

Arbitration in the Brazilian electricity sector

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Since 2012, disputes related to the Brazilian electrical power sector have increasingly ended up in the courts, and this judicialization is now one of the main challenges the sector must overcome. Although it is perfectly lawful for sector agents to turn to the courts, judicial review of decisions by the regulatory agency, involving highly specific rules, can affect the whole system, with both technical and economic consequences. A good example is the wave of preliminary decisions, starting in 2015, that protected certain power producers from the effects of hydrological risk, with significant financial implications for the electrical power market.

Arbitration is a dispute resolution method that can contribute to dejudicializing the sector. Decree 10.025/2019 provides for arbitration as a mean to resolve disputes involving the federal government in the port, highway, railway, waterways and airport sectors. According to the Decree, the federal government (or federal agencies) and concessionaires can make use of arbitration to resolve disputes over issues related to disposable property rights, such as matters involving revision of concession contracts to restore their financial and economic balance.

Recently, in September 2021, the directors of the National Electric Energy Agency (ANEEL – Agência Nacional de Energia Elétrica) relied on Decree 10.025/2019 to authorize an arbitration submission agreement made between Transnorte Energia S.A – TNE and ANEEL, with the federal government, FUNAI (the National Foundation for Indigenous Peoples) and IBAMA (the Brazilian Institute of the Environment and Renewable National Resources) as intervening parties, for revision of the concession contract for the 500 kV Lechuga-Ecuador-Boa Vista transmission line, which is to link the state of Roraima to the National Grid (SIN – Sistema Interligado Nacional).

In August 2015, TNE had submitted an application to ANEEL requesting amicable termination of the concession contract, on the grounds that the works were no longer legally viable, and that delays in the construction schedule had created an economic and financial imbalance in the contract. ANEEL agreed with TNE as to the difficulties and in December 2016 issued its recommendation for termination of the contract to the Ministry of Mines and Energy (MME).

In September 2017, TNE filed an ordinary action, seeking damages in addition to rescission of the concession contract. In parallel, in February 2018, the MME rejected ANEEL's recommendation and suggested that the agency revise the economic and financial balance under the concession.

In April 2019, TNE formally submitted its application to ANEEL for revision of the concession contract. In the courts, TNE was successful at first instance: the court granted rescission of the contract and found the federal government liable to pay damages in an amount to be determined on

liquidation of judgment. At the administrative level, ANEEL denied TNE's petition to reconsider the revised amount of revenue established by the agency. TNE then submitted to ANEEL a proposal for arbitration of the dispute over how to make the concession contract viable.

The matters at issue in the case is clear, since it involves a structural solution for the Manaus-Boa Vista line to connect the state of Roraima to the national grid, and the environmental licensing process, which was discussed right from the planning phase, with broad dialogue between the institutions involved and the uaimiri-atroari indigenous community, over more than 10 years. The MME has been involved to demonstrate the technical and economic advantage of maintaining the contract with TNE, and legal analyses have been provided by the Office of the Advocate General of the Union (AGU) and by the federal prosecutors assigned to ANEEL.

Although arbitration is provided for in private transactions made through the Electrical Power Trading Chamber (CCEE – Câmara de Comercialização de Energia Elétrica), arbitration clauses are rare in concession contracts in the electricity sector. ANEEL's decision thus represents an important precedent for the use of arbitration in matters related to concessions, signalling a possible advance in dispute resolution in the sector.

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