BRAZIL CANADA COMPARATIVE LAW

ARBITRATION

ARTICLE 4

ACULEX
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Introduction

Brazil and Canada are safe and reliable territories for the use of alternative methods of conflict resolution. The Judicial System of these countries endorses Internacional and domestic arbitration. Brazil and Canada are signatories of the 1950 NY Convention on Recognition and Enforcement of Foreign Arbitral Awards. Despite the similarities, the local legislation holds some special features which must be acknowledged. Especially which type of procedure is suitable for which type of conflict.

The Arbitration Law was a landmark in Brazil. It was enacted in 1996 and later modernized in 2015. Since then, the amount of arbitration and its values are growing. For instance, in 2015, 222 cases under condition were started adding up to R$ 10.7 billions (CAD 3.7 billions), opposed to the 249 cases and R$ 24 billions (CAD 8,3 billions) raised in the following year.

Canada has been a strong example over past decades. The country was one of the first to apply the Model Law in 1986, with few modifications. However, each province has its own legislation concerning this topic. In defiance of dissemination of this method, its broad usage has hampered the organization of statistics.

On the next pages, the lawyer and arbitrator Ana Carolina Beneti, alongside the arbitrator and mediator, Louise Barrington, will provide an overview and explain arbitration, its legislation, usage and agencies both in Brazil and Canada. They illustrate how mediation is also a trend in these countries.
ARBITRATION
BY ANA CAROLINA BENETI
Arbitration in Brasil

SCOPE AND LEGISLATION

Is arbitration a common method for dispute resolution in Brazil?

The use of arbitration is fairly recent in Brazil. Brazilian Arbitration Law was enacted in 1996 but only since 2001 has arbitration started to become a real choice in contracts and conflicts. Arbitration is now widely used especially in complex litigation and contracts.

According to a recent research carried out in Brazil\(^1\), only in 2016, there were over 249 arbitration cases in Brazil involving over BRL 24 billion in dispute (CDL 9.388.569.600,00)\(^2\). In 2015, the number of cases were 222 totalizing BRL 10,7 billion (CDL 4.185.737.280,00). The CAM-CCBC – the arbitration center instituted by the Brazil-Canada Chamber of Commerce and now one of the main arbitration institutions in Brazil – had 96 cases initiated under its rules in 2016, having handled an amount in disputes of over BRL 4 billion (CDL 1.500 billion).

Is there a specific legislation that regulates arbitration in Brazil?

As mentioned, arbitration is governed by the Brazilian Arbitration Law (Law No. 9,307 of September 23, 1999 – “Arbitration Law”). The Arbitration Law has been recently modified by Law No. 13,129 of May 26, 2015, but no major changes have been introduced to the Brazilian arbitration system. Arbitration continues to be based on the principle of parties' autonomy, independence of the arbitral proceedings and Courts' strong support to arbitration.

The Arbitration Law regulates aspects of the arbitration agreement (arbitration clause or an arbitration commitment, needed when the conflict starts and there is no arbitration clause), the support of the Courts when a party refuses to start arbitration, requirements of an arbitral award, challenges to the arbitral awards and rules for recognition of foreign arbitral awards.

The changes recently incorporated to the Arbitration Law aimed at explicitly expanding the range of arbitration (i.e. expressly providing for arbitration public administration) and allowing more freedom to parties to choose an arbitrator.

Matters already established by usage such as the interruption of the statutes of limitation, possibility of issuance of partial awards and minor terminology corrections have also been incorporated into the Law.

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\(^1\) According to Professor Selma Lemes, Fundação Getúlio Vargas: http://www.estadao.com.br/noticias/geral,o-crescimento-da-arbitragem,70001836073

\(^2\) Brazilian Central Bank Conversion rate: CDL 1.00 = BRL 2.55 - July, 7, 2017 (http://www4.bcb.gov.br/pec/conversao/conversao.asp)
Are there limitations for the use of arbitration as dispute resolution method in Brazil?

The Arbitration Law determines that those who are competent to enter into agreements are free to use arbitration in the resolution of disputes related to disposable rights (Article 1).

