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First Lusophones' Arbitration Meeting: Note and Invitation Translating Cultures and Promoting Arbitration

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Fernando Pessoa and Machado de Assis. What do these names have in common other than the fact that they are celebrated Portuguese-speaking writers? Far away situated because of geography, history, and culture, these two writers have left an important legacy that has brought closer different cultures through their literary work. In addition to being writers, Pessoa and Machado have also worked as translators. And, in the translation of a poem, they have met at last. The poem translated by them is the Portuguese version of a well-known text by Edgar Allan Poe, an American writer, originally published in 1845, entitled *The Raven*.¹⁾

This literary encounter of Pessoa and Machado perhaps could illustrate or translate the First Lusophones' Arbitration Meeting that took place during the *Paris Arbitration Week* (PAW) in April 2018.

The Portuguese-speaking world, whether it is Portuguese, Brazilian, Angolan or Mozambican, has been inspired by the Roman-Germanic legal tradition.²⁾ This legal tradition – as rightly puts Professor Miguel Reale – has courageously travelled across the seas.³⁾ As far as arbitration is concerned, the relations between Portuguese-speaking countries relate to economic realities. Despite the different realities of these countries, they shared the same need for arbitration as a means to strengthen their internal market and to engage in foreseeable international commercial transactions. If in contemporary Portugal international arbitration has also grown in light of the European tradition, in Brazil arbitration was needed as a better-suited solution for commercial disputes. In turn, Mozambique and Angola as African commercial hubs with an important oil & gas sector have also used international arbitration as a tool to translate different legal systems.

In light of the above perspective, Mr. Yves Derains, who has become fluent in Portuguese on his own merits, opened the First Lusophones' Arbitration Meeting welcoming the Portuguese-speaking guests at his Paris-based firm on the occasion of the enriching activities promoted by the International Chamber of Commerce (ICC) and by other entities supporting the PAW. In his opening speech, Mr. Derains presented the three topics for discussion at the meeting to incite the encounter and the debate among participants, including exchanges between the different countries then represented.

The first panel discussed the topic “Institutional Initiatives Aiming at Increasing Publicity and

Transparency in Arbitration”, animated by the moderator Mr. Fernando Mantilla-Serrano, Partner of Latham & Watkins, Paris. Ms. Ana Serra e Moura, Deputy Secretary-General of the ICC International Arbitration Court, presented the topic, with comments by Mr. Felipe Moraes, Secretary-General of Câmara de Mediação e Arbitragem Empresarial do Brasil (CAMARB). Their presentations considered (a) publicity and transparency in relation to players (constitution of the arbitral tribunal and disclosure obligations of arbitrators), (b) publicity in relation to the proceedings (in relation to *amici curiae* and to the reasons of the arbitral institution’s decisions), and (c) publicity of awards, including their publication and later enforcement proceedings.

Among other matters, Ms. Ana Serra e Moura from the ICC reported its experience in proceedings with Brazilian, Portuguese and African parties, relevant statistics, and the progress made towards greater transparency with the adoption of measures set forth in the *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, available on the ICC website.

In turn, Mr. Felipe Moraes from the CAMARB reported on its increasing experience with State entities and on its efforts to promote greater transparency. He mentioned recent updates in Brazilian law on publicity in arbitration involving State entities, and the experience of CAMARB in this respect. He also talked about the new CAMARB Arbitration Rules (2017) with provisions on publicity and transparency in cases involving State entities, distinguishing between public and private law State entities. Articles 12.2 and 12.5 of these Rules state that the CAMARB Secretariat will publish on its website information about CAMARB arbitrations concerning State entities of public law, including the date of the request for arbitration, the names of the parties, and the award. Pursuant to Article 12.3, the CAMARB will not provide additional information about these arbitrations to third parties, information which may otherwise be provided by the parties themselves according to the law. Further, Article 12.4 provides that the arbitration hearing will not be opened to the public, unless the parties agree otherwise.

Moreover, Mr. Felipe Moraes mentioned the new legal provisions on transparency in arbitrations involving corporate and capital markets issues, such as the 2017 amendment to Instruction No. 358 of the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* or “CVM”) requiring publicly traded companies’ disclosure of the institution of arbitration proceedings that may affect a company’s economic and financial situation. Finally, he commented on CVM’s recent decisions in this regard.

The second panel discussed the topic “Arbitration with the State and State Entities in Brazil and in Portugal”. The moderator Dr. Ana Gerdau de Borja Mercereau presented the speakers Mr. Renato Stephan Grion, Partner of the law firm Pinheiro Neto Advogados from São Paulo, and Mr. Filipe Vaz Pinto, Partner of MLGTS from Lisbon. The arbitration experience with the State and State entities in Portugal and in Brazil is challenging with new developments shared by the speakers and the participants.

