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POTENTIAL ADVANTAGES AND DISADVANTAGES OF ARBITRATION V. LITIGATION IN BRAZIL: COSTS AND DURATION OF THE PROCEDURES

*Gustavo Sampaio Valverde**

I. INTRODUCTION

THIS paper intends to provide useful information in order to assist those negotiating contracts in Brazil to decide whether to submit potential future disputes to arbitration or litigation. The elements affecting this decision normally relate to factors such as the enforceability of the decision, partiality and risk of corruption, expertise of judges/arbitrators, and familiarity of the parties with the procedure. This paper focuses on two other very relevant factors, namely the costs and the duration of the procedures.

The importance of cost and duration and their influence in the contracting parties' choice between arbitration and litigation are somewhat self-evident. These two factors are also related to each other insofar as the longer the procedure, the more expensive it becomes. The costs incurred by the party will eventually reduce the value of the right being adjudicated to it. Even if the party later recovers part of these costs by virtue of the common rule in Brazil that places the economic burden of the procedures on the shoulders of the defeated party, this recovery is never in full.¹ The duration of the procedure also directly affects the value of the right, especially in those situations where the party would be able to obtain other investments at a rate of return higher than the legal or contractual interest rate accrued on the disputed right.

For many years observers have made record of most Latin American countries' reluctance to embrace arbitration as an effective means of dispute resolution. Even though the progress experienced by the region lately may not yet have changed the long-held foreign investors' suspicion, it is indisputable that improvements have been made. In recent years with the opening of their countries' economies, Latin America has

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1. See CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 20 (Brazil), available at <http://www.planalto.gov.br/ccivil/Leis/L5869.htm> [hereinafter C.P.C.].

sought to adopt dispute resolution mechanisms that might favor foreign investments. This effort has created a legal environment more favorable to arbitration, as foreign investors are usually reluctant in submitting the resolution of their disputes to national courts, and the local judiciary is seldom able to handle the ever-increasing complexity of business disputes. In following this tendency, Latin American countries started to both adhere to multilateral conventions on the recognition and enforcement of foreign arbitral awards and to review their domestic arbitration statutes. This renewed approach resulted in an increasing number of Latin American parties participating in international arbitration in the last decade, as well as in an increasing number of Latin American experts being appointed as arbitrators in the major arbitral tribunals around the world.

Brazil has followed the continental tendency toward arbitration and has indeed created a friendlier environment to arbitration within its borders. In the past ten years the country ratified the Inter-American Convention on International Commercial Arbitration (Panama Convention), the Inter-American Convention on Extraterritorial Effects of Foreign Judgment and Arbitral Awards (Montevideo Convention), and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).² The country also enacted a new arbitration statute in 1996 (Arbitration Statute), which had its constitutional conformity affirmed by the Brazilian Supreme Court (STF) later in 2001.³ Accompanying these improvements, and under this renewed legal framework, the number of arbitral procedures in Brazil has increased significantly.

This paper will use the Chamber of Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CCBC) and the Chamber of Arbitration and Mediation of Sao Paulo (FIESP) as illustrative examples of arbitration in Brazil, due both to their importance and to their location in Brazil's major business center of Sao Paulo. The CCBC is the oldest and the most traditional chamber in the country.⁴ The FIESP was established more recently but has been increasingly regarded as the major arbitration center in Brazil.⁵

2. See Panama Convention, Jan. 30, 1975, available at http://www.sice.oas.org/dispute/comarb/intl_conv/caicpae.asp; Montevideo Convention, May 8, 1979, available at http://www.camarb.com.br/areas/subareas_conteudo.aspx?subareano=148; New York Convention, July 6, 1988, available at http://www.camaradearbitragemsp.org.br/legislacao/convencao_inter.htm#nova.

3. See S.T.F.-SE-AgR 5206/EP-Espanha, Relator: Min. Sepulveda Pertence, 12.12.2001, 2149 S.T.F.J. 30.4.2004, 958 (Brazil), available at <http://www.stf.gov.br/jurisprudencia/nova/doc.asp?s1=000298589&p=1&d=SJUR&f=s&na=SE-AgR%205206%20EP%20-%20ESPANHA>.

4. See Câmara de Comércio Brasil-Canadá, <http://www.ccbc.org.br> (last visited Nov. 5, 2006).

5. See Câmara de Mediação e Arbitragem de São Paulo, <http://www.camaradearbitragemsp.org.br/>.

In spite of the noted development, a significant part of the international commercial arbitration procedures involving Latin American parties still take place in foreign venues. Even Latin American parties executing international transactions within the region are often puzzled by the multiplicity of conflicting arbitral rules. Furthermore, the absence of information as to local practices and the lack of tradition of the local arbitral tribunals are also factors contributing to the parties' general preference in conducting arbitration elsewhere.

This situation affects Brazil in particular because the country has traditionally been considered the black sheep of Latin American arbitration.⁶ Brazil ratified the Panama Convention only in 1995, the Montevideo Convention in 1997 and the New York Convention was not ratified until 2002. The Arbitration Statute does not follow the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration and embodies some unusual provisions that have raised some inconvenient issues not yet settled by domestic courts.⁷ These facts account for the country's lack of tradition and expertise and have a negative impact on the foreign investors' decision either to subject disputes to Brazilian arbitral bodies or choose Brazil as the venue for their arbitrations.⁸

In view of that, this paper will also consider an international body as a likely arbitration alternative for Latin American transactions. The international institution that is most often appointed to administer disputes arising out of international business transactions in Brazil is the International Chamber of Commerce (ICC). The ICC has increased its experience in the region and is fully equipped to conduct arbitrations in Portuguese, having several Brazilian experts integrating its body of arbitrators.⁹

Ad hoc arbitration is ruled out of the present analysis because institutional arbitration is normally considered as a more suitable choice for resolving international commercial disputes.¹⁰ Considering the focus of

6. See INTERNATIONAL ARBITRATION IN LATIN AMERICA ch. 1 (Nigel Blackaby et al. eds., Kluwer Law Int'l 2001).

7. One of these issues concerns the role that the *compromisso* perform in those contracts that either provides for the means for the constitution of the tribunal or appoints any existing institutional rule. Law No. 9.307, of Sept. 23, 1996, D.O., arts. 6, 7: 18897, Sept. 1996 (Brazil), available at http://www.camaradearbitragem.org.br/ingles/legislacao/frc_meio.htm [hereinafter Law No. 9.307].

8. See Carlos Nehring Netto, *The New Brazilian Arbitration Law*, in INT'L COM. ARB. IN LATIN AMERICA, THE ICC INT'L CT. OF ARB. BULL., SPEC. SUPP. 11 (Paris, ICC Publishing 1997).

9. See ICC, http://www.iccwbo.org/drs/english/expertise/all_topics.asp [hereinafter ICC].

10. The Brazilian Arbitration Statute provides in its article 5 that [i]f the parties, in the arbitration clause, select the rules of any arbitral institution or specialized entity, the arbitral proceedings shall be commenced and conducted pursuant to such rules; it being also possible that the parties determine in the arbitration clause itself, or in a separate document, the agreed procedure instituting the arbitral proceedings.

Law No. 9.307, *supra* note 7.

the paper, it might be argued that ad hoc arbitration tends to be less expensive because the parties do not bear the administrative expenses of the institutions and often can limit the value of arbitrators' fees. Additionally, ad hoc proceedings are more flexible, and therefore permit a more efficient management of time.