There are some areas of law in Brazil in which, based on the arbitrability requirements of Article 1 of the Arbitration Law, arbitration cannot be used, such as family related disputes; some environmental law disputes; compliance with competition requirements etc.

There are still questions in relation to arbitration in labour matters; consumer’s protection; bankruptcy related cases etc. Recently, Article 1 of the Arbitration Law was amended in order to incorporate an express provision authorizing the use of arbitration by the direct and indirect public administration to settle disputes relating to available property rights (Paragraph 1, Article 1, Law No. 13,129/2015).

Courts have been deciding in favour of arbitration by the indirect public administration and other pieces of legislation related to the public administration have been enacted authorizing the use of arbitration in contracts involving the public administration, but the express legal authorization in the Arbitration Law has been viewed as a consolidation of that important movement.

International and Domestic Arbitrations

Does Brazilian law differentiate between international and domestic arbitration? What are the differences?

The Arbitration Law does not differentiate between international and domestic arbitrations. All arbitrations have the same legal treatment and awards are equivalent to court decisions, creating the same consequences to the parties.

The Law provides different treatments, however, to the enforceability of awards issued inside and outside Brazil. According to Article 31 of the Arbitration Law, arbitral awards have the same binding effects as court decisions.

The difference being that foreign arbitral awards – those issued outside Brazil --, must undergo a recognition process (exequatur) at the Superior Court of Justice (STJ, in Portuguese) before being enforced in the country. Decisions issued in Brazil can be subject to direct enforcement by the local Lower Courts, without the need of any type of prior recognition by the courts. When recognizing a foreign ruling (court or arbitral), STJ will only verify whether the formal procedural requirements have been fully complied with in all instances until final judgment.

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3 The Brazilian Supreme Court and the STJ are the Brazilian highest courts with jurisdiction over constitutional and legislative (infra-constitutional) matters, respectively.
Regarding the arbitral awards, the STJ will check whether:

(I). The parties to the arbitration agreement were competent to enter into agreements;

(II). The arbitration agreement was valid according to the law chosen by the parties, or, in its absence, according to the law of the country where the award was made;

(III). The parties were notified of the appointment of the arbitrator or of the arbitration procedure, or there is no indication of a violation of adversary principle during proceedings;

(IV). The arbitral award was not rendered outside the limits of the arbitration agreement, and it was not possible to separate the part in excess;

(V). The institution of the arbitration was in accordance with the arbitration agreement; and

(VI). The arbitral award is binding on the parties, has not been annulled or suspended by a court of the country where the arbitral award is issued (Art. 38, Arbitration Law).

The Court will also examine if, according to Brazilian law, the subject matter of the litigation can be resolved by arbitration and if the foreign arbitral decision is in keeping with Brazilian sovereignty and public policy (Arbitration Law, Art. 39).

The Arbitration Law expressly determines that service of process to parties resident in Brazil can be made according to the rules chosen in the arbitration agreement or to the procedural laws of the country in which the arbitration is carried out. These forms of service of process will not be considered an offense to the national public order, as long it is demonstrated the unequivocal receipt of the notice and that the party had time and opportunity to fully exercise his defense rights (Article 39, sole paragraph, Arbitration Law).

Is Brazil a signatory to the 1950 New York Convention on Recognition and Enforcement of Arbitral Awards (the “NY Convention”)?

Brazil has been a signatory to the NY Convention since June 7, 2002 and the Convention was signed by the country without reservations.

Decree No. 4,311, of 2002 ratified the NY Convention, which is now inserted into Brazilian legislation.

It is important to mention that the main applicable legislation in Brazil for the recognition and enforcement of foreign arbitral awards are the NY Convention, the Arbitration Law, the Code of Civil Procedure and the Superior Court of Justice Internal Rules.
How are foreign arbitral awards enforced in Brazil? How is the process for enforcement of arbitral awards?

As already mentioned, according to Article 31 of the Arbitration Law, arbitral awards have the same binding effects as court decisions. The only difference is the need of recognition by the STJ of arbitral awards issued outside Brazil before enforcement by a local court.

Brazilian arbitral awards – those issued in Brazil -- are directly enforced by a local Lower Court in the case of non-compliance of the award.