Among other matters, Mr. Filipe Vaz Pinto discussed the Portuguese reform of 2018, in light of the adoption of Decree-Law No. 111-B/2017, which, among other provisions, introduced changes to Article 476 of the Code of Public Contracts (on alternative dispute resolution). The changes came about at a time when the Judiciary in Portugal is facing increasing difficulties to deal effectively with the case load brought before State Administrative Courts, while at the same time arbitration involving State entities is facing growing public criticism, even if sometimes based on wrong perceptions, not actual facts. This is perhaps what justifies the unease feeling that this reform

“gave with one hand what it took away with the other”: while the new rules purport to expand the use of arbitration in disputes involving the State or State entities, including disputes concerning public tenders, they also establish a non-waivable right of appeal in respect of all disputes with an amount exceeding € 500,000. It remains to be seen how these rules will play out in practice and be perceived by investors.

In turn, Mr. Renato Stephan Grion discussed Brazilian initiatives like the new provisions on arbitration with State entities under the Brazilian Arbitration Law (Law 9,307/1996, Article 1, § 1, and Article 2, § 3, modified by Law No. 13,129/2015), the Federal Decree 8,465/2015 (on port sector arbitration), and the Decree of the State of Rio de Janeiro 46,245/2018 (on arbitration with State entities of the State of Rio de Janeiro). He also referred to the survey “*Arbitration in Regulated Infrastructure Sectors*” published in 2017 by the FGV/CERI and The World Bank, which shows that several Brazilian agencies such as ANP (National Petroleum Agency or *Agência Nacional do Petróleo*), ANTT (National Land Transport Agency or *Agência Nacional dos Transportes Terrestres*), ANAC (National Civil Aviation Agency or *Agência Nacional de Aviação Civil*) and ANATEL (National Telecommunications Agency or *Agência Nacional de Telecomunicações*) have concluded arbitration agreements. In relation to the ANP, Mr. Renato Grion referred to Proceedings No. 139,519/RJ (*Conflito de Competência*), in which the Superior Court of Justice (*Superior Tribunal de Justiça* or “STJ”), in 2017, referred the ANP to ICC arbitration proceedings instituted by the mixed capital company Petrobras based on an arbitration clause under an oil & gas concession contract concluded with the ANP. Later, he discussed the implications of the new publicity provision under Article 2, § 3, of Law 9,307/1996, noting that several Brazilian institutions have adjusted their arbitration rules in light of this.

Finally, the third panel considered the topic “Arbitration in the Oil & Gas Sector in Angola and Mozambique”, moderated by Prof. Dr. Eduardo Silva da Silva, Partner of S&R Dispute Resolution Office, from Brazil. The speakers were Ms. Sofia Martins, Partner of the law firm Miranda Advogados, from Lisbon, and Ms. Filipa Cansado Carvalho, of Counsel of the law firm PLMJ, also from Lisbon. They discussed the legal and regulatory framework of the oil & gas sector in these countries, the type of disputes and ways to tackle political, economic and social questions related to arbitration in Angola and Mozambique.

Ms. Sofia Martins described in detail the structure of oil & gas operations in both Angola and Mozambique, focusing in particular on the structure of Production Sharing Agreements, on the standard dispute resolution provisions as well as on mandatory arbitration-related provisions in the laws of both countries.

In turn, Ms. Filipa Cansado Carvalho highlighted some difficulties that might arise within or in connection with arbitration proceedings seated in Angola or Mozambique and shared some war stories. Among other issues, Ms. Cansado Carvalho explained why it is fundamental to involve Portuguese-speaking lawyers at the negotiation stage as well as when a dispute arises. She also spoke of recent legislation enacted in Angola seeking to prevent non-members of the Angolan Bar Association to act in arbitrations seated in Angola, describing how this has been applied in practice so far and comparing this to the current situation in Mozambique. Ms. Cansado Carvalho concluded on a positive note stating that, although arbitration and, in particular, oil & gas arbitration involving Angola or Mozambique is not without challenges, with knowledge of what these difficulties are and of how these jurisdictions work it is generally possible to manage them.

The debate about the above-mentioned topics has been enriching and promoted the interaction

between the Portuguese-speaking practitioners. Among the participants were Ms. Ana Paula Montans (Arbitrator, London), Dr. Clávio Valença (Partner, Valença Galíndez, São Paulo), Dr. Daniel de Andrade Levy (Of Counsel, Enyo Law, London), Prof. Dr. Diego Fernández Arroyo (Sciences Po, Paris), Dr. Gustavo Scheffer da Silveira (Counsel, ICC, São Paulo), Prof. Dr. Judith Martins-Costa (Partner, Judith Martins-Costa Advogados, Porto Alegre), Ms. Luiza Saldanha Pena Costa (Associate, Betto Seraglini, Paris), Prof. Dr. Mariana França Gouveia (Partner, PLMJ/Universidade Nova de Lisboa, Lisbon), Dