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Book Review

OXFORD

BOOK REVIEW

***International Arbitration: Law and Practice in Brazil*, by Peter Sester, ed. Published by OUP (2020)**

One of the most rewarding aspects of practising in the field of international arbitration is working with clients, lawyers, and arbitrators from different countries. And of all the many countries in which I've had the pleasure to have worked, one of my favourites is Brazil. I consider myself extremely fortunate that work has taken me there at least once a year for the past 15 years or so. What I like best about Brazil is the people: welcoming, warm, diligent, enthusiastic—and always hopeful about the future. This hope is summed up in an interview I read a few years ago with the Carioca novelist, Paul Coelho, in which Coelho quoted a Brazilian poet who said 'Don't lose your hope in difficult times. God was born in Brazil'.

In the past 20 years, arbitration has grown dramatically in Brazil—this can be seen in the rising numbers of cases involving Brazilian parties, the rising number of cases seated in Brazil, the proliferation of excellent local arbitral institutions, the numerous pro-arbitration decisions of the Superior Tribunal de Justiça (the court with jurisdiction over cases involving foreign arbitral awards), the fact that the International Court of Arbitration the International Chamber of Commerce (ICC) opened a hearing centre in São Paulo in 2018, and the popularity of international arbitration conferences in Brazil.

Speaking personally, my own experience of arbitration involving Brazilian parties and arbitrations seated in Brazil has always been positive. The Brazilian lawyers I have worked with have always been first-rate. I served as an arbitrator in a case seated in São Paulo last year, with Brazilian law firms representing both sides. The experience was every bit as good as serving as an arbitrator in London, New York, Paris, or Singapore. The quality of the Brazilian advocates on both sides was very high—both sophisticated and skilled. And my fellow arbitrators, one a Paulista, were wonderful colleagues.

The time seems ripe, therefore, for a book about international arbitration in Brazil written in the English language. That way I, and the many other non-Portuguese speaking international arbitration practitioners who, like me, are always looking forward to their next case in Brazil can better understand local law and practices. And

so I am grateful that in the spring of 2020, Oxford University Press published *International Arbitration: Law and Practice in Brazil*.

The book is edited by Peter Sester—a German-born lawyer and a highly-respected arbitration practitioner based in Rio, who is also a Professor of International Arbitration at FGV-Rio Law School. Sester has gathered together a prominent group of authors. The list of contributors in the book (xliii–xlvii)[1] reads like a who's who of the Brazilian international arbitration bar and includes highly distinguished practitioners like Eleonora Coelho, Marcelo Roberto Ferro, Pedro Batista Martins, and Luciano Benetti Timm.

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There is an often-recited story about arbitration in the USA that runs something like this:[2] back in the 18th and 19th centuries, courts were hostile to arbitration. This hostility was based on the belief that arbitration agreements were problematic—and thus void as against public policy—because they 'oust the jurisdiction' of the courts.[3] The chief complaint against arbitration agreements was that there was a fundamental right of access to the courts that a party could not renounce in advance of a dispute. The US Supreme Court put it this way in *Morse*:

> Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him . . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge . . . . He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented. [4]

As a result, in the 19th century, parties had a right to withdraw from agreements to arbitrate—to 'revoke' them—up until the time an award was rendered, and, as a result, courts would not grant specific performance of arbitration agreements.[5]

Things begin to change at the beginning of the 20th century, culminating in the enactment of the Federal Arbitration Act in 1925 (FAA). The FAA was designed to reverse the judicial hostility to arbitration and place arbitration agreements on an 'equal footing' with other agreements. In the almost 100 years since the passage of

1 Page numbers alone in round brackets are to Peter Sester (ed), *International Arbitration: Law and Practice in Brazil* (OUP 2020).

2 This familiar story is recounted: *Kulukundis Shipping Co, SA v Amtorg Trading Corp*, 126 F.2d 978 (1942); Katherine van Wezel Stone, 'Rustic Justice: Community and Coercion Under the Federal Arbitration Act' (1999) 77 NCL Rev; Julius Henry Cohen, 'The Law of Commercial Arbitration and the New York Statute' (1921) 31 Yale LJ 147; Paul L Sayre, 'Development of Commercial Arbitration Law' (1928) 37 Yale LJ 595, 599.

3 *Kill v Hollister*, 1 Wils 129 (1746); *Insurance Co v Morse*, 1874, 20 Wall 445, 451, 22 L.Ed. 365.

4 *Morse*, 20 Wall at 451.