In the recognition process, a request for recognition has to be filed at the STJ with the original or certified copy of the award and a sworn translation of the decision.

The requesting party has also the burden to demonstrate that the award was rendered by a competent arbitral tribunal (or arbitrator), the parties have been duly notified to participate in the proceedings and that the award has become final.

The party against whom the decision was granted or any interested party shall be notified and may file a challenge to the recognition of the award. Such challenge is limited to the formal aspects of the decision and should not be an attempt to re-discuss the merits of the case.

The case is decided by the Special Court of the STJ, formed by 25 most senior Justices of the Court and one of the Justices will be appointed to act as a Reporting Justice.

Before judgment on the recognition of the foreign arbitral award, the Public Prosecution Office will examine and render an opinion on the challenge. Once the arbitral award is recognized by the STJ the exequatur is granted, it can be enforced at the Lower Federal Court of the jurisdiction of the parties.

The proceedings for enforcement of arbitral awards are the same for the enforcement of court decisions. It is important to note that foreign arbitral awards, after recognition, will have to be enforced by the Lower Federal courts, while awards issued in Brazil will be subject of enforcement by the Lower State Courts.

How is Brazilian courts approach towards arbitration in Brazil?

Arbitration in Brazil has developed quickly and strongly and it is becoming one of the most important methods for dispute resolution in the country.

One of the main reasons for such strong and steady development is the unquestionable support of Brazilian Courts, in special the STJ, responsible for not only recognizing foreign arbitral awards but also for deciding the final appeals on court cases. In light of this strong support arbitration is receiving from the courts, Brazil is becoming a
convenient place for arbitration and it has been providing foreign and Brazilian parties with a reliable, binding and faster than court method for dispute resolution, especially for highly complex contracts and cases.

**Are arbitration awards revised by courts?**

In Brazil, arbitral awards (issued outside or inside Brazil) are not subject to any revision or appeal by the courts.

According to the Arbitration Law, arbitral awards are subject to challenges, which could ultimately lead to the nullification of such award. The challenge can only be filed under the limited circumstances related to procedural aspects.

The conditions for challenge are listed in Article 32, of the Arbitration Law, which are:

(I). In case of nullity of the arbitration agreement;

(II). The arbitral award rendered by someone who could not be an arbitrator;

(III). The award does not contain the report, the grounds for a decision, the final operative part of the decision or date and place of issuance (Article 26, of the Arbitration Law);

(IV). The award was issued outside the limits of the arbitration agreement executed by the parties;

(V). Then proven that it was rendered under corruption;

(VI). Award rendered in a period of time superior than 6 months when no other time limit is established by the parties or arbitral institution, and;

(VII). The principles of equality of the parties, impartiality of the arbitrator and his or her freedom to decide have not been respected during the arbitration.

In the majority of the cases, Brazilian Court decisions have strictly required demonstration of these specific conditions, when deciding a challenge to the award, and they have not entered into the merits of the dispute.

**What are the major dispute resolution institutions used in Brazil?**

There are several excellent and reliable arbitration institutions in Brazil. The Brazilian institutions which are handling the biggest number of proceedings or the most complex are:

(A). Center for Mediation and Arbitration of the Brazil-Canada Chamber of Commerce (CAM-CCBC), and;
The CAM-CCBC is the oldest arbitration centre in Brazil (it was created in 1979). It is traditional and extremely reliable.

The proceedings are quite standard - parties are guaranteed equal participation throughout the case, impartiality and independence of the arbitrators are guaranteed.

The Secretariat is well experienced in handling any sort of case and does assist the parties throughout the case.

As mentioned another important centre for arbitration is the São Paulo:


Other important arbitration institutions in Brazil are:

(A). CAMARB (Business Chamber of Arbitration);

(B). FGV (Arbitration Chamber of the Getulio Vargas Foundation);

(C). ARBITAC – Câmara de Mediação e Arbitragem (Paraná) and;

(D). AMCHAM (Arbitration Centre of the American Chamber of Commerce).