Nevertheless, institutional arbitration is backed by a permanent body, which contributes to a more reliable and effective mechanism to produce consistent and legally binding decisions.¹¹ The awards rendered by institutions have the imprimatur of an established and internationally acknowledged body, which may enhance recognition and enforcement of the award. Moreover, the arbitration rules of institutions are well-established and often provide for simple and predictable procedures. These rules discourage delays and dilatory tactics by the parties and may function as an important tool to speed up the arbitration, as incidental and unforeseen matters arising during the proceedings can be handled efficiently.

In the Brazilian legal environment, the institutional arbitration might have a further advantage in clarifying the dispensability of performing the "submission to arbitration" provided for in article 6 of the Arbitration Statute.¹² This article, coupled with article 7, states that "[i]f the parties fail to agree ahead of time on the form for instituting the arbitral proceedings" and there is "resistance as to the commencement of the arbitral proceedings" by either of the parties, the interested party must seek redress in Brazilian courts to enforce the arbitration agreement.¹³ This requirement may represent a significant waste of money and time. Parties opting for an institutional arbitration, whose rules will determine from the outset the form of instituting the arbitral proceedings, are likely to avoid such a situation.

In short, this paper assumes that in an international transaction the parties will assess the potential advantages and disadvantages of arbitration in light of either the Brazilian CCBC and FIESP, or the international ICC.

11. See Carlos J. Bianchi, *Practical Aspects of Enforcement of Foreign Arbitral Awards in Latin America*, 17-11 MEALY'S INT'L ARB. REP. 17 (2002).

12. Article 6 of the Brazilian Statute no. 9.307/96 provides that
[i]f the parties fail to agree ahead of time on the form for instituting the arbitral proceedings, the interested party shall notify the other party, either by mail or through any other means of communication with confirmation or receipt, of its intention to commence arbitral proceedings, fixing a date, time and place for the signature of the submission to arbitration[.]

and article 7 of the same statute provides that

[i]n case there is an arbitration clause but resistance as to the commencement of the arbitral proceedings, the interested party may request the Court to summon the other party to appear in Court so that the submission to arbitration may be signed; the judge shall order a special hearing for this purpose.

Law No. 9.307, *supra* note 7.

13. *Id.*

Further, the present analysis assumes that the transaction takes place in Sao Paulo, and thus in the absence of an arbitration clause, state courts would be competent to resolve any dispute under the relevant agreement. This assumption relies on the fact that Sao Paulo is the most economically developed state in the country and where the most important business transactions occur. On the other hand, Federal Courts in Brazil only assert jurisdiction over disputes that entail a federal entity interest, which is not usually the case in business transactions involving two private parties.¹⁴

A commercial dispute arising out of a contract where Sao Paulo has been chosen as the venue for litigation will initially be subject to a trial judge of a Sao Paulo district court.¹⁵ This judge is competent for holding commercial procedures between private parties, which does not involve any federal interest. The district court's decision might be challenged by either of the parties, through appeals addressed to the state court of appeal.¹⁶ The court of appeal has broad competence to review the district judge's decision, both on law and fact.¹⁷ If the court of appeal's decision addresses any issue of law contained in a federal statute, its decision may be subject to review by the Superior Tribunal de Justica (STJ) on the grounds of a special appeal.¹⁸ Similarly, if either the state court or the STJ's decision addresses any constitutional issues, it may be challenged by an extraordinary appeal to the STF.¹⁹ Due to the large amount of federal statutes existing in Brazil and the comprehensive nature of its Constitution, both the special and extraordinary appeals are largely used in most lawsuits held in the country.

Therefore, in order to properly assess the costs and duration of such a judicial procedure, it is necessary to take into account these four levels of decision making: the district court, the court of appeals, the STJ, and the STF.

In summary, this paper compares the costs and length of the arbitral proceedings in the CCBC, FIESP, and ICC, with the costs and length of judicial proceedings held in Brazil's Sao Paulo state courts, including the special and extraordinary appeals to the higher federal courts on the grounds of any federal or constitutional violation.

Section 2 of this paper addresses the issue of cost, and is subdivided into sub-sections 2.1, 2.2, 2.3, and 2.4. Sub-section 2.1 is further broken down into items A, B, and C, each of them dealing with the costs of arbitration in each of the CCBC, FIESP, and ICC. Sub-section 2.2 addresses the costs of litigation in the state of Sao Paulo as well as in the Brazilian

14. See CONSTITUICAO FEDERAL [C.F.] art. 109 (Brazil), available at https://www.planalto.gov.br/ccivil_03/Constituicao/Constitui%C3%A7ao.htm [hereinafter C.F.]

15. See *id.* at art. 125; C.P.C., *supra* note 1, at arts. 94, 95, & 100.

16. See C.P.C., *supra* note 1, at art. 513.

17. See *id.* at art. 515.

18. See C.F., *supra* note 14, at art. 105(III).

19. See *id.* at art. 102(III).

higher courts that are likely to handle a commercial dispute in the country. Sub-section 2.3 establishes a comparison between the costs of arbitration and litigation, and is also further subdivided into items A, B, and C to compare the costs involved in claims of different sizes: \$1 million, \$30 million, and \$100 million. Sub-section 2.4 provides analysis and comments on the data collected.

Section 3 of this paper deals with the issue of duration of the proceedings, and is subdivided into Sub-sections 3.1, 3.2, and 3.3. Sub-section 3.1 covers the duration of arbitration procedures in each of the CCBC, FIESP, and ICC. Sub-section 3.2 deals with the duration of litigation procedures in the state of Sao Paulo and Brazilian higher courts. Sub-section 3.3 provides analysis and comments on the findings.

Section 4 makes a comparison between arbitration and litigation on the basis of both cost and timing, and is also subdivided into sub-sections 4.1, 4.2, and 4.3. Sub-section 4.1 addresses claims of \$1 million, sub-section 4.2 addresses claims of \$30 million, and sub-section 4.3 addresses claims of \$100 million.

Finally, section 5 of the paper provides general guidelines based on the data collected and analyzed throughout the text.

II. COSTS

A. ARBITRATION

1. CCBC

The CCBC was created in 1979 as the first body holding arbitration procedures in Brazil.²⁰ As of December 2005, it had administered thirty-eight arbitral procedures in matters related to the construction industry, execution of contracts, financing, corporate disputes, sales contracts, and more.²¹ The CCBC has established a close relationship with the Sao Paulo Stock Exchange and with its highly regarded companies in terms of corporate governance, therefore being considered one of the most suitable bodies to hold corporate and financial market disputes in Brazil.²²

The cost of an arbitration procedure at the CCBC comprises: arbitrators' fees, court fees, experts fees, and other expenses.²³

a. Arbitrators' Fees

The arbitrators' fees are priced at \$162 per hour for each arbitrator working on a CCBC procedure.²⁴ This fee is paid directly to the arbitrators. The minimum pre-determined amount of time in each arbitration

20. See Câmara de Comércio Brasil-Canadá,, <http://www.ccbc.org.br/arbitragem1.asp?subcategoria=historico>.

21. See *id.*

22. See *id.*

23. Câmara de Comércio Brasil-Canadá Table of Arbitration Fees and Costs, <http://www.ccbc.org.br/arbitragem1.asp?subcategoria=tabela%20de%20custos#>.

