exists under United States federal law, though the parties are free to fix such a period, as they are for most procedural aspects of the arbitration.

Under Brazilian law, the decision of arbitrators must be in writing and by a majority if there is more than one arbitrator. If there is no majority, the president of the tribunal decides the outcome.105 United States law explicitly requires that an award also be in writing if it is to be confirmed, modified or corrected,106 though it seems unlikely that an arbitral decision would not be so reduced. No such power to decide the outcome of an arbitration, however, is conferred upon the president of the tribunal.

An arbitration award in Brazil must contain a report, including a summary of the dispute and the names of the parties; the basis of the decision, including analysis of law and fact; the disposition of the arbitrators on each question and a period to comply with the decision; and the date and place of the decision.107 Under United States law, there is no requirement that the arbitrators render a reasoned award,108 though parties often stipulate to this in the arbitration clause. If the parties’ agreement or an applicable institutional rule requires an award to meet specified criteria, a court may find that the arbitrator or arbitral tribunal exceeded its power, providing a basis for vacating the award.109

The Brazilian requirements, as compared with those under United States law, demonstrate how timid this Latin American nation

104. See Law No. 9.307, supra note 5, at art. 23.
105. See id. at art. 24.
is about abandoning the formalities of the judiciary while supporting arbitration as a necessity in global trade. The extra requirements under Law No. 9.307—particularly providing a reasoned analysis—may deter some who would otherwise select arbitration for its efficiency.

B. Remedies

In Brazil, in addition to deciding the questions of liability submitted to the arbitrators, the award can decide liability for costs and expenses of the arbitration, as well as damages stemming from litigation in bad faith. Aside from this, there is no express provision in the Brazilian law allowing for punitive damages. While no Brazilian law so specifies, it is accepted that the tribunal may also award interest for non-compliance with the award if the agreement so states. Also, the arbitral tribunal can fix a term during which the parties must comply with an award.

In the United States, the parties may stipulate to the rules under which an arbitration is conducted, including the damages agreed to be awarded by the arbitrators. The only instance where the court will second-guess an agreement of the parties regarding the awarding of damages is in states where courts interpret punitive damages to be reserved to the state. The Supreme Court has stated, however, that if the "parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." As such, the selection of a state's substantive law to govern an arbitration does not apply to law relating to an arbitrator's award, leaving open the possibility of awarding punitive damages where state law prohibits such an award by an arbitrator.

C. Confirmation of a Settlement

Prior to the rendering of a decision, under Brazilian law, the parties can require the arbitrators to reduce any settlement reached by

110. See Law No. 9.307, supra note 5, at art. 26, III.
111. See id. at art. 27.
112. See id. at art. 26, III.
the parties to a judgment meeting the requirements of an arbitral award.\textsuperscript{117} Under United States law, there is no similar explicit provision requiring the arbitrators to reduce a settlement agreement to an enforceable arbitral award. While the Brazilian provision may seem unnecessary for a settlement agreed upon by the parties, it does provide the parties the certainty of an enforceable award that can be confirmed in a foreign or domestic court. This provision offering the formality of an award exemplifies Brazil’s skepticism of alternative dispute resolution by showing its reliance on courts to ensure compliance with the mutual settlement of an arbitrated dispute.

**D. Amendment of an Award**

Under Brazilian law, the parties may, within five days of notification, request a correction of any material error in the judgment or request a clarification of any part of the decision. The arbitrators may decide to amend the decision within ten days.\textsuperscript{118}

United States law does not expressly provide for petitioning the arbitrators for clarification or amendment of an award. It does, however, allow any party to an arbitration to petition a court of competent jurisdiction to make an order modifying or correcting an award. For such a change to be made, one must show that the award refers to an evident or material miscalculation or mistake in describing a person, thing or property referred to in the award. The award can also be amended where the arbitrators have made an award upon a matter not submitted to them, unless the matter does not affect the merits of the case. Lastly, a party may petition a court to make an amendment or modification where the award is imperfect in matter of form not affecting the merits of the controversy.\textsuperscript{119} The interested party must serve notice on the adverse party within three months of the decision in order to argue for modification or correction of an award.\textsuperscript{120}

**E. Confirmation of a Domestic Award**

In Brazil, once the award is final, it has the same force as a judicial decision and can be enforced as such.\textsuperscript{121} Still, enforcement of any judgment—judicial or arbitral—may require the assistance of the courts where a party is unwilling to comply.