There are no obstacles in having an ICC - International Court of Arbitration of the International Chamber of Commerce, ICDR/AAA or LCIA arbitrations in proceedings with a seat in Brazil.

Arbitrations administrated and ruled by international institutions are common, similarly quite efficient and already experienced in working in cases involving Brazilian parties, law or matters and even handling cases in Portuguese.

Trends

Are there any trends in the use of the different dispute resolution methods in Brazil?

Other methods, which are becoming more frequently used are dispute resolution boards and mediation prior to arbitration.

Following this trend, on June 26, 2015, Brazil enacted its first Mediation Law (Law No. 13,140/2015), despite the fact that the practice of mediation had already been adopted in the country. According to the Mediation Law, mediation in general may be carried out by any impartial third party, without decision-making power, appointed or accepted by the parties,
with the purpose of assisting them, so that they can identify consensual solutions to the controversy.
In relation to the subject matter of the dispute, mediation may be used in all types of disputes that could be subject to a negotiation between the parties, including in the settlement of disputes involving consumer rights, labor relations and family law. Disputes involving the public administration can be resolved using mediation, as expressly provided by the Mediation Law.

Mediation, negotiation and conciliation will only be binding if the parties enter into an agreement by the end of such proceedings.

There are no specific Brazilian laws or rules governing dispute boards and they are set up based on institutional rules or agreement by the parties. They are often used in complex construction cases.
ARBITRATION
BY LOUISE BARRINGTON
BRAZIL CANADA COMPARATIVE LAW
Arbitration in Canada

LEGISLATION AND SCOPE

Is arbitration a common method for dispute resolution in Canada?

The use of arbitration is well established in Canada. Canada and its provinces were among the first to adopt the Model Law, with only minor deviations, in 1986. Canadian courts support arbitration at both domestic and international levels, and many well-known international arbitration counsel and arbitrators are Canadian or were originally trained in Canada. There appears to be a marked preference in Canada for ad hoc, as opposed to institutionally administered arbitration.

Is there specific legislation that regulates arbitration in Canada?

Canada is a federal state, comprising ten provinces and three territories. The Constitution provides that the administration of justice and both intra-provincial and cross-border commerce are within the ambit of the provinces.

Thus, each province enacts its own arbitration legislation. Domestic arbitration statutes may vary from one province to another, with respect to the role of the courts, consolidation of cases, and the relationship between mediation and arbitration.

Nine of the ten provinces have enacted separate legislation to govern domestic and international arbitrations. For example, the province of Ontario has the domestic Arbitration Act, 1991, and for cross-border cases, the new International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sched. 5, which came into force in March 2017. Similar legislation came into force in most other provinces in the same year.

In Quebec, Canada’s only province with a civil law regime, the National Assembly has not enacted a separate statute, but Quebec’s arbitration law is contained in the Civil Code of Quebec.

At the federal level, the Canadian government has the Commercial Arbitral Act to govern arbitrations coming under federal jurisdiction. The current version of the federal legislation is the Commercial Arbitration Act, R.S.C., 1985, c. 17 (2nd Supp.), most recently amended in 2015. The federal Act covers issues relating to the government itself or to Crown corporations, and to issues of admiralty law.

Are there limitations for the use of arbitration as dispute resolution method in Canada?

Canadian law is liberal with respect to the kinds of disputes that are arbitrable. Generally, any dispute which can be negotiated between parties can also be resolved through arbitration. There are a few exceptions, such as some employment and consumer disputes. Family arbitration,
pursuant to Ontario’s domestic legislation, is governed by the Arbitration Act and by the Family Law Act.

In the event of conflict between the Arbitration Act and the Family Law Act, the Family Law Act prevails. An appeal lies to the Family Court. If a decision is made in a family law matter by a third party, as a result of a process not in accordance with Ontario law or the law of another Canadian jurisdiction, that decision is not an award and has no legal effect.

**International Arbitration**

**Does Canada law differentiate between international and domestic arbitration?**

Yes, see Question 2 and 3 above. Each province enacts its own arbitration legislation. Domestic arbitration statutes may vary from one province to another, with respect to the role of the courts, consolidation of cases, and the relationship between mediation and arbitration. The international statutes enacted by each province are mostly identical except in Quebec.