24. The exchange rate Real/Dollar has fluctuated a little lately. For instance, the ratio on 11/11/2005 was R\$2,16/US\$1.00 and on 08/30/2006 was R\$2,13/US\$1.00. For the

procedure is 100 hours per arbitrator.²⁵

b. Court Fees

Apart from the arbitrators' fees, the parties must pay a court fee in the amount of \$925 for each month the arbitration is outstanding.²⁶ The court fee is payable directly to the chamber with the caveat that those companies associated with the CCBC will receive a 15 percent discount on this fee.²⁷

c. Expert Fees

If the arbitration requires any technical work by an expert, the parties will have to pay the expert fee, at a value fixed according to the nature of each procedure.²⁸

d. Other Expenses

All expenses incurred by the arbitrators or the experts, such as travel expenses, hotel, food, and so forth, will be charged to the party who has required the act giving rise to the expense, or to both parties if the act has been required directly by the CCBC.²⁹

2. *FIESP*

Despite the fact that it was created only nine years ago, the FIESP has already administered thirty-four arbitrations, ten that are still currently outstanding.³⁰ Compared to the CCBC, the matters subject to the FIESP are somewhat broader, but also of considerable value, complexity, and importance.

At the FIESP chamber the parties will incur the following costs: arbitrators' fees, registration fee, administration fee, and other expenses.³¹

a. Arbitrators' Fees

The arbitrators' fee at the FIESP will be calculated based on a rate of \$162 per hour for each arbitrator.³² The minimum amount of hours required in each arbitration varies with the value of the claim, and shall be determined in accordance with the following table:³³

purposes of the conversions herein the paper uses the former ratio. See Central Bank of Brazil, <http://www.bcb.gov.br/>.

25. See Câmara de Comércio Brasil-Canadá Table of Arbitration Fees and Costs, *supra* note 23.

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

30. See Câmara de Mediação e Arbitragem de São Paulo, <http://www.camaradearbitragemsp.org.br/>.

31. See TABLE OF ARBITRATOR COSTS AND FEES OF THE FIESP CHAMBER, available at <http://www.camaradearbitragemsp.org.br/servico/tabela.htm>.

32. *See id.* at art. 3(2).

33. *See id.* at art. 3(1).

Value of the Claim	Minimum of hours per arbitrator
Up to \$46,296	30
From \$46,297 to \$231,481	50
From \$231,482 to \$462,962	80
Above \$462,963	100

b. Registration Fee

The registration fee is due upon notification to commence the arbitration. This fee is calculated according to the value of the claim as follows:³⁴

Value of the Case (in US Dollars)	Registration Fee (in US Dollars)
Up to 46,296	231
From 46,297 to 231,481	462
From 231,482 to 462,962	925
Above 462,962	1,388

c. Administration Fee

The party initiating the arbitration will pay the FIESP the amount corresponding to 2 percent of the value of the disputed right as an administration fee.³⁵ This fee is due upon the signing of the Term of Arbitration referred to in article 3 of the FIESP Rules.³⁶ If no value has been assigned to the case, the chamber will decide what amount shall be collected as the administration fee.³⁷ This fee is capped at \$27,777, regardless of the amount in dispute, and the minimum amount that shall be collected there under is \$2,777.³⁸

d. Other Expenses

In addition to these fees, the parties are also responsible for paying all expenses necessary for the adequate conduction of the arbitration.³⁹ Among these expenses are those incurred by the arbitrators in the execution of their duties, expert examination fees, travel expenses, expenses

34. See *id.* at art. 1(1).

35. See *id.* at art. 2(1).

36. See FIESP RULES, art. 3, available at http://www.camaradearbitragem.org.br/ingles/documentos/arbitration_rules.pdf

37. See TABLE OF ARBITRATOR COSTS AND FEES OF THE FIESP CHAMBER, *supra* note 31, at art. 2.

38. See *id.* at art. 2(1)(a), (b).

39. See *id.* at art. 4.

dealing with examinations and hearings outside the venue of the arbitration, and expenses related to the holding of hearings in non-business hours.⁴⁰

3. ICC

The ICC is the world's leading chamber in the field of international commercial arbitration. It was established in 1923 and has pioneered the holding of modern arbitration procedures in the world.⁴¹ Since its creation, the ICC has administered over 13,000 international arbitration disputes involving parties from more than 170 countries.⁴²

The costs of arbitration at the ICC include: arbitrators fees', administrative costs, experts fees, and other expenses.⁴³

a. Arbitrators Fees

The arbitrators' fees are managed and fixed by the court on the basis of the sum in dispute, according to the following scale:⁴⁴

Sum in dispute (in US Dollars)	Fees	
	Minimum	Maximum
Up to 50,000	\$2,500	17%
From 50,001 to 100,000	2%	11%
From 100,001 to 500,000	1%	5.5%
From 500,001 to 1,000,000	0.75%	3.50%
From 1,000,001 to 2,000,000	0.5%	2.75%
From 2,000,001 to 5,000,000	0.25%	1.12%
From 5,000,001 to 10,000,000	0.10%	0.616%
From 10,000,001 to 50,000,000	0.05%	0.193%
From 50,000,001 to 80,000,000	0.03%	0.136%
From 80,000,001 to 100,000,000	0.02%	0.112%
Over 100,000,000	0.01%	0.056%

To calculate the arbitrators' fee, the amount corresponding to each successive row of the table should be worked out separately so that for each slice of value, the correspondent percentage shall be applied. These partial amounts will be added together to determine the total amount of the arbitrators' fee.

40. *See id.*

41. *See ICC, supra* note 9.

42. *See id.*

43. *See ICC, RULES OF ARBITRATION (2003), APPENDIX III: ARBITRATION COSTS AND FEES, available at* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf [hereinafter ICC RULES OF ARBITRATION].

44. *See id.*

In determining the arbitrators' fee, the ICC will also take into consideration the diligence of the arbitrators, the time spent, the rapidity of the proceedings, and the complexity of the dispute.⁴⁵ The fee is multiplied by the number of arbitrators, up to a maximum that normally will not exceed three times the fees of one arbitrator.

Under exceptional circumstances, the court may fix the arbitrators' fees at a figure higher or lower than those contained in the scale above.⁴⁶ Although arbitrators in the ICC are not intended to be compensated on an hourly basis, in complex cases where they have devoted substantial time to the proceeding and would otherwise be under-compensated, the ICC may fix the fees above the scale.⁴⁷ In practice, the court is often reluctant to do this, as one of the main advantages of the scale is to provide predictability for the parties as to the costs of the procedure. On the other hand, there have been few, if any, cases where the ICC has fixed the fees of the arbitrators below the minimum figure set forth in the scale.

Under the ICC Rules, if the parties do not state the sum in dispute, the court will fix the arbitrators' fee at its discretion.

b. Administrative Costs

The administrative costs represent the fee charged by the ICC to administer an arbitration. The ICC administrative costs cover not only the services rendered by the chamber, but also all disbursements in connection with a particular case (e.g., postage, international courier services, telephone, faxes, or photocopies).

Note that the so-called registration fee is the non-refundable amount of \$2,500 and payable at the request of the arbitration is actually an advance of the administrative costs. Accordingly, it will be considered in the final determination of the amount owed as administrative costs.

The court will fix the administrative costs according to the following scale:⁴⁸

In order to determine the value of the administrative costs, the amounts calculated for each successive slice of the sum in dispute will be added together, observing the flat cap of \$88,800 for disputes over \$80 million.⁴⁹

Where the parties do not state the sum in dispute, the ICC will fix it at its discretion.⁵⁰ As in the case of the arbitrators' fee, in exceptional circumstances the court may fix the administrative costs at a lower or higher figure than those resulting from the application of the scale above, provided that these costs do not exceed \$88,000.⁵¹

45. *See id.* at art. 2(2).

46. *See id.* at art. 2(1).

47. *See id.* at art. 2(2).

48. *See id.*

49. *See id.*

50. *See id.* at art 2(5).

51. *See id.* at art. 2(2).

Sum in dispute (in US Dollars)	Administrative Expenses
Up to 50,000	\$2,500
From 50,001 to 100,00	3.5%
From 100,001 to 500,000	1.7%
From 500,001 to 1,000,000	1.15%
From 1,000,001 to 2,000,000	0.7%
From 2,000,001 to 5,000,000	0.3%
From 5,000,001 to 10,000,000	0.2%
From 10,000,001 to 50,000,000	0.07%
From 50,000,001 to 80,000,000	0.06%
Over 80,000,000	\$88,800

c. Experts' Fees

In the cases where an expert exam is ordered, the ICC will fix the fees and expenses of the expert to be paid by the parties.⁵² The administrative fees do not cover the experts' fees.

d. Other Expenses

For additional services, the ICC will charge administrative expenses at its discretion, which cannot exceed the amount of \$10,000.⁵³ The parties will also be responsible for the payment of any other expenses incurred in relation to the procedure, like the arbitrators' and experts' expenses.⁵⁴ These expenses consist primarily of costs for travel and accommodation in situations where the arbitrators and experts do not live near the location of the proceedings. The expenses also comprise of costs of conducting hearings, telephone calls, faxes, photocopies, translations, and transcript of the proceedings. In addition, there may be expenses incurred by experts appointed to work on the proceedings or by a secretary/registrar.

B. LITIGATION

According to article 4(1) of the Judiciary Tax Statute n. 11.608/03, in the State of Sao Paulo, the plaintiff will be required to pay a judiciary tax upon the filing of a lawsuit in the amount equivalent to 1 percent of the right in dispute.⁵⁵ At this stage, the tax is calculated based on the value

52. *See id.* at arts. 1(11) & 31(1).

53. *See id.* at art. 3.

54. *See id.* at art. 31(1).

55. Pursuant to the rules of Brazilian civil procedure, the party who loses the case shall reimburse the other party for all taxes and other expenses incurred by the latter in the lawsuit.

assigned to the lawsuit by the plaintiff.⁵⁶ This value is sometimes arbitrary because the elements necessary for its precise determination are not yet settled. For this reason, it remains under judicial scrutiny and might be completed anytime upon judicial request or at the end of the procedure.

In addition to that judiciary tax, article 4(2) of the statute provides that upon the filing of an appeal to the state court of appeals the appellant will be required to pay the amount corresponding to 2 percent of the value settled by the trial decision.⁵⁷ Without this payment, the court will not assert jurisdiction over the appeal and the trial judge's decision will become definitive (*res judicata*).⁵⁸ In the case of an appeal the party will also be required to pay for the transportation of the filing back and forth to the court of appeals, in the amount of eight dollars for each filing to be carried.

Finally, according to article 4(3) of the statute, the party executing the final decision will still have to pay another 1 percent over the value being executed in order to obtain the ultimate satisfaction of its right.⁵⁹

Sao Paulo's Judiciary Tax Statute also sets a floor and a ceiling for those values based on the value of the state fiscal unit (UFESP).⁶⁰ The first paragraph of article 4 states that in each of the above-mentioned events the minimum amount to be collected will correspond to five UFESPs, and the maximum amount will correspond to 3,000 UFESPs.⁶¹ As of August 2006, the value of each UFESP corresponded roughly to six dollars, meaning in practical terms that the value to be collected by the parties during this month in each of the events referred to above would vary from thirty dollars up to \$18,000.⁶²

In the STJ there is a general exemption for judicial taxes.⁶³ Therefore, parties will not be required to pay any amount whatsoever in this regard. The only expense the parties will incur in this court is the cost of transportation of the filings, according to a scale based on the amount of pages

56. See Law No. 11.608, of Dec. 29, 2003, D.O.: 1, Dec. 2003 (Brazil), available at http://portal.tj.sp.gov.br/wps/portal/tj.noticia.visualizar?noticia_id=32958&urlVoltar=/wps/portal/tj.noticia.categoria?categoria=72&titulo=&mostrarLista=true&listarReduzido=4&listarAmplio=TUDO&tituloEstatico=&urlEstatico=&linkEstatico=&rodape= [hereinafter Law No. 11.608].

57. See *id.*

58. See *id.*

59. The judiciary tax does not cover the expenses set forth in article 2 of statute no. 11.608/03, which refers to publications, summons, auctions, warranties, expert fees, and office fees.

60. UPESP, available at http://www.assovesp.org.br/sistema/bin/pg_dinamica.php?id_pag=320.

61. See Law No. 11.608, *supra* note 56.

62. The parties will be required to collect another tax should they file an appeal to challenge any interlocutory decision. In these cases, the tax charged for this specific act corresponds to 10 UFESPs, which represents approximately sixty dollars. The party will also have to pay approximately four dollars for the transportation of each filing. *Id.* at art. 4(5).

63. See INTERNAL REGULATION OF THE SUPERIOR TRIBUNAL DE JUSTICA, art. 12, available at http://www.stj.gov.br/portal_stj/publicacao/engine.wsp?tmp.area=340.

in the filings and its weight.⁶⁴ For a process weighing sixty-six pounds, for example, the party will be required to pay \$125 in transportation fees.⁶⁵

In the STF, upon the filing of the extraordinary appeal, the party will be required to pay a tax in the fixed amount of forty-four dollars, regardless of the value in dispute.⁶⁶ Furthermore, a transportation fee will also be charged according to the weight of the filings. For the same sixty-six pound filling, the party will be required to pay \$127.⁶⁷

C. COMPARISON BETWEEN ARBITRATION AND LITIGATION

In order to compare the data collected above in an attempt to extract from it a useful guideline, it is necessary to make some preliminary assumptions.

This comparison will consider an ordinary procedure. No unusual circumstances (e.g., incidents, injunctions) that vary from a standard process for disputing a commercial matter will be taken into account.

This comparison will not take into consideration any expense incurred by the parties apart from the official costs paid directly to the courts. The reason for this assumption is that the other expenses (e.g., arbitrators' expenses, expert fees and expenses, general administrative expenses) will be incurred regardless of the court that is holding the procedure, and the difference in value among the courts would not be material for the purposes of this paper.

Apart from the CCBC, the main criterion employed by the courts in determining how much they will charge for their services is the value of the disputed right. Following this same criterion it seems appropriate to consider three different scenarios: (1) the first involving a small claim of \$1 million, (2) the second involving a medium-sized claim of \$30 million, and (3) the last involving a large claim of \$100 million. In each of these scenarios the comparison will aim to determine how much the procedure would cost in each of the aforesaid courts.

Despite the difference in value, it will be assumed that the three disputes have the same level of complexity. This assumption will not distort the results because the three different scenarios are not being cross-compared.⁶⁸

The level of complexity assumed for the disputes will be a low one, which apart from creating a more manageable basis for comparison, will

64. See S.T.F.J., No. 303, 25.01.05 (Brazil), available at <http://www.stf.gov.br/institucional/resolucoes/DocumentoRES.asp?documento=95>.

65. See *id.*

66. See *id.*

67. See *id.*

68. Although as a general rule the complexity of the procedure implies a more costly arbitration, in some courts this factor may have a more direct impact on the costs of the procedure. For instance, whereas it is indifferent in the CCBC and in case of litigation, the complexity of the dispute will be relevant in determining the arbitrators' fee under the rules of the ICC.

not distort the results because it will have a very similar impact in each of the arbitration chambers.

For the three courts of arbitration, the arbitrators' fee will be calculated for just one arbitrator. Finally, the paper will not take into consideration the charges for transportation of filings or the tax paid for the filing of an extraordinary appeal at the STF, due to their immateriality.

1. A Claim of \$1 Million

a. CCBC

If a small claim of \$1 million is subject to arbitration in the CCBC, the parties will have to pay an arbitrators' fee in the amount of \$16,203. Due to the assumed low complexity of the procedure, a minimum of 100 hours of work is being considered at a cost of \$162 per hour.

The parties will also be required to pay a court fee in the amount of \$16,666. At the CCBC the court fee is determined based on the duration of the procedure. As will be discussed below, the average duration of a procedure in this court is eighteen months, at a rate of \$925 per month.

b. FIESP

At the FIESP, the same \$1 million dispute will require an arbitrators' fee of \$16,200. The value of the claim in this chamber will impact the determination of the arbitrators' fee. Nonetheless, in a \$1 million claim the arbitrator fees will already be set at the highest level, requiring 100 hours of work at a rate of \$162 per hour.

The registration fee in this case will be \$925, determined according to the value of the claim. The parties will also have to pay an administration fee in the amount of \$20,000, which also varies according to the amount in dispute.

c. ICC

In the ICC, a \$1 million claim will result in an arbitrators' fee of \$11,250. The administrative costs for this claim will be \$16,800. As mentioned above, both costs will be calculated based on the value of the claim.

d. Litigation

In the Sao Paulo district court, the parties in a \$1 million dispute will collect the initial tax of \$4,629. Upon filing the appeal at the court of appeals there will be an additional collection of \$9,259. Finally, at the end of the procedure the parties will pay an extra \$4,629, totaling taxes in the amount of \$18,518.

2. *A Claim of \$30 Million*

a. CCBC

The criteria for calculation of both the arbitrators' fee and the court fee in the CCBC take into account the amount of work to be performed by the arbitrators and the duration of the procedure. Thus, these costs will not vary with the increase of the amount in dispute. The result is that for this medium-sized claim the parties will still pay \$16,203 for the arbitrators' fee and \$16,666 for the court fee, under the same assumptions referred to above.

b. FIESP

A \$30 million dispute in the FIESP will cost the same \$16,200 in terms of arbitrators' fee. The fee considered in this case is again 100 hours at a rate of \$162 per hour. It shall be conceded that the FIESP will likely set the arbitrator fees at a higher figure in this case due to the higher value of the claim (in comparison with the \$1 million claim considered before). Nevertheless, the lack of objective criteria thereon forces the paper to consider the higher amount of hours set forth in the table transcribed above.

In this medium-sized claim both the registration fee and the administration fee will have reached the respective caps of these values. The former will be \$1,388 and the latter will amount will be \$27,777.

c. ICC

In the ICC, a \$30 million dispute will cost the parties \$38,750 in arbitrators' fees, and \$56,800 in administrative costs.

d. Litigation

In a lawsuit of \$30 million the aforementioned limit contained in the Judiciary Tax Statute will have been reached in all the events provided for therein. Thus, the tax initially collected will amount to \$18,472. Upon the presentation of an appeal, another \$18,472 will be due. Upon the execution an extra \$18,472 will be collected. In the present simulation the parties will collect a total of \$55,416.

3. *A Claim of \$100,000,000*

a. CCBC

As the CCBC fees do not vary with the increase of the amount in dispute, in this large claim the parties will still pay \$16,203 for the arbitrators' fee and \$16,666 for the court fee.

b. FIESP

Assuming a flat 100 hours of work at a rate of \$162 per hour for claims higher than \$1 million, the arbitrators' fee will remain the same \$16,200.

On the other hand, at this level both the registration and administration fees are capped at \$1,388 and \$27,777, respectively.

c. ICC

The arbitrators' fee in a \$100 million claim in the ICC will be \$61,750. In a claim of such value the administration costs will have reached the limit of the scale, which corresponds to a flat value of \$88,800.

d. Litigation

Due to the cap provided for in the Judiciary Tax Statute, a \$100 million claim will cost the same \$55,416 paid for the \$30 million claim above considered.

D. ANALYSIS AND COMMENTS

Despite the inherent limits of the present schematic analysis, it is possible to come up with some conclusions and guidelines from the different scenarios illustrated above.

One may assert, for instance, that in disputes involving small values, the CCBC is definitely not the best choice. As the CCBC does not fix its cost according to the amount in dispute, but rather on the basis of the time expended in the procedure, the smaller the value of the claim, the relatively more expensive this court becomes. Conversely, as the value increases, the CCBC turns out to be a good option. In a \$1 million claim, the CCBC is already less expensive than the FIESP. In a \$30 million dispute, this court is the least expensive among all four alternatives considered herein, and in a large suit of \$100 million, it becomes even more attractive for its fixed cost.

All three other courts follow a different pattern as their costs increase based on the increase of the amount in dispute.⁶⁹ The difference corresponds to the absolute value charged by each of them.

In small claims of \$1 million, litigation is the least expensive choice. At this level the FIESP is more expensive than the ICC.

But in medium-sized claims of \$30 million, the ICC becomes substantially more expensive than the FIESP, which at this level is already cheaper than litigation. But it is important to note that at this point the litigation cost has already reached its threshold, meaning that this alternative will become relatively cheaper as the amount in dispute increases.

69. In fixing the arbitrators' fee in accordance with the sum in dispute, the FIESP and the ICC differ from some leading international arbitration institutions such as the American Arbitration Association, the London Court of International Arbitration, and the Arbitration Institute of the Stockholm Chamber of Commerce. This method has the main advantage of providing the parties from the outset with an idea of the costs they are likely to incur. This system also discourages both the undue inflation of the amount of the party's claims and the submission of frivolous claims, which may lead to a more efficient arbitration.

In large disputes of \$100 million, the FIESP remains the cheapest alternative. But at this point the FIESP costs will also have topped their threshold and will no longer increase with the increase of the value in dispute. At this level the ICC remains the most expensive of the alternatives, and its cost will continue to increase because there is no cap for the arbitrators' fees in the ICC.

These examples confirm the reputation of the ICC for being an expensive choice in comparison with litigation and other arbitral institutions. This raises the question of whether the sum in dispute should really determine the costs of the arbitration. In a different scale the same problem may also affect the FIESP, insofar as it also bases its fees and costs on the sum in dispute. Some argue that the ideal choice is to base the remuneration of arbitrators solely on time spent, more or less as the CCBC does. This method would increase arbitrators' remuneration in small and medium-sized arbitrations, but at the same time it would not impact considerably the arbitrations involving large sums. The assumption is that the latter kind of procedure is often much more extensive and time consuming, which in the end would be reflected in the arbitrators' fees. All in all, it is important to note that both the FIESP and ICC rules leave some room for a court's evaluation upon fixing the value of the arbitrators' fee, which may be used to correct inevitable distortions.

The cost of arbitration is usually believed to be high in comparison both with the amount in dispute and the costs of subjecting a similar proceeding to litigation. This tendency, however, is not confirmed by the present analysis, at least insofar as when the CCBC or the FIESP is selected to handle the arbitration. Furthermore, unlike the costs involved in litigation, the overall arbitration costs are more freely manageable by the parties through the reduction of the number of arbitrators, simplification of the procedure, and the adequate limitation of the scope of the dispute at the outset of the proceeding.

