

The ANA and mediation and arbitration of disputes

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In the area of dispute resolution, the New Basic Sanitation Legal Framework introduced by Law 14.026/2020 reflects an increasingly strong trend in the Brazilian legal system toward the use of arbitration and other alternative mechanisms for resolution of disputes in the public sector. Two points under the New Legal Framework merit particular attention.

The first is the express provision for use of arbitration to resolve disputes under contracts involving the provision of basic sanitation services.

According the changes made by the new legislation to article 10-A of the Basic Sanitation Legal Framework (Law 11.445/2017), the parties to a sanitation services contract may establish arbitration as the means for resolution of disputes. According the Law, the arbitration must be conducted in Brazil and in the Portuguese language, in accordance with Brazil's Arbitration Law (Law 9307/1996).

As amended by Law 13.129/2015, the Arbitration Law expressly provides for the use of arbitration by all levels of government in Brazil and by government agencies, following the courts' position that public authorities can submit to arbitral jurisdiction. Even prior to the changes to the Arbitration Law, the legislation governing concessions of public services provided for the use of arbitration (article 23-A of Law 8987/1995, included by Law 11.196/2005). A practical example of this trend is the notice of the competitive bidding procedure for the concession of basic sanitation services in the State of Rio de Janeiro, which contemplated arbitration as the mechanism for resolution of disputes.

Strictly speaking, therefore, the provisions on arbitration introduced by Law 14.026/2020 to the Basic Sanitation Legal Framework are not an innovation.

Regardless, the use of arbitration in disputes involving basic sanitation is a welcome development, especially because it promises speedier resolution – litigation before the courts can drag on for years – and a more fact-based approach in decision-making, given that disputes generally present complex technical issues that are much better dealt with in an arbitral environment. As it stands at present, litigants in cases before the courts face lengthy delays before a decision is issued, and when decisions are finally issued, they are often technically deficient and fail to address all the questions at issue.

The second change made in the Basic Sanitation Legal Framework is the availability of a mediation- and arbitration-like proceeding in the ANA – the National Waters and Basic Sanitation Agency – to resolve conflicts between players in the sanitation market.

According to the amendments made by the new legislation to article 4-A§5 of Law 9984/2000 (which governs the ANA), the ANA must make available a mediation and arbitration-like proceeding, on a voluntary basis and subject to the parties' agreement, to municipalities, states, regulatory agencies, and providers of public basic sanitation services.

Regulations are needed to define the ANA's role as mediator and arbitrator, and thus the contours of its work in this area are still undefined. From all appearances, the mediation- and arbitration-like proceeding referred to in the Law contemplates the resolution of disputes by the ANA by means of administrative proceedings brought by the interested parties, and should not be confused with arbitration within the meaning of the Arbitration Law.

Still, the New Basic Sanitation Legal Framework seems to make it clear that the ANA's mediation and arbitral services are purely voluntary for the parties, which may choose to exclude this option from their contracts.

In the end, the message under the New Basic Sanitation Legal Framework is that familiarity with arbitral environments is now a necessity for all participants in the sector, especially public authorities, which are still much more accustomed to the courts and their vicissitudes.

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