ARBITRATION AND MEDIATION & GOVERNMENT AND REGULATORY

CLIENT ALERT

SEPTEMBER/2019

FEDERAL DECREE ESTABLISHES SPECIFIC RULES FOR ARBITRAL PROCEEDINGS INVOLVING THE FEDERAL ADMINISTRATION IN THE PORT, ROAD, RAILROAD AND AIRPORT SECTORS

On September 20, 2019, the Federal Government issued Decree No. 10,025 (the "Decree") to regulate arbitral proceedings involving the Federal Administration in the port, road, railroad and airport sectors. The following features of the Decree are noteworthy

- **Procedural requirements -** arbitrations must be in Portuguese and seated in Brazil. As already established in Federal Law No. 9,307, the Decree makes it clear that arbitration procedures involving the Administration must be in law, rather than in equity — and sets forth that disputes shall be adjudicated solely according to Brazilian Law.

- **Institutional arbitrations are to be preferred -** the Decree recommends the Administration to choose institutional arbitrations (*i.e.* administered by arbitral institutions) over *ad hoc* arbitrations. With regards to institutional arbitrations, the Decree determines the Administration to only elect arbitral institutions registered and accredited before the Federal Attorney General's Office ("*Advocacia-Geral da União*"). The Federal Attorney General's Office will only accredit arbitral institutions with more than 3 (three) years of practice, and which have their own arbitration rules available in Portuguese.

- **Arbitrable matters -** the following issues may be subject to arbitration: **(i)** issues/claims related to the economic-financial balance of administrative contracts; **(ii)** the calculation of the damages connected to the termination or transference of partnership agreements ("*contratos de parceria*"); **(iii)** the breach of contractual obligations and the application and calculation of penalty clauses.

- **Maximum duration** - the arbitral procedure shall establish a minimum of 60 (sixty) days for the presentation of the initial response, and a maximum of 24 (twenty-four) months for the rendering of the final decision - counted from the signature of the arbitration term. Upon the parties' agreement, however, such maximum term may be extended, one single time, provided that it does not exceed 48 (forty-eight) months.

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- **Contractual amendments and arbitration covenants -** the Administration will be allowed to resort to arbitration regardless of whether the contract it intends to discuss contains an arbitration clause or not. The Decree allows, upon the parties' agreement, the execution of contractual amendments so as to include arbitration clauses in existing contracts — or, alternatively, the execution of arbitration covenants in contracts that do not contain arbitration clauses. In the latter scenario, the Administration shall deem arbitration to be preferable over the judicial resolution of disputes whenever (i.) "*the dispute is based on mainly technical issues*", and (ii.) *"when delay in the final resolution of the dispute may impose harm to the adequate rendering of the service, or the operation of the infrastructure, or hamper investments deemed to be prioritary.*"

- **Awards and remedies -** the Administration usually pays amounts fixed in arbitral awards by means of court-ordered debt payments ("*precatórios*"). Administrative practice, however, allows the Administration to solve contractual disputes through additional remedies. Taking advantage of them, the Decree sets forth that awards may be executed, upon the parties' agreement, by means of **(i.)** an offset with contractual penalties or other non-tax obligations; **(ii.)** mechanisms that could be adopted by the Administration to restore the economic-financial balance of the contract; and (iii.) assignment of payment obligations to a third party, to the extent allowed in national statutes.

- **Binding effects -** the Decree must be observed by arbitration clauses signed on or after September 20, 2019. Nevertheless, upon the parties' agreement, its rules may also be extended to arbitrations resulting from covenants executed prior to such date.

The number of arbitration procedures involving the Administration is expected to increase in the upcoming years. It also is likely, therefore, that the Federal Administration and the States will enact additional regulations for arbitrations in specific sectors or types of administrative agreements.

To access Decree No. 10,025, click here (in Portuguese).

For further clarifications on this subject, please contact any of the undersigned or your regular Veirano Advogados lawyer.

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