5 ibid. See also, *Rison v Moon*, 22 SE 165, 167 (Va. 1895) ('[E]ither party may withdraw from an agreement to arbitrate, made after a cause of action has arisen, and before the award has been rendered, and . . . such an agreement is no bar to suit at law or in equity, and no foundation for a decree of specific performance.').

the FAA, arbitration has grown dramatically in the USA, with courts viewing arbitration as a favoured method of dispute resolution, especially in international cases.[6]

A similar story can be told about arbitration in Brazil—only with all the action taking place about 70 years later. In Brazil, hostility towards arbitration was still prevalent as late as the last quarter of the 20th century. This hostility was encapsulated in the words of a leading legal scholar, Francisco Cavalcanti Pontes de Miranda, who wrote in 1977: 'Arbitral tribunals (as an institution) are primitive tribunals, truly retrogressive'.[7] This hostility was also reflected in Brazilian law: Brazilian courts were empowered to refuse to enforce pre-dispute arbitration agreements unless that agreement was ratified by both parties once a dispute arose;[8] and even where a case proceeded to an award, parties could spend years in court before obtaining a decision on the enforceability of the award.[9]

Things began to change in the early 1990s, when three young Brazilian scholars and practitioners began to draft new, modern legislation that ultimately became the Brazilian Arbitration Law of 1996 (BAL): Carlos Alberto Camona, Selma Ferreira Lemes and Pedro Batista Martins. All three are among the most distinguished and prominent arbitrators in Brazil to this day. The effect of the BAL was to reduce the interference of the Brazilian courts in arbitration. Developments in the law since the enactment of the BAL has only further fuelled the popularity of arbitration in Brazil. In 2001 the Supremo Tribunal Federal (STF) rejected a challenge to the constitutionality of the BAL and to the constitutional amendment that transferred from the STF to the Superior Tribunal de Justiça (STJ) jurisdiction over foreign arbitral awards.[10] Since that time the STJ has rendered numerous pro-arbitration decisions.[11] In 2002, Brazil ratified the New York Convention.[12] In 2015, the BAL was amended to grant state entities the ability to submit disputes to arbitration—an important change given the significant role that state entities play in the Brazilian economy.

Since the enactment of the BAL and the other developments since, arbitration has taken off in Brazil. However, it took a little bit of time before it took off in earnest. The Centro de Arbitragem e Mediação da Câmara de Comércio Brasil Canadá (Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce (CAM-CCBC)), one of the most respected of the local arbitral institutions in Brazil, registered an average of only two arbitrations a year from 1996 (when the BAL was

6 *Mitsubishi Motors Corp v Soler Chrysler–Plymouth, Inc*, 473 US 614, 631 (1985) ('the emphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce'.). See also *Scherk v Alberto-Culver Co*, 419 US 506, 516–17 (1974).

7 Francisco Cavalcanti Pontes de Miranda, *Comentários ao Código de Processo Civil*, Volume XV (Forense 1977) 344.

8 See arts 1,037–1,046 of the Brazilian Civil Code of 1916.

9 This was a result of the Brazilian Civil Code of 1916 (article 1,045) and the Civil Procedure Code of 1973 (arts 1,072–1,102).

10 Justice Luis F Salomão, Justice of the Superior Tribunal de Justiça, wrote the Foreword to the book. In it he notes that while Brazilian courts review foreign awards rigorously by reference to due process considerations, they 'almost never review the merits of an arbitral reward [sic]' (v).

11 Thus we learn in Chapter 9, *International and Domestic Awards* by Pedro Batista Martins, that from the time the STJ acquired jurisdiction over foreign arbitral awards in 2005 to November 2018, it declined to grant recognition to only seven awards out of 92 (301).

12 Brazil signed the New York Convention in 1958, but the hostility to arbitration put a halt on its ratification.

enacted) to 2001. That increased to 10 a year in 2002, and then to an average of 13 from 2003 to 2007. However, starting in 2008, six years after Brazil ratified the New York Convention, the number of cases rose dramatically, averaging 57 new cases per year through to 2013. By 2017, CAM-CCBC registered 141 new arbitrations, which itself was a rise of over 40 per cent compared to 2016. The other leading arbitral institutions in Brazil also saw an increase in their case load.[13] From 2014 to 2017, 964 arbitral proceedings were initiated before Brazilian arbitral institutions, an increase of nearly 60 per cent compared to the period from 2010 to 2013.

In 2018, the ICC reported Brazil to be the most represented nationality among parties from Latin America (representing 32% of all Latin American parties) and that Brazil placed third in the ICC country statistics that rank the number of arbitrations by the nationality of the parties, coming after the USA and France.

It is clear that arbitration has grown dramatically in Brazil over the past 20 years, attracting lawyers and arbitrators from all over the world. There has been a need for a good English-language book about international arbitration in Brazil for a long time.

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The book is divided into two parts. The first part, *Fundamentals of Arbitration in Brazil*, contains two chapters by Sester—the first of which provides an overview of the history of arbitration in Brazil and the second of which provides an article-by-article commentary on the BAL. The book also includes an English translation of BAL in an appendix. Both chapters are very helpful in providing an overview of international arbitration in Brazil. And the article-by-article commentary provides an illuminating perspective on Brazil's arbitration statute.

