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Arbitration in Brazil

Mr. Luiz Eduardo Martins Ferreira, Legal Counsel
Sao Paulo Stock Exchange (BOVESPA), Brazil

1. Arbitration in the Brazilian Law

Arbitration was institutionalised in Brazil by Law no. 9.307, of 23rd September 1996, and it was based on (i) The New York Convention on the Recognition and Execution of Foreigners Arbitral Awards ("Convention of New York") of 1958 (ratified by Brazil in 2001), (ii) The Inter-American Convention on International Commercial Arbitration of Panama of 1976 (ratified by Brazil in 1985) and (iii) the "Standard Law" of the United Nations Commission for the Development of the International Trade - UNICTRAL, of 1985 (the Brazilian law did not fully incorporate the "Standard Law").

2. Compulsory Nature of the Arbitration

Once included in the Arbitration Clause[1], in certain agreements (voluntary preliminary pact) the parties will be obliged to accomplish what they have promised, establishing the judgment by arbitration (renouncement to the court) to solve a dispute.

MARKET ARBITRATION PANEL

3. Institution

On July 27th 2001, the Sao Paulo Stock Exchange "BOVESPA" instituted the Market Arbitration Panel, aiming to offer an appropriate forum for the solution of issues relative to capital markets and issues especially of a corporate nature.

4. Goals of the Market Arbitration Panel

Firstly, the Market Arbitration Panel has the function of acting in the composition of conflicts arising in the special listing segments of BOVESPA, which are New Market and Level 2 of Corporate Governance.

However, i) increasing the arbitration institute, ii) the benefits provided by the panel and iii) the recent amendments in Brazilian legislation that made possible the inclusion of solution by arbitration in company by-laws (Article 109, paragraph 3[2] of Law no. 10.303, of 31st October, 2001, that amended the Corporate Law)[3] must all be taken into consideration. The Market Arbitration Panel has decided to authorise the adhesion of any persons, companies and others than those participants referred to in the special listing segments.

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1. The Arbitration Clause is the convention through which the parties of an agreement commit to submit to arbitration the disputes arising from such an agreement (Article 4 of Law no. 9.307/96)

2 . §3 The by-law can establish that the divergences between the shareholders and the company, or between the controlling shareholders and the minority shareholders, can be solved by arbitration, in the terms that specify.

3. Art. 109. Neither the by-law nor the General Meeting can deprive the shareholder of his rights

5. Compulsory Adhesion to The Market Arbitration Panel Rules

The companies listed in the New Market and Level 2 of Corporate Governance segments, as well as their controlling shareholders, administrators and Fiscal Council members, are obliged to adhere to the Market Arbitration Panel Rules.

6. Voluntary Adhesion to The Market Arbitration Panel Rules

Investors of companies listed in the New Market or Level 2 of Corporate Governance may voluntarily adhere to the Market Arbitration Panel Rules. Any other company, including those companies listed in the other special listing segments, (Level 1 of Corporate Governance) will also be eligible to adhere.

7. Procedure of Adhesion to The Market Arbitration Panel Rules

The signing of a "Term of Approval" is necessary to adhere to the Market Arbitration Panel Rules and will become the solution of the disputes by mandatory arbitration.

8. Proceedings of Voluntary Adhesion to The Market Arbitration Panel Rules

For those who are voluntarily interested in submitting a dispute to the Market Arbitration Panel Rules, it is necessary to include an Arbitration Clause or another specific document, referring expressly to the regulations of the Market Arbitration Panel. In addition, the participation also depends on the consent of the Chairman of the Market Arbitration Panel.

9. Controversies Susceptible to Solution in The Market Arbitration Panel

- Corporate rules;
- Rules applicable to capital markets

Differently to other Arbitration Centres, the Market Arbitration Panel counts on an essential characteristic, that is the maintenance of expert arbitrators in the most varied corporate issues and subjects relative to the capital market, whose degree of complexity and difficulty is quite considerable. In this sense, the Market Arbitration Panel will be able to solve controversies resulting of the application of the dispositions contained in the Corporate Law, in company by-laws, in the rules edited by the National Monetary Council, Brazilian Central Bank and Security and Exchange Commission of Brazil, as well as other applicable rules to the operation of the capital market in general.