Because the arbitrators' fees and expenses represent a significant cost in arbitration, savings might be obtained if a sole arbitrator is appointed, especially in cases that do not involve much complexity or high sums. This approach would not only reduce arbitrators' fees but also make the procedure simpler and significantly cheaper.

The high costs involved in arbitration derive sometimes from the manner in which the procedure is framed and from procedural moves taken by the parties. Lack of skill, dilatory tactics, and unsuitable procedural rules may amount to a raise in arbitration costs. Even in institutional arbitrations, the parties can go about solving these problems by adapting the procedural rules so as to make them more suitable and efficient under the specific circumstances.

The adequate identification and delimitation of the issues in dispute can also have a considerable impact on the costs of the arbitration. The identification of such issues should be attempted at the onset of the procedure. After the first exchange of pleadings the court should be in a

position to precisely identify the issues involved in the dispute.⁷⁰ Of course, during or after the hearings a new issue may arise and adjustments may be necessary. As these adjustments are costly and cause delays, the fewer issues arising during the procedure, the cheaper and quicker the procedure will become.

In contrast, litigation does not provide any of these flexibilities. The parties have no control over the judges or over the procedural rules governing the proceedings. As a result, the parties are usually unable to act toward the reduction of the litigation costs. Even so, the present analysis shows that litigation in Brazil is not often called an over-expensive procedure. On the contrary, depending on the nature of the dispute, it may become cheaper than arbitration.

According to the elements above, the best option available for the parties in disputes involving small claims is litigation or FIESP. In medium- and large-sized claims the FIESP remains a very attractive court. Perhaps this helps to explain the increasing demand for the FIESP services in Brazil.

The other domestic court of arbitration, the CCBC, is the least expensive alternative for medium- and large-sized claims such as those above considered. As noted before, the CCBC costs do not follow the sum in dispute, which makes this court even more attractive as the sum in dispute increases. In contrast, for small disputes the CCBC is the most expensive alternative and might be the last option of parties choosing an arbitral tribunal in Brazil.

The ICC is the most expensive court for medium- and large-sized claims. Even when the sum in dispute is small, this tribunal remains poorly positioned as the second most expensive choice. Based on this, it is fair to conclude that parties appointing an arbitral court in Brazil would never be willing to choose the ICC if the sole criterion for such a decision was the cost involved therein.

Finally, litigation is the least expensive alternative when small sums are in dispute. When medium and large sums come into play, however, the litigation becomes the second most expensive choice. Only the ICC is more expensive than litigation in Brazil in such claims.

III. DURATION OF THE PROCEDURES

The present analysis will not take into account the time spent in the execution of decisions. According to Brazilian civil procedure, after obtaining a decision settling the merits of the dispute and absent voluntary performance, the winning party will have to file another lawsuit to enforce the decision.⁷¹ The outcome of this latter procedure will largely depend on the particular characteristics of the defeated party (e.g., its

70. To some extent the Term of Reference provided for in the ICC Rules is an important tool to identify the issues involved in the procedure from the outset.

71. See C.P.C., *supra* note 1, at art. 566.

ability to pay the award, its patrimonial profile, the existence of assets for seizing). As the execution of the award represents a necessary step in both arbitral and judicial proceedings, this paper will not consider the time spent there under.

Thus, the length of both procedures will be assessed from the filing of the claim until the last act preceding the filing of the execution process. In the case of arbitration, this last act may be the homologation of the award by the STJ, pursuant to article 35 of the Brazilian Arbitration Statute n. 9.307/96. In judicial proceedings, this act is the final decision in the lawsuit, which is no longer subject to any kind of appeal.⁷²

A. ARBITRATION

The remarkable common feature of arbitration, and perhaps its most appealing advantage, is the rapidity of its proceedings.

From a sheer theoretical perspective, the FIESP and ICC rules furnish a higher incentive for a faster procedure as compared to the CCBC rules. As seen above, the arbitrators' fee and the court fees in the CCBC will be substantially higher in longer proceedings, which may present an incentive for the arbitrators and the court to slow down the pace of the proceedings. The opposite applies to the FIESP and the ICC, in which the longer the proceeding the worse for arbitrators and courts in terms of fees collected. This may represent a strong incentive for them to speed up the proceedings and reach an award as soon as possible.

In the CCBC the estimated average length of an ordinary proceeding is approximately eighteen months.⁷³ In the FIESP the estimated average length is approximately only seven months.⁷⁴ But this amazing mark might derive from the fact that out of the twenty processes already finished at the FIESP Chamber, eight of them were settled by agreement and four were extinguished either by judicial decisions or by a voluntary act of the party.

Under the ICC the proceedings seem to take a bit longer. As stated by Emmanuel Jolivet, the ICC's General Counsel,

ICC has not published any statistics on the average duration of arbitration cases administered under its auspices. It seems however that the average duration is around two year [sic]. This of course takes into account the cases that are suspended. It is important to note that the parties and their counsel are primarily responsible for the length of the proceedings.⁷⁵

The apparently longer proceedings in the ICC might be explained by the higher complexity and value of the cases subject to it in comparison with those handled by the CCBC and FIESP. It is also important to note

72. *See id.* at art. 467.

73. The CCBC does not provide official statistics in this regard.

74. The FIESP does not provide official statistics in this regard.

75. E-mail from Emmanuel Jolivet, ICC General Counsel, to Gustavo Valverde (Nov. 2, 2005, 10:32:39 EST) (on file with author).

that the ICC has administered over 13,000 cases, while the other two chambers have administered only a few dozen. In these circumstances, any estimation as to the ICC ends up being much more reliable than those estimations concerning the CCBC or FIESP.

In any event, assuming two years as the average duration of an arbitration already reveals an impressive feature of this kind of procedure. As shown below, this makes the arbitration process a speedy alternative for settling conflicts.

As noted above regarding the costs of arbitration, the parties also have much flexibility in designing the arbitral proceeding so as to make it quicker. The ICC Rules, for instance, expressly authorizes that the parties “agree to shorten the various time limits set out” therein.⁷⁶ Here again the parties can manage the duration of the proceedings by making proper decisions concerning the number of arbitrators, the simplification of the procedure, and the limitation of the scope of the dispute.

The conduct of the parties and their counsels during the proceedings will also be critical in determining the proceedings’ length. If the parties agree on a fast-track proceeding and act accordingly, the duration of the case can be significantly diminished. Moreover, the courts usually have the power to step-in and replace arbitrators if they fail to fulfill their duties, which obviously leads to the quick solution of the controversy.