\textsuperscript{117} See Law No. 9.307, \textit{supra} note 5, at art. 28.

\textsuperscript{118} See id. at art. 30.


\textsuperscript{120} See id. at § 12.

\textsuperscript{121} See Law No. 9.307, \textit{supra} note 5, at art. 31.
Under United States law, the parties may agree that a domestic award should be confirmed in the United States District Court where the award was made, or in another court. As with Brazilian law, a domestic award is considered self-executing. It is enforceable in each of the fifty states under the Full Faith and Credit Clause.

F. Grounds for Invalidation of an Award

In Brazil, a complaining party must petition for nullification of a judgment within ninety days of the arbitral award. The court will vacate the judgment and order a new arbitral procedure if it finds that the submission was null; if the award was not issued by a qualified arbitrator; if the requirements of an award are not met; if the award is rendered outside the scope of the arbitration agreement; if the award does not decide the dispute to be resolved; if the award was rendered by an arbitrator in breach of his duty or by graft or corruption; if it was rendered outside the agreed-upon period to resolve the dispute; or if the procedural principles are not respected.

United States law requires the interested party to serve notice of its motion to vacate, modify, or correct an award upon the adverse party or his attorney within three months after the award is filed or delivered. A court may vacate an award under the FAA if it was procured by corruption, fraud or undue means; if an arbitrator were biased or corrupt; if an arbitrator were guilty of misconduct in the process, causing one of the parties to be prejudiced; or if an arbitrator exceeded his powers or did not perform them such that there was not a proper award. In addition, once an award is vacated, a court may

123. See U.S. Const. art. IV, § 1.
124. See Law No. 9.307, supra note 5, at art. 33:

The arbitral judgment is null if:
I. the submission was null;
II. it was issued by someone who could not be an arbitrator;
III. it does not contain the requirements of Article 26 of this Law;
IV. it is rendered outside the limits of the arbitration agreement;
V. it does not decide the dispute submitted to arbitration;
VI. it is proven it was rendered by prevarication, graft, or passive corruption;
VII. it is rendered outside of the period, respecting the provision of Article 12 (III) of this Law; or
VIII. the principles dealt with in Article 21, section 2 of this Law were disrespected.

Id.
126. See id. § 10(a):
order a rehearing by the arbitrators if the time for rendering the arbitral award has not expired.\textsuperscript{127}

It is difficult to speculate as to how deferential the Brazilian courts will be to the arbitration process when considering whether to vacate an award. United States courts have been quite deferential to arbitrators' decisions and only vacate awards in the narrow circumstances enumerated above or where the court finds a "manifest disregard of law."\textsuperscript{128} It is notable how many more grounds for vacating an award exist under Brazilian law. Considering that United States law does not require an arbitral submission, the first three provisions for vacating an award under Law No. 9.307 listed above\textsuperscript{129} do not have a parallel under United States law. The United States law focuses on corruption, improper behavior, and failure to follow the agreement of the parties. An award in Brazil may be null for failing to complete a document. Another contrast is that the Brazilian law requires a judge who vacates an award to order a new arbitration; under United States law, the judge has discretion to do so.\textsuperscript{130} If a United States judge did not order a new arbitration, it would fall on the parties to reinitiate the process.

As with other differences between the two national statutes, the bases for nullifying an award extend further in Brazil and have the potential of duplicating the arbitration process if the judge finds grounds for nullification. On the other hand, the Brazilian statute facilitates resolution of the dispute by arbitration by requiring the judge to order a new arbitration upon nullification.

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

\textit{Id.}

127. \textit{See} \textit{id.} \textsuperscript{\textit{§}} 10(b).