10. Composition of The Market Arbitration Panel

In accordance with the regulation of the Market Arbitration Panel, the panel should be composed of at least 30 arbitrators, elected by BOVESPA's Board of Directors, for a two year term. Each arbitrator should comply with the following requirements (cumulatively):

- to possess an unblemished reputation and good knowledge of the capital market; and
- to be a capable person, having a minimum of 30 years of age.

Today, a board of 31 arbitrators make up the Market Arbitration Panel, with one Chairman and two Vice-Chairmen, among them lawyers, accountants, economists and administrators. The panel also includes a General Secretary (who does not make up part of the board of arbitrators).

To act in an arbitration procedure, the arbitrator does not need to necessarily integrate the board of arbitrators of the Market Arbitration Panel. The parties may appoint other persons as arbitrators, by submitting their names for approval to the Market Arbitration Panel Chairman and Vice-Chairmen.

The appointed arbitrator should not:

- be, or has been a controller, administrator, audit committee/fiscal council member, auditor, employee or representative of some of the litigant parties, in the last three years;
- be rendering services to some of the litigant parties, or to have rendered it within the last three years, except for offering opinions on issues not linked to the dispute; and
- have an economic or legal interest in the dispute.

11. Arbitration Proceedings

The Market Arbitration Panel maintains in operation three types of arbitration proceedings:

1. Ordinary Arbitration

Ordinary Arbitration should be used to solve disputes of a large complexity, if it involves very detailed and specific proceedings, and must have a maximum of five arbitrators (Arbitration Tribunal).

In summary, the party that claims to solve a certain dispute should direct a request to the Market Arbitration Panel indicating the parties that will participate, presenting the facts that originated the controversy, formulating the request, esteeming the involved values, as well as joining all the documents pertinent to aid the judge in making a decision.

Providing that the request complies with all of the demanded requirements, the requested party should present the defense to the Market Arbitration Panel within five days, and the requesting party will hear about the defense.

The parties will be notified to attend a first hearing in the attempt of a composition, and in case a settlement is reached, the respective settlement agreement will have the effect of an arbitration award. In case the composition fails, the existing preliminary subject will be resolved and the proceedings of an arbitrator's appointment will be initiated.

The appointed arbitrators should elaborate the Arbitration Term that should contain the summary of the dispute and the rules of the proceedings (Arbitration Commitment). After the correct signing of the Arbitration Term, evidence and producing of evidence (documental, oral, expert, testimonial) will begin. After this stage, the sentence should be pronounced, observing the time delay stipulated in the Arbitration Term.

2. Summary Arbitration

Summary Arbitration should be used to solve disputes of a simpler complexity.

On his own request, the party that claims for arbitration must indicate the proof that he intends to produce in the Settlement and Judgment Hearing. The Chairman of the Market Arbitration Panel promotes the draw of a single arbitrator, except if the parties make the indication by mutual consent, when the Chairman notifies the requested party and arrange a date for the hearing. In this hearing, there will be a composition attempt, and in case it is frustrated the Arbitration Term is immediately signed. In this case, the requested party presents his defence and evidence, and either at that moment, or within 48 hours, the arbitrator pronounces the sentence.

3. Ad Hoc Arbitration

In *Ad Hoc* Arbitration, or informal arbitration, the parties can establish private proceeding rules, as for the number of arbitrators and the use of another Centre, since they make it by mutual consent and through an Arbitration Term that should count on the Chairman's Market Arbitration Panel approval.

In all of the proceedings, the principles of the adversary, equality of the parties, impartiality of the arbitrators and free convincing are respected, besides being adopted the secrecy, the speed, the economy of resources and the expertise of the arbitrators.

12. Arbitration Award

The arbitration award should be issued for a majority of votes, in the terms defined by the parties in the Arbitration Term or, in the absence of a term stipulation, in the time period of 180 days counted from the commencement of the proceedings.

