# Arbitration: a solution to Brazilian judiciary crisis?

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In light of the difficulties that Brazilian courts are facing, arbitration seems to be the best method of dispute resolution to reduce time and costs, and to obtain sound judgments.

- Brazilian courts are overloaded because of the delay in solving claims
- Brazil has introduced Act 9307 dated 1996 for conflict resolution through arbitration, but some obstacles still need to be tackled for its use in sea carriage
- This article makes some recommendations for the application of arbitration in disputes connected to sea carriage

## The current issue

Brazilian courts are congested to the point that a dispute often lasts for between five and seven years – and sometimes even longer – before a final judgment is reached. During this time, the claim could be increased by indexation of approximately 12% per annum. The defendant (owner/carrier) may therefore feel pressure to solve the dispute through settlement due to the punitive cost of defending a claim for this length of time. This is emphasised by the fact that, since Brazilian courts are not specialised in maritime law, decisions in favour of the defence are not guaranteed, regardless of the strength of their argument.

Several steps are being adopted to reduce the duration and cost of disputes in court. One example is a new Civil Procedural Code, which was recently approved and will come into force on 1 March 2016. Unfortunately, the steps taken suggest that greater importance has been placed on speeding up the resolution of claims rather than on improving the quality and/or correctness of the judgments.

## The case for arbitration

In September 1996, Act 9307/96 was enacted in Brazil to regulate the resolution of disputes through arbitration. The Brazilian arbitration model is similar to other international models. Brazil has also joined the 1923 Geneva Protocol, which makes arbitration clauses binding on the parties, rendering them unable to submit their dispute to judicial proceedings.

In 2002, Brazil joined the 1958 New York Convention, recognising the validity and accepting enforcement of arbitral awards rendered abroad.

The new Civil Procedural Code emphasises that an arbitration clause shall prevail, preventing the parties from filing a judicial dispute. Additionally, it establishes that those claims filed in courts will need to have a preliminary hearing to attempt an agreement before filing the defence.

However, although arbitration seems to be the right choice for dispute resolution in Brazil, there are still some barriers preventing wider use of it, especially related to sea carriage.

### Difficulties of arbitration

Brazilian law establishes that parties should clearly agree to an arbitration clause signed by all parties. However, this does not happen when the clause is introduced through a bill of lading (BL) or without the signature of cargo interests, either of which would cause it not to be accepted by Brazilian courts.

Another grey area that needs to be clarified by Brazilian courts is when acting as subrogated to the insured's rights. Cargo underwriters have been successful on many occasions in making an arbitration clause not applicable to them, since they are neither party to the contract nor have they signed any agreement for arbitration.

Conversely, it has been alleged that subrogation entails a conveyance of rights and commitments between the insured and the carrier. This is an issue under dispute at the Superior Courts that is awaiting a final interpretation.

### Finding a way to validate an arbitration clause contained in a BL

Firstly, it is necessary that a BL covering cargoes bound for Brazil includes a Brazilian arbitration clause, where specialised maritime arbitration associations already exist. It is not advisable to elect arbitration abroad, since Brazilian laws and courts stipulate that Brazilian jurisdiction and laws will apply to claims involving obligations performed in Brazil (discharge or loading in Brazilian ports). Mention of arbitration abroad might render the clause null and void.

In order to offset the shipper's missing signature, it is recommended that the shipper provides a signed letter with an express agreement to the arbitration clause inserted in the BL and that such undertaking is also passed on to the consignee/receiver as well as to the subrogated insurer upon transference of the original BL.

Following this process means that there will be a good chance of enforcing the arbitration clause, which also binds the cargo insurers.

### New Maritime Cargo chapter under discussion

There is a proposed bill under discussion in the Brazilian Congress to implement the new Commercial Code, which would include a specific chapter on the carriage of goods by sea. This specific chapter was amended by a specialised commission within the Brazilian Maritime Law Association (ABDM) and the adjustment aims to make Brazilian legislation comparable with other nations.

The amendment contains a rule regarding arbitration in Brazil, which sets out that, when paying the insured, the insurer will subrogate not only to the insured's rights, but also to his obligations and commitments. Amongst other commitments, the insurer would be bound to the arbitration clause.

### Conclusion

The measures adopted so far in Brazil have not been sufficient to reduce the duration of the disputes in the judicial courts pertaining to cargo claims, which results in a large number of claims with several years of indexation and interest.

Arbitration seems to be the best way forward and all efforts should be concentrated to that end.