The Canadian provinces cooperated through the Uniform Law Conference of Canada in drafting amendments to their international commercial arbitration legislation, in order to maintain the highest possible degree of harmony among the provincial Acts in implementing reforms contained in the 2006 amendments to the Model Law. The international statutes in nine provinces and in the territories track the Model Law as amended in 2006. The provisions of Québec’s codes are consistent with the UNCITRAL Model Law.

**Is Canada a signatory to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”)?**

Canada has been a party to the Convention since 1986. Canada declared that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in the case of the Province of Quebec, where the law did not provide for such a limitation. Both the federal government and the provincial governments have recently enacted legislation to implement directly the New York Convention.

In the past, although the Courts have applied New York Convention as an international law, it had not received direct application in the provinces.

**How are foreign arbitral awards enforced in Canada? What is the process for enforcement of arbitral awards?**

In Ontario, as in most provinces, the 2017 Act expressly provides that the New York Convention is the law of Ontario, expressly assuring that Ontario courts will recognize and enforce foreign arbitral awards from jurisdictions which are members of the New York Convention.
Most provinces have appended the New York Convention text to their international arbitration statutes. Others have enacted legislation to incorporate the Convention into provincial law.

The Quebec Code of Civil Procedure provides for the recognition and enforcement of foreign awards if the matter in dispute is one that may be settled by arbitration in Quebec and is not contrary to public policy. The Quebec law provides that the Convention should be “taken into consideration” when determining a party’s right to obtain recognition and enforcement of an award.

Foreign awards include awards made in other countries, but not those resulting from interprovincial relationships.

In Ontario, the Superior Court of Justice is designated under the 2017 Act as the competent authority to apply the Convention, for the purpose of seeking recognition and enforcement of an arbitral award pursuant to the Convention.

Other than in Quebec, a party seeking enforcement must produce an authenticated original award or certified copy, a copy of the arbitration agreement, a certified translation into English. In Quebec either English or French may be submitted.

What is the attitude of the Canadian courts to arbitration?

Canada’s judiciary is very supportive of arbitration and faced with an action in a matter which is the subject of an agreement to arbitrate, will refer the parties to arbitration unless it finds that the arbitration agreement null and void, inoperative or incapable of being performed. The robust support of arbitration in Canadian courts is a feature that makes Canada an attractive seat for international arbitration.

In recent decisions, Canadian courts have enforced an award despite procedural flaws, refused to grant an interim injunction where the arbitral tribunal could have done so, and held that a party had waived its objection to the constitution of a tribunal by not pursuing it at the seat of the arbitration.

Due to the popularity of \textit{ad hoc} arbitration in Canada, institutional statistics available do not provide a complete picture.

Anecdotally however, it appears that despite modern legislation, experienced arbitrators and supportive judiciary, Canadian businesses appear to use arbitration less frequently than in other jurisdictions.

This may be due to faith in the Canadian courts, as well as the fact that much of Canada’s trade is inter-provincial or with the U.S. Over 75% of Canada’s international trade is with the U.S. Since both countries have common law systems with rather similar procedures, it may be that Canadians and Americans are comfortable enough in each other’s
courts to make arbitration unnecessary except in cases where privacy or procedural flexibility is important.

**Are arbitration awards revised by courts?**

In Canada, international arbitral awards are not subject to appeal in the courts. In keeping with the Convention, which is part of the legislation (attached in Ontario as Schedule 1), a party wishing to avoid enforcement of an arbitration award must persuade a judge of the Superior Court that the award is defective due to one or more reasons set out in the exhaustive list of Article V of the Convention.

Canadian judges have in several instances enforced foreign awards despite finding that the awards were defective.

**What are the major dispute resolution institutions in Canada?**

Despite the popularity of ad hoc arbitration in Canada, arbitration institutions exist in several cities, to promote and to administer arbitration cases. The major institutions in Canada are the ADR Institute of Canada (ADRIC) and ADR Chambers both in Toronto, Ontario, the British Columbia International Commercial Arbitration Centre (BCICAC), and the Mediation and Arbitration Institution and the Canadian Commercial Arbitration Centre of Québec.