Before the signature of the sentence, the Arbitration Tribunal should submit a draft of the sentence to the appreciation of the Chairman or one of the Vice-Chairmen, who may prescribe modifications related to formal aspects and point out aspects relating to the merit of the controversy (without affecting the decision).

The extension of the arbitration decision is restricted to the parties of the proceeding. However there is the possibility of the company extending its effects to other shareholders that may plead the same situation.

From time to time, the decisions by arbitration will be published, including the names of the arbitrators who participated in the proceeding, but without disclosing the names of the parties or any other information that may be used to identify them.

13. Quarrels

Regarding specifically to what was requested, we have to add the following:

(i) in what form should the company's submission to arbitration take?

With the edition of Law no. 9.307/96, the Arbitration Clause (that precedes the controversy, disposing of the event of a future dispute) inserted a certain agreement becoming enforceable, being enough and capable of submitting the dispute to the arbitration proceeding, avoiding the state jurisdiction. In this way, when the dispute arises the parties shall ask for the establishment of arbitration, with the signature, in good faith - or, in having resistance, for a judicial decision - of the Arbitration Commitment, that it is the document that will establish the juridical-procedural outlines of the arbitration (summarising the dispute and the proceedings rules).

For Corporate Law to suit arbitration procedures, it is expressly established that companies may insert in their by-laws, any rule which submits the arbitration proceedings to the controversies among shareholders and their company, as well as among minority and controlling shareholders.

However, the effectiveness of the statutory Arbitration Clause is not completely accepted. For some jurists the simple provision of arbitration in the company's by-law is not enough to oblige the shareholders to submit themselves to an arbitration proceeding, being indispensable the signature of a specific Arbitration Clause. For others, the statutory clause is equivalent to an Arbitration Clause, becoming possible with the establishment of an arbitration proceeding immediately, i.e., as soon as a controversy with any shareholder arises.

Specifically in the case of the Market Arbitration Panel, the parties are obliged to adhere to its regulations and sign a Term of Approval that is equivalent to the Arbitration Clause, in accordance with item 7 above, in order to avoid any further discussion about the arbitration proceeding.

(ii) what changes in law and practice would be required to join officers and directors?

Corporate Law has foreseen only the one possibility of a public corporation's by-law implementing arbitration to solve conflicts among the shareholders and the company or among the controlling and minority shareholders (article 109, § 3º).

In the Market Arbitration Panel, in order to avoid any further discussion about the joining of officers and directors, it is necessary to sign the Term of Approval submitting the discussion to the arbitration procedure.

(iii) how are damages calculated?

Established in the arbitration proceeding, the respective sentence (or arbitration decision) should contain a "report" (delimitation of the request), the legal basis of the decision (reasons that convinced the Arbitration Tribunal) and the "decision" itself. In the last part of the arbitration award, the Tribunal solves the subject, resolving the conflict and refer only to the request of the winning party, declaring it proceeding or not, or deciding and specifying the sentence (example: "I impose the losing party the payment of R$___) and the form and execution terms of what remains to be resolved.

The decision by arbitration should be clear to avoid ambiguous or erroneous interpretations. Its imprecision can cause, for instance, an appeal requesting clarification of the decision or even the request to make the arbitration award not valid. There is also the possibility of a proceeding denominated "sentence revision" that aims for the prescription of modifications of the formal aspect of the decision, and even as for the merit of the controversy, by the Chairman or Vice-Chairmen of the institute. The respective Arbitration Tribunal should specify in the arbitration award the responsibility of the parties concerning the costs and expenses of the arbitration proceeding, as well as the fees of the arbitrators who have taken part.

(iv) how should multi-party arbitration be handled?

In the Arbitration Act, and also in the Market Arbitration Panel Rules, there is no difference in arbitration proceedings involving a single party on both sides of the proceeding, or that involves two or more parties on each side.

It is still possible to consider the possibility of grouping different arbitration proceedings that discuss the same issue and involve the same request or requested party. In this case, there should be

previously appraised the consequences of grouping the proceedings, especially the appointment of the arbitrators that would make up the respective Arbitration Tribunal.