The law and rules may also play an important role in expediting the proceedings by imposing important constraints to the lengthening of the arbitral procedure. Article 11(III) of the Arbitration Statute provides that the agreement through which the parties submit a dispute to arbitration may indicate “the time limit for the rendering of the arbitral award.”⁷⁷ According to article 23, “[t]he arbitral award shall be rendered within the time limit stipulated by the parties” or “within six months,” if no express stipulation is provided for in the arbitration agreement or through mutual consent of the parties and arbitrators.⁷⁸ Pursuant to Article 32(VII), the arbitral award will be null and void if it is made after this time limit.⁷⁹

The ICC Rules also convey a great significance in regulating the timing of the arbitration. Article 18(4) provides that “[w]hen drawing up the Terms of Reference, or as soon as possible thereafter” and “after having consulted the parties,” the arbitral tribunal “shall establish in a separate document a provisional timetable that it intends to follow.” Article 24(1)(2) further provides that “[t]he time limit within which the Arbitral Tribunal must render its final Award is six months,” which may be extended by the court under certain circumstances.⁸⁰

76. See ICC RULES OF ARBITRATION, *supra* note 43.

77. See Law No. 9.307, *supra* note 7.

78. See *id.*

79. See *id.*

80. See ICC RULES OF ARBITRATION, *supra* note 43.

Another decisive issue regarding the length of arbitration in Brazil relates to the recognition of foreign awards. Article 34 of the Arbitration Statute characterizes foreign arbitral awards as those “rendered outside of the national territory.”⁸¹ In such cases, article 35 provides that “[i]n order to be recognized” in Brazil the foreign award is subject to homologation by the STJ.⁸²

Article 35 of the Arbitration Statute originally provided that this homologation would be granted by the STF. According to the Amendment to the Brazilian Constitution n. 45/04 (the so-called Judiciary Reform), jurisdiction over the recognition and enforcement of foreign awards was shifted from the STF to the STJ.⁸³ Article 105 of the Brazilian Constitution now appoints the STJ as the competent court to hear and decide as a matter of original jurisdiction the homologation of foreign awards.⁸⁴

Even though some may argue in favor of the amendment, by saying that the STJ might have a less conservative posture as compared to the STF and might be able to decide faster on the homologation requests due to its smaller backlog of processes, this shifting might actually pose a further problem to the length of arbitral proceedings. Now the decision on the homologation of foreign awards is no longer final because the parties will have a constitutional right to file an extraordinary appeal to the STF against the STJ decision, which in practice may considerably lengthen the overall proceeding.

In any event, this further step that has to be fulfilled so as to enforce foreign arbitral awards in Brazil becomes critical for parties drafting arbitration clauses, as the time spent in the homologation process may well exceed that of the arbitration itself. For instance, when the homologation process was still in the jurisdiction of the STF, the proceeding could take years to accomplish.

Therefore, in arbitrations that may result in enforcement within the Brazilian territory, the parties should strongly consider choosing Brazil as the place of arbitration. Despite its civil law tradition, in Brazil whether an award is foreign or domestic does not depend on factors such as the parties’ nationalities, the subject of dispute, the rules of the arbitration, or the applicable law. Rather, it depends solely on the whether the award is “rendered outside of the national territory.”⁸⁵

In practice, the choice of Brazil as the country where the award will be rendered may represent a period of several months, or even a few years, in the overall duration of the arbitration. On the other hand, as Brazil is

81. See Law No. 9.307, *supra* note 7.

82. See *id.*

83. See C.F., *supra* note 14, at amend. n.45/04, art. 1.

84. See *Id.* at art. 105.

85. Article 34, and sole paragraph, of the Brazilian Arbitration Statute (Law 9.307/96) provides that “[a] foreign arbitral award shall be recognized or enforced in Brazil pursuant to international treaties effective in the national legal system, or, if non-existent, strictly in accordance with the present Law. A foreign arbitral award is an award rendered outside of the national territory.” Law No. 9.307, *supra* note 7.

a contracting state to the New York Convention, the parties will be fully protected should they have to enforce the award in any other contracting state that has made the reciprocity declaration of article III of the Convention.

B. LITIGATION

Unlike arbitration, one of the main problems of litigation in Brazil is precisely the length of the judicial proceedings, both in the state courts and in the higher federal courts.

The World Bank conducted research on judicial performance in Brazil, and its diagnosis evidences that the country's judicial system suffers from several serious problems.⁸⁶ The delay in proceedings was found to be one of the most problematic constraints affecting litigation in the country.⁸⁷

For nearly the past decade Brazil has been experiencing a judicial crisis. The lengthy delays in resolving cases taken to the courts arise mostly out of the opportunistic practices of a few powerful actors, namely the government, the private bar, banks, and public utilities.⁸⁸ The congestion resulting from these practices ends up affecting all the users of the Brazilian judicial system. Besides, the analysis of trends in workload makes it clear that since the early 1990s there has been a dramatic growth in demand on Brazilian courts, which coupled with the lack of adequate structure of the judicial system also has contributed to the problematic congestion and delay.⁸⁹ Accordingly, researchers identified several examples of cases that wait in the judiciary for years or even decades without ever coming to a solution.⁹⁰

The World Bank research found that the Sao Paulo district court accounts not only for the major share of first instance filings in absolute terms—which actually would be expected due to its size—but it also has the higher civil litigation rate.⁹¹ Another research conducted by the Statistic Group of the STF shows that in the year 2003 the number of new filings per 100,000 inhabitants in Sao Paulo district court was 10,576, against the national average of 4,674.⁹² In the same year the number of new cases per judge was 2,476, surpassing the country's average of 946 new filings.⁹³ Another figure, which considers together the sum of new cases, pending cases, and cases disposed, reveals that the workload in the

86. See WORLD BANK, REPORT NO. 32789-BR, BRAZIL: MAKING JUSTICE COUNT: MEASURING & IMPROVING JUDICIAL PERFORMANCE IN BRAZIL (Dec. 30, 2004), available at http://www.bancomundial.org.br/content/_downloadblob.php?cod_blob=1635 [hereinafter REPORT NO. 32789-BR].

87. See *id.*

88. See *id.*

89. See *id.*

90. See *id.*

91. See *id.*

92. See SEMINARIO: A JUSTICA EM NUMEROS, available at <http://www.stf.gov.br/seminario/> [hereinafter SEMINARIO: A JUSTICA EM NUMEROS].

93. See *id.*

Sao Paulo district court in 2003 reached the exorbitant number of 8,024 processes for each judge.⁹⁴ This amounts to a rate of congestion of 91.89 percent, which is regarded by the research as a critical situation.⁹⁵ On the other hand, Sao Paulo has 5.09 judges per 100,000 inhabitants, which places it among the states with the lowest rates in the country.⁹⁶

The situation in the Sao Paulo court of appeals is also difficult. There were 937 new filings per 100,000 inhabitants in 2003, against a national average of 453.⁹⁷ This represents a number of 745 cases for each judge.⁹⁸ The workload in the court is 770 processes per judge, which amounts to a rate of congestion of 56.19 percent. As a result, the Sao Paulo court of appeals has a backlog of undistributed cases that have accumulated for several years. During 2004, an appeal took three years on average only to be distributed to one of the judges of that court.⁹⁹

In the STF and STJ, the figures are also alarming. The World Bank research found that the STF has experienced a dramatic increase in its workload over the past fifteen years, and since 1990 filings have increased almost six times.¹⁰⁰ As of July 11, 2004, there were 132,797 cases waiting filing, which roughly corresponds to an entire year of entries.¹⁰¹ And this is despite the amazingly high productivity of STF judges. In the last few years the eleven judges of the STF have decided close to 100,000 cases annually.¹⁰² The Statistic Group research reveals a rate of congestion of 58.67 percent in 2003, when 111,916 new cases entered the STF.¹⁰³

The caseload for the STJ showed comparable historical trends to that of the STF regarding cases distributed and disposed.¹⁰⁴ The Statistics Group research shows that in 2003, 238,982 new cases were filed in the STJ, amounting to a rate of congestion of 31.12 percent.¹⁰⁵ The statistics managed by the STJ secretary reveal an increasing number of cases disposed each year since the creation of the tribunal in 1989, with the unprecedented number of 216,999 decisions coming out in the year 2003.¹⁰⁶ The World Bank research confirms that Brazil's average filings are already high in comparison with Latin America standards, and that the caseload handled by the STF and STJ far exceeds outside international norms.