Also worth mentioning is Arbitration Place in Toronto, a purpose-built venue for arbitration and mediation hearings and for the promotion of ADR in Canada. Although Arbitration Place does not administer arbitrations under its own rules, it provides state-of-the-art support services including transcription, teleconference facilities, a tribunal secretary and administrative services. It also hosts arbitration hearings and events for its partner organizations – ICC Canada, the Chartered Institute of Arbitrators, the Toronto Commercial Arbitration Society (TCAS), the LCIA and ICDR, the international wing of the American Arbitration Association and CCBC.

**Trends**

**Are there any trends in the use of the different dispute resolution methods in Canada?**

Despite its many advantages, arbitration is often an expensive and often lengthy process, similar to litigation in Canada courts.

Many disputing parties find the costs too heavy a burden and abandon smaller claims. The Canada legal community, including lawyers negotiating government contracts and the judiciary has embraced mediation as an alternate method of resolving disputes in a more efficient
and less expensive way, while reducing the pressure on the public courts. Even if a mediation does not produce a complete settlement, it may reduce time and expense by resolving some issues or at the very least, clarifying the issues in order to streamline the subsequent litigation or arbitration proceedings.

Institutions such as ADR Chambers attempt to deal with lower value cases under Expedited Rules. However, unless the parties have written the Expedited Rules into their original arbitration agreement, it is difficult to agree to use the Expedited Rules once a dispute has arisen. By that time, the parties and their counsel are hesitant to renounce any of the procedural steps that may assist them in making their case; consequently, the Expedited Rules are under-utilised.

**Any new trends in dispute resolution in Canada?**

**Writing:** Ontario’s new legislation incorporates Option 1 of the 2006 amendments to the Model Law, providing that the writing requirement is met if the arbitration agreement is recorded in written form, including electronic communications, and agreements may be concluded orally, by conduct, or by other means.

For example, if an agreement is contained in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other, the written requirement is met.

**Enforcement:** Another welcome clarification came with the 2017 amendments to provincial and federal Limitations Acts, establishing a maximum period for enforcement of 10 years from the date the award is made. This harmonizes the enforcement period, which had previously varied from two years in Alberta to ten years, or no limitation, elsewhere in Canada.

**Third party funding:** is seen as increasing access to justice for under-resourced parties, or for those who are out-resourced by an opponent, as well as spreading risk and increasing business efficiency. A number of funders have shown interest in Canada, with some having already established offices in the Territory. Canada still has laws regarding champerty and maintenance which generally prohibit third-party funding in litigation. It is an open question as to whether the champerty and maintenance prohibitions apply to international commercial arbitration, and only time and some court decisions or clarifying legislation will tell.

**Investment Treaty Arbitration:** Canada has a long history with investment arbitration, both as signatory to some 30 bilateral investment treaties and having been since 1992 a party to NAFTA, the North American Free Trade Agreement, and more recently the Comprehensive Economic and Trade Agreement (CETA) with the European Union. At the time of writing, United States negotiators are attempting to remove the Chapter 11 dispute resolution provisions of NAFTA so that the national courts of each of the three NAFTA signatories would resume power to decide
investment disputes. Canada and Mexico are resisting this attempt.

The recent withdrawal of the US from the Trans Pacific Partnership (TPP) has also left the future of that multilateral accord in doubt. The Foreign Investment and Promotion and Protection Agreements (FIPAs) to which Canada is a party generally provide for arbitration under ICSID or ICSID Additional Facility Rules, under UNCITRAL Rules or under some other agreed institution's rules such as ICC, Stockholm or LCIA.
Reference Legislation

Laws of Brazil:

- Brazilian Arbitration Law (Law 9,307, of September 23, 1996)
- The Arbitration Law (Law 13,129 of May, 26, 2015)
- Decree No. 4,311, of 2002
- Brazilian Code of Civil Procedure
- Superior Court of Justice Internal Rules
- Mediation Law (Law 13,140/2015)

Laws of Canada:

- Model Law, of 1986
- Quebec: The Civil Code and The Civil Code of Québec