129. \textit{See Law No. 9.307, supra note 5, at art. 32, I–III.}

G. Recognition and Enforcement of Foreign Arbitral Awards

Under United States law, a foreign award is not self-executing and must be confirmed in Federal District Court; a party may confirm a foreign award within three years of the final award.\textsuperscript{131} Under the New York Convention, a party must present an original copy of the arbitral award as well as the arbitration agreement, or a certified copy of each.\textsuperscript{132} The party seeking enforcement must also provide a certified translation of the documents if they are not in the official language of the courts of the nation in which recognition and enforcement is sought.\textsuperscript{133} Once confirmed, a foreign award carries the same force as a domestic award and can be enforced anywhere in the United States.\textsuperscript{134}

In Brazil, a foreign award can be recognized or enforced under the international treaties to which Brazil is party or Chapter VI of Law No. 9.307.\textsuperscript{135} This chapter includes a requirement similar to the New York Convention of producing originals or certified copies, along with official translations, of the arbitral agreement and the authenticated award.\textsuperscript{136} The most significant difference is that Brazil provides but one forum for enforcing a foreign arbitral award; only the Supremo Tribunal Federal, Brazil's highest court, is vested with the power to approve foreign arbitral awards.\textsuperscript{137} Such a limitation could cause an enforcement action to be delayed by the court's heavy caseload and thus slow the completion of the arbitration process.

The grounds for refusing enforcement of a foreign award in the United States are specified by the New York and Panama Conventions and are similar to those found under Brazilian law.\textsuperscript{138} The provisions under Brazilian law only apply in situations where Brazil is not bound by an international treaty.\textsuperscript{139} Now that Brazil is party to the New York Convention in addition to the Panama Convention, the grounds for refusing recognition of an award are the same as those under United States law and closely follow the same steps and principles in the rec-

\textsuperscript{131} See id. at § 207.
\textsuperscript{132} See New York Convention, supra note 14, at art. IV, § 1.
\textsuperscript{133} See id. at art. IV, § 2.
\textsuperscript{135} See Law No. 9.307, supra note 5, at art. 34.
\textsuperscript{136} See id. at art. 37.
\textsuperscript{137} See id. at art. 35.
\textsuperscript{138} See New York Convention, supra note 14, at art. V; Panama Convention, supra note 18, at art. 5; Law No. 9.307, supra note 5, at art. 38.
\textsuperscript{139} See Law No. 9.307, supra note 5, at art. 34.
ognition and enforcement of foreign arbitral awards.\textsuperscript{140} The fact that the United States requires reciprocity—that the foreign nation of the party seeking enforcement of the award must have ratified the same treaty—means that both of these conventions apply in cases where parties from the United States and Brazil seek to enforce an award in the other country.\textsuperscript{141} If an international treaty does not apply, the Brazilian law contains similar requirements to both conventions,\textsuperscript{142} providing the same grounds for non-enforcement.\textsuperscript{143}

\textsuperscript{140} See New York Convention, \textit{supra} note 14, at art. V:
1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
   (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

\textit{Id.}

\textsuperscript{141} See 9 U.S.C. § 304 (1999); New York Convention, \textit{supra} note 14, Declaration/Reservation 1.

\textsuperscript{142} Cf. New York Convention, \textit{supra} note 14, at art. V; Panama Convention, \textit{supra} note 18, at art. 5.

\textsuperscript{143} See Law No. 9.307, \textit{supra} note 5, at art. 38:
Homologation may only be denied for recognition or execution of a foreign arbitral "judgment" when the defendant shows that:
1. the parties lacked capacity in the arbitration agreement;
H. The Role of Public Policy

The greatest unknown is how the courts of each nation will respond to a motion to refuse recognition and enforcement of a foreign arbitral award. Of all of the grounds for denying recognition, the public policy exception is the most uncertain, providing judges in the forum where recognition is sought wide discretion to determine whether an award will be enforced.

Law No. 9.307 provides little guidance as to what may constitute a violation of good customs or public policy, though it does provide an example of what is not a violation of public policy: effective service of process on a Brazilian resident or domiciliary, pursuant to the arbitration agreement or in accordance with the procedural law of the country where the arbitration is carried out, provided the Brazilian has ample opportunity to present his defense. This provision is new to the Brazilian law.