The second part—*Specific Issues of Arbitration in Brazil*—contains 20 chapters and covers a wide range of issues. Two chapters address the development of Brazilian arbitration law: Chapter 3: *Consolidation of Arbitration by the Brazilian Courts: STF and STJ* by Ministro Ricardo Villas Boâs Cueva and Chapter 9: *International versus Domestic Awards* by Pedro Batista Martins. Three chapters address the role and authority of arbitrators in Brazil, both in terms of the law governing their authority and the Brazilian practice: Chapter 4: *Settlement Agreements and the Role of the Arbitral Tribunal* by Eleonora Coelho and Fabiana de Cerqueira Leite; Chapter 5: *Characteristics of Brazilian Arbitration Practice* by Marcela Tarré Bernini; Chapter 12: *Evidence Production and the Role of Arbitration* by Lauro Gama. Three chapters address perennial issues in the field of international arbitration that every country faces: Chapter 6: *Conservatory and Interim Measures* by Patrícia Shiguemi Kobayashi, Chapter 7: *Non-Signatories* by Felipe Vollbrecht Sperandino and Chapter 19: *Insolvency and Arbitration* by Márcio Souza Guimarães.

The book also contains a number of chapters on areas of practice that generate a good deal of arbitration in Brazil: (i) Chapter 11: *Project Finance, PPP and Concession*

13 These are: AMCHAM's Arbitration Centre (Centro de Arbitragem da AMCHAM—Brasil—AMCHAM); Chamber of Mediation, Conciliation and Arbitration of São Paulo—CIESP/ FIESP (Câmara de Mediação, Conciliação e Arbitragem CIESP/ FIESP); Stock Exchange Arbitration Chamber (Câmara de Arbitragem do Mercado (CAM do Mercado); Arbitration Chamber of Getúlio Vargas Foundation (Câmara de Arbitragem da Fundação Getúlio Vargas—CAM/ FGV); and Business Arbitration Chamber—Brazil (Câmara de Arbitragem Empresarial—Brasil (CAMARB)).

Agreements by Peter Sester; (ii) Chapter 13: *Agreements Between Shareholders and General Corporate Matters* by Nelson Eizirik; (iii) Chapter 14: *Stock Corporation Arbitration* by Peter Sester and Luís André Azevedo; (iv) Chapter 15: *Post M&A Arbitration* by Marcelo Roberto Ferro and Andre Pedro Garcia de Souza; (v) Chapter 16: *Commercial Contracts* by José Antonio Fichtner, André Luís Monteiro, and Marcela Levy; (vi) Chapter 17: *Construction Contracts Between Private Parties* by Augusto Tolentino and Chapter 18: *Construction Contracts Involving the Public Administration* by Gustavo Scheffer da Silveira and Eugenia Cristina Cleto Marolla; (vii) Chapter 20: *Labour Law Arbitration* by Luciano Benetti Timm and Fabiane Verçosa; (viii) Chapter 21: *Oil and Gas Arbitration* by Rodrigo Garcia de Fonseca; and (ix) Chapter 22: *Electric Energy Arbitration* by Renato Stephan Grion.

Thrown in for good measure are interesting chapters on *The Brazilian Arbitration Institutions* (Chapter 8) by Ana Carolina Weber and arbitration in other Portuguese-speaking countries—*Arbitration in the Portuguese Speaking World* (Chapter 10) by Mariana França Gouveia and Ana Carolina Dall'Agnol. The book also boasts an excellent introduction by leading arbitration practitioner Gary Born—*Introduction: The International Practitioner's Perception of Arbitration in Brazil*—a self-described "gringo view" (xlix)—that alone is worth the price of admission.

The book as a whole provides an excellent perspective on arbitration in Brazil. It tells us how Brazil addresses issues that every country faces—for example, we learn that, unlike the arbitration laws of many countries, the BAL contemplates that arbitrators might assist parties in the settlement of their dispute (210). It tells us that Brazil follows similar practices to other countries when it comes to the conduct of arbitration proceedings—for example, we learn that the Redfern Schedule is commonly use in Brazil (359). And it tells us of the many ways in which Brazil has distinctive practices—for example, in the prominent use of arbitration to resolve corporate disputes (Chapters 13 and 14).

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Having had some experience in Brazilian arbitrations over the past 15 years or so, I have become familiar with certain distinctive features of arbitration in Brazil. However, all these pieces of discrete knowledge that I have picked up along the way always felt like disconnected pieces of a jigsaw puzzle. Reading this book has helped me see how these distinct pieces of the puzzle fit together with the law and practice of international arbitration in Brazil as a whole. I highly recommend this excellent book. It will prove invaluable to anyone involved in international arbitration proceedings in Brazil.

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