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Evidence Production in Arbitration in Brazil: What to Expect

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International arbitration often involves parties, arbitrators, and counsel from both Common Law and Civil Law traditions, which sometimes creates misinterpretations about how evidence production will occur. The recent São Paulo court opinion determining that an ICC arbitral tribunal should widen the scope of the expert evidence it was considering in a dispute regarding the construction of a new subway line in São Paulo may also have cast doubt upon how far the Judiciary can go in influencing evidence production in arbitrations seated in Brazil.

This article presents an overview of what can be reasonably expected by foreign counsel and parties when arbitrating in Brazil as regards evidence production – a question many clients and friends have been asking lately.

The following factors regulate and influence evidence production in arbitrations seated in Brazil: (i) the parties' pre or post-dispute agreement; (ii) the Brazilian Arbitration Act; (iii) Brazilian procedural laws; and (iv) the rules of the selected arbitral institution, if applicable.

The parties to an arbitration have autonomy to choose prior to the dispute or when the arbitration has commenced not only the substantive law applicable to the merits of the dispute, but also the procedural rules which will guide the proceeding, including the rules of evidence production. The parties usually agree on these rules in the beginning of the arbitration, which will be reflected in a procedural order issued by the arbitral tribunal.

It is unusual for the parties to an arbitration – seated in Brazil or elsewhere – to adopt the broad-ranging discovery tools established by the U.S. Federal Rules of Civil Procedure, allowing, for instance, extensive document requests and witness depositions. Evidence production in arbitration usually rests in a middle ground between Civil Law and Common Law traditions.

An option is to adopt a separate set of evidentiary rules, for instance, the recently updated IBA Rules on the Taking of Evidence in International Arbitration, which in fact has already happened in some disputes in Brazil under the ICC Rules. The IBA Rules are intended to govern in an efficient and economic manner the evidence production in international arbitrations, particularly those involving parties from different legal traditions, as they provide for a comprehensive blend of Civil Law and Common Law procedures.

Despite the parties' autonomy, they are not entirely free to define how evidence production will occur. They must ensure that evidence production complies with the law of the arbitration seat (or lex arbitri) in order to minimize the chances of judicial annulment of the arbitral award.

This is why it is important to select a seat whose laws and courts are arbitration-friendly and supportive of the types of evidence commonly used in arbitration, such as São Paulo and Rio de Janeiro.

As regards evidence production, Section 22 of the Brazilian Arbitration Act provides that either ex officio or at the parties' request the tribunal may hear the parties or their representatives, hear witnesses, and appoint experts. Also, if an arbitrator is substituted, her substitute may request that evidence be produced again. Finally, "If a party fails, without good cause, to comply with a request to testify, the tribunal shall give due consideration to such behavior when issuing the award; if a witness is absent, the tribunal may request the judicial court of jurisdiction to compel the witness to appear before court."

The Brazilian Arbitration Act also establishes that the Brazilian Code of Civil Procedure ("CPC") shall apply when the Act is silent.

In a nutshell, under the CPC, evidence must be relevant, pertinent, and obtained through licit means. There is no discovery, especially considering the model of U.S. Federal Rule of Civil Procedure 26: document requests are extremely limited; a party cannot be compelled to produce evidence adversely affecting his/her interests unless strictly necessary and ordered by court; as a rule, the party who deems the evidence is necessary has the burden to present it and will only be able to compel the other party to produce it by: (i) proving that it does not possess the evidentiary piece and that the counter-party does; (ii) describing the evidence sought in detail; and (iii) proving the evidence is relevant to the case.

Expert witnesses appointed by the parties are popular and, naturally with ethical limitations, entitled to act as advocates. It is the job of the court-appointed expert – and not of the "party-appointed" expert witness – to find the effective "truth." The role of the court-appointed expert is to interact with the expert witnesses, analyze their reports, and then present his/her independent findings to the tribunal. As such, requests for the disclosure of communications between counsel and party-appointed expert witnesses would likely be denied in an arbitration seated in Brazil. Finally, attorney-client communications are as a rule privileged.