Besides this provision, public policy is found throughout the Codigo Civil, judicial opinions, the Constitution, legislation, and legal treatises. This leaves Brazilian judges much discretion to preserve national interests. Under Brazilian law, a judge has a duty to examine any public policy implications ex officio. According to one scholar, there are three types of public policy: The first two are the laws of international public policy and include, first, institutions or laws that are of interest to society and to the world (such as prohibition of slavery and polygamy); and second, rules that are considered by legislators as principles of a good and moral social order. The third type of

II. the arbitration agreement was invalid according to the law to which the parties submitted themselves, or, in default of such showing, by virtue of the law of the country where the arbitral “judgment” was rendered;

III. there was no notification of the designation of the arbitrator or of the arbitration proceeding, or the principle of the adversary system was violated, making an ample defense impossible;

IV. the arbitral “judgment” exceeded the limits of the arbitration agreement, or it was not possible to separate the part that exceeded it from that which was submitted to arbitration;

V. the institution of the arbitration was not in accordance with the arbitral submission or the arbitration clause;

VI. the arbitral judgment has not yet become obligatory for the parties, has been annulled, or it has been suspended by a court of the country where the arbitral judgment was rendered.

Id.

144. See Law No. 9.307, supra note 5, at art. 39, sole paragraph.

145. See Decreto-Lei No. 4.657, de 04 de setembro de 1942, D.O.U. de 09.09.1942 (Braz.).
public policy is one of domestic law and includes laws that are imperative to social order.\textsuperscript{146}

The definition of public policy is quite vague under Brazilian law, at least by United States standards, and should be considered when selecting either the situs or the governing law of an arbitral proceeding. United States law may be more favorable to those wishing to submit to arbitration or those seeking recognition and enforcement of an arbitral award. As in the context of choice of law,\textsuperscript{147} United States public policy is construed narrowly in deference to the preference for arbitration and the view that public policy is merely a last-ditch argument after the legal arguments have been made. The United States Supreme Court has stated that “public policy... must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'”\textsuperscript{148}

United States case law indicates that courts are wary of invoking public policy to deny recognition of arbitral awards. As the Second Circuit stated, “[e]nforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”\textsuperscript{149}

An important, yet unresolved, issue in the United States courts is whether to apply national or international public policy. It is clear that foreign policy is not sufficient to constitute national public policy.\textsuperscript{150}

The unchecked discretion of the trial judge in Brazil in applying public policy may be most unpredictable in the context of arbitration in comparison with the record of United States courts. In fact, Brazilian judges are thought to be required to consider public policy when matters come before them,\textsuperscript{151} elevating this unknown to a disconcerting level in the context of international arbitration, where predictability is important. Because only the Supremo Tribunal Federal, Brazil’s highest court, has the power of recognition and enforcement of for-

\begin{itemize}
  \item \textsuperscript{146} See Eduardo Espinola & Eduardo Espinola Filho, A Lei de Introducao ao Codigo Civil Brasiliero Comentada 522 (Livraria Editora Freitas Bastos eds., 1944).
  \item \textsuperscript{147} See supra Part V.A.
  \item \textsuperscript{148} W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983) (citations omitted).
  \item \textsuperscript{149} Parsons & Whittenmore Overseas Co. v. Societe Generale de l’Industrie du Papier, 508 F.2d 969, 974 (2d Cir. 1974).
  \item \textsuperscript{150} See id.
  \item \textsuperscript{151} See Decreto-Lei No. 4.657, de 04 de setembro de 1942, D.O.U. de 09.09.1942 (Braz.).
\end{itemize}
eign arbitral awards, there is no effective appeal if recognition is denied based on public policy or any other reason.

**Conclusion**

As Brazil avails itself of international arbitration under Law No. 9.307, more disputes will be resolved using this new Brazilian mechanism. Generally, the statutes of Brazil and the United States are similar and will facilitate arbitration in the long-term. While the Brazilian law makes great strides in promoting arbitration, the FAA remains a model for the world in terms of encouraging and facilitating arbitration. The unnecessary legal obstacles to arbitration and the large role carved out for the judiciary under Law No. 9.307 send the signal that Brazil is willing to facilitate arbitration but only with certain safeguards. While these safeguards may have been appealing to the Brazilian legislature, they may stifle the use of this mechanism in Brazil and cause international trading partners to think twice about whether they wish to be subject to the unpredictable aspects of this law. Absent a revision of the deficiencies of this statute, the true test as to the vitality of the Brazilian law will be determined by the effect it is given by Brazilian and foreign businesses, as well as the Brazilian courts.

152. See Law No. 9.307, supra note 5, at art. 35.