Collective Arbitration in Brazil’s Capital Markets: What Lies Ahead

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Over the past decades, arbitration has become one of the principal mechanisms for resolving corporate disputes in Brazil, particularly in complex cases involving significant economic interests. The consolidation of arbitral institutions, together with the regulatory stability provided by Law 9.307/1996 and the consistently favorable approach of the higher courts, has helped establish arbitration as a reliable and widely accepted forum for dispute resolution.

Within this context of institutional maturity, the debate surrounding collective arbitration in the capital markets has gained prominence, particularly following the introduction of Bill PL 2.925/2023, which was later incorporated into a broader legislative proposal and is currently under consideration by the Federal Senate as Bill PL 5.662/2025. The bill provides for the expansion of civil liability mechanisms in the context of publicly-traded companies and seeks to promote collective forms of investor protection, including through arbitration.

In collective arbitration, although only certain parties have standing to initiate the proceedings, the effects of the outcome extend to the entire group covered by the dispute, even where those investors did not participate directly in the arbitration. This significantly broadens the legal, financial, and reputational exposure associated with the controversy. The practical importance of collective arbitration is particularly pronounced in publicly traded companies, where efficiency and coherence in dispute resolution require that certain issues be addressed in a uniform manner.

Collective arbitration remains largely unaddressed by specific legislation, which has contributed to the limited use of the mechanism. The bill seeks to address this gap by introducing a pioneering regulatory framework focused on the capital markets.

The bill aims to strike a balance between encouraging shareholders to pursue compensation for violations of their rights and establishing safeguards to deter frivolous claims. For example, while the bill provides for a success premium of up to 20% of the amount awarded to claimants, it also imposes stringent formal requirements that must be met before collective proceedings may be initiated.

One of the bill's main innovations in this area is the expansion of standing to initiate collective arbitration. In addition to the Public Prosecutors' Office (Ministério Público) and the CVM (Brazil's securities and exchange commission), standing would also be given to debenture holders' trustees and to the affected investors themselves, provided they hold securities representing at least 5% of the securities of the same type or class.

As noted above, while standing to initiate collective arbitration is restricted, the effects of the arbitral award would be far reaching. The award would extend to all investors of the same type and class, even those who did not participate directly in the proceedings, unless they opted out by filing individual actions, and did not intervene in the arbitration as a party, or in support of another claimant (article 27-H§12(III) read with article 27-H§9).

One of the main structural challenges facing collective arbitration concerns the determination of damages to individual investors following a collective award. Unlike the ordinary courts, arbitration do not benefit from an institutional enforcement apparatus designed to manage large-scale enforcements. As a result, translating a collective arbitration award into payments to a large group of investors may require coordination with the judiciary or the development of tailored procedural solutions by arbitral institutions.

The collective investor protection mechanisms introduced by the bill have the potential to materially reshape both the structure and economic incentives of corporate litigation. The mechanisms may influence the behavior of market participants and may directly affect how companies assess, price, and manage litigation risk and contingencies.

Only through interpretation and practical application will it be possible to assess the proposed legislation's actual impact on the legal system. If properly calibrated, the collective arbitration model may help rationalize disputes and strengthen corporate governance. Conversely, if implemented without clear procedural guidelines and objective criteria, it may encourage opportunistic litigation and increase regulatory uncertainty for publicly-traded companies and their management.

With the changes proposed in Bill PL 2.935/2023 on the horizon, closely monitoring legislative developments, strategically reviewing arbitration clauses, and adopting structured approaches to risk management are becoming central priorities for publicly-traded companies.

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