The predictable result of all these figures is an enormous delay in the proceedings. It is obviously very difficult to foresee the duration of a

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *See* REPORT NO. 32789-BR, *supra* note 86.

101. *See id.*

102. *See id.*

103. *See* SEMINARIO: A JUSTICA EM NUMEROS, *supra* note 92.

104. *See id.*

105. *See id.*

106. GRAFICO DE PROCESSOS JULGADOS, available at <http://www.stj.gov.br/webstj/processo/estatistica/grafico%20processos%20julgados%202003.pdf>.

specific case, as it will depend on a variety of factors such as the behavior of the parties, the diligence of the judge and the court to which the process has been distributed, the need of effecting technical findings, and the number and nature of appeals. Thus, estimations in this regard have a great deal of variability.

Nevertheless, a case involving a non-complex international commercial dispute, such as the one this paper has been dealing with, would take roughly up to two years to be decided by the district judge. The appeal would take up to two years just to be distributed to one of the components of the Sao Paulo court of appeals, and would take up to two years to be decided by the court. The special appeal to the STJ would take up to three years, added to three more years of the extraordinary appeal in the STF. It is fair to conclude that the length of such a proceeding discussing an international commercial matter and experiencing all the existing appeals in Brazilian civil procedure would range from six to thirteen years.

C. ANALYSIS AND COMMENTS

The figures above confirm the common argument in favor of the efficiency of arbitration. On average, the CCBC handles its proceedings in eighteen months, which is roughly the same time a judicial proceeding would take in the district court of Sao Paulo. The FIESP assesses the average duration of its proceedings in seven months. Even considering a best-case scenario, it is hard to believe that a case could be resolved by the Sao Paulo district court in such a time. In the ICC, which appears to be the slowest of the three arbitration courts, a proceeding takes two years on average. A case subject to Sao Paulo state courts after two years might be still awaiting distribution at the court of appeals.

It is true that the parties can play some role in shortening the duration of a judicial case, and under special circumstances, they can even have the case resolved in less than six years. But the room for interference in the length of the proceedings is still incomparably higher in arbitration, as it has a much more flexible procedure.

Assuming interested and capable parties, the chance of shortening an arbitration will always be much higher, thus outweighing any eventual reduction in a correlate litigation. Therefore, it is possible to affirm that even in the two extremes of a range—that is comparing the fastest litigation with the slowest arbitration—arbitration would still likely be quicker than litigation.

The assumption is that the parties have selected Brazil as the place of arbitration and have conducted the arbitration under institutional rules. As noted above, in such case they need not resort to national courts either to obtain the recognition of the award or to enforce the arbitration agreement. In these circumstances, they will be able to enforce the award just after the arbitration. This means that normally they would be in a position to end the whole proceeding—including attachment of assets,

auctions, and collection of respective value—long before the final award of a judicial proceeding had they chosen to litigate in the first place.

IV. COMPARATIVE ANALYSIS OF THE COSTS AND DURATION OF THE ARBITRATION AND LITIGATION PROCEEDINGS

Now the findings as to the duration of the proceedings and the previous analysis concerning costs must be compared in order to draw the final conclusions and guidelines of this paper.

A. A CLAIM OF \$1 MILLION

In disputes involving small sums, litigation appears to be the least expensive choice. But the length of the judicial procedure is such that the expenses arising from the excessive duration of the proceeding might outweigh the economy in cost. A long process imposes several costs on the parties, not only those directly related to the conducting of the proceeding itself (e.g., attorneys fees, in-house legal department costs, expenses to follow-up the proceeding), but principally those deriving from the effect of time on the value in dispute. The party will be prevented from investing the assets in its activities, and even in the financial market, in which case it might be able to receive a much higher interest rate than that accrued in the judicial claims.¹⁰⁷ In these circumstances the present value of the right in dispute will fatally be far inferior to its actual value.

Taking this into consideration, the parties who choose to litigate might not be in a better situation than those who decide to arbitrate under the rules of the CCBC or ICC. But the quicker procedure of these chambers in comparison to the slower pace of the judicial procedure may offset their higher costs.

At this point the parties would be facing one of the most common dilemmas facing a decision-maker: is saving time worth the cost? This is a question to be answered on a case-by-case basis, according to the specific circumstances of the parties and the right in dispute.

B. A CLAIM OF \$30 MILLION

In medium-sized claims, the CCBC is the best option regarding cost, and the second-best regarding timing. Conversely, the FIESP is the second best in terms of cost, but has the fastest proceeding. Because the difference in costs between the two courts at this level is small, the parties might be better off choosing the FIESP despite its slightly higher costs. The positive effects of efficiency would offset this extra cost.

107. Article 406 of the new Brazilian Civil Code states that if it is not otherwise provided by the contract, the legal interest rate will correspond to that charged by the government for its own credits. As of October 2005 this interest rate was 1.51 percent per month. See Civil Code of Brazil, available at http://www.planalto.gov.br/ccivil_03/Leis/2002/L10406.htm.

The ICC is much more expensive than litigation at the \$30 million level. Nevertheless, it can deliver an award in less than one-third of the time the judicial courts would be able to. Again the parties would have to go about the aforesaid dilemma of making their choice in light of the particularities of the case.

C. A CLAIM OF \$100 MILLION

When larger sums are in dispute, the CCBC becomes significantly less expensive than the FIESP, which may support the opposite conclusion of that reached as to medium-sized claims. Here, the faster proceeding of the FIESP may not make it so attractive so as to outweigh the benefits of the CCBC's lengthier but cheaper proceeding.

At this level the ICC costs increased even more, becoming significantly higher than in claims involving medium-sized sums. On the other hand, the litigation costs have not varied at all, as they had already reached their cap. Again the decision between arbitration and litigation will depend on the particular circumstances of each case. But due to the enormous difference in the value, it is likely that the parties would rather litigate to afford an ICC procedure, had their decision been solely based on the costs and length of the proceedings.

V. CONCLUSION

The decision of whether to choose arbitration or litigation is a very complex one. Those facing it have to assess several factors, including costs and duration. With regard to these two factors, the particular characteristics of the party and the right in dispute are important starting points for the assessment. Whether the party is financially healthy and able to wait a longer period for the solution of the case, and whether the market opportunities for new investments justify affording a more expensive but faster proceeding are just two elements to be taken into account. The nature of the right and the necessity of having a full trial, along with the probability of federal and constitutional matters arising out of the dispute, may also interfere in such evaluation. In any event, within the limits of the present paper and based on the analysis above, it is possible to draw the following general guidelines in order to facilitate the decision on whether to arbitrate or litigate in Brazil:

1. In disputes involving small claims, litigation is the least expensive option, although its significantly lengthier proceeding justifies a specific assessment of the particular circumstances before choosing this alternative. The ICC is the second-best option since it is less expensive and just slightly more time-consuming than the CCBC. In a \$1 million claim-scenario the FIESP is the most expensive chamber.
2. In disputes involving medium-sized claims. The FIESP is the best alternative because its faster proceeding may offset the cheaper arbitration under the CCBC auspices. The choice between the ICC

and litigation will depend on the particularities of the case. Even though the ICC is much more expensive, it still might be selected due to its much quicker proceeding.

3. If larger sums are in dispute, the CCBC becomes the best option, as the quicker procedure of the FIESP will no longer outweigh the benefits of the comparatively significantly less expensive procedure of the CCBC. At this level the ICC costs are so high that the parties might choose litigation despite its much lengthier proceeding, although this decision may still vary in each case.

Comments and Casenote