Evidentiary rules are usually related to the principle of due process, also recognized, for instance, by the Brazilian Federal Constitution. Due process may thus be deemed to reflect Brazilian public policy, so that any incompliance with the principles described above may be grounds for the judicial annulment of the award. Therefore, when Brazil is the seat of the arbitration, parties and arbitrators shall observe the provisions and principles established by the lex arbitri (particularly the Brazilian Arbitration Act and applicable Brazilian procedural laws), and consulting with specialized counsel is recommendable.

Finally, it is worth noting that as opposed to litigation in Brazilian courts, where codified Civil Procedure precludes direct witness examination and cross-examination (counsel must ask the questions to the judge, who will then direct the questions to the witness), Common Law-style direct examinations and cross-examinations have been widely adopted in arbitrations in Brazil and in international arbitrations involving Brazilian parties, a practice which shall not represent a risk against future recognition of the arbitral award in Brazil.

The rules of international arbitral institutions such as the ICC, the ICDR, and the LCIA, and of well-established Brazilian arbitral institutions such as the Câmara de Comércio Brasil Canadá

(CCBC), Câmara de Arbitragem do Mercado (CAM), Câmara de Mediação e Arbitragem do Centro das Indústrias do Estado de São Paulo – CIESP, and Centro de Arbitragem da Câmara Americana de Comércio – AMCHAM, provide solely for a generic framework of how evidence production will occur.

For instance, the CCBC Arbitration Rules provide that "The parties can submit all the evidence they deem convenient in order to instruct the proceedings and to enlighten the arbitrators. Yet, the parties shall present any other available evidences that any member of the Arbitration Tribunal may consider necessary for the understanding and settlement of the dispute. It is up to the Arbitration Tribunal to accept any evidence deemed as convenient, necessary or relevant."

The Rules of the Câmara de Mediação e Arbitragem do Centro das Indústrias do Estado de São Paulo – CIESP provide that "The parties may present all of the evidence that they judge useful for the instruction of the proceedings and for the clarification of the arbitrators. The parties should further submit any other evidence that any member of the Arbitral Tribunal deems necessary for the understanding and resolution of the controversy. It will be the responsibility of the Arbitral Tribunal to determine the useful, necessary and pertinent proof." The Rules of the Centro de Arbitragem da Câmara Americana de Comércio – AMCHAM provide that: "The Arbitral Tribunal shall decide on the taking of evidences requested by the parties or production of evidences it may consider applicable."

These rules from traditional Brazilian arbitral institutions are similar, for instance, to those established by Articles 20 of the ICC Rules of Arbitration, 19 of the ICDR Arbitration Rules, and 22 of the LCIA Arbitration Rules. The framework provided by all these national and international rules leaves the parties – and, if they are silent, the arbitrators – with considerable discretion to decide what to admit as evidence.

Therefore, it is suggestible that the parties agree on the details (for instance, time-limits of the submissions; availability of witness statements; which types of evidence exactly will and will not be admitted), again ensuring compliance with the lex arbitri in order to minimize the chances of judicial annulment of the award.

As we know, the background of the arbitrators – Civil Law or Common Law – may also influence evidence production, and should be assessed when appointing one.

Arbitrators and counsel in arbitrations seated in Brazil shall have the aforementioned principles in mind to ensure that evidence production complies thoroughly with Brazilian law, particularly if enforcement is to be sought in Brazil.

Adopting the IBA Rules on the Taking of Evidence in arbitrations seated in Brazil has also proved to be efficient, especially when the dispute involves parties and counsel from different legal traditions. This choice may also help avoid surprises and reduce the exposure to judicial interference over how evidence production will be conducted.

These rules are still not popular in arbitrations involving Brazilian parties, a culture that should change as the practice of arbitration in Brazil becomes more and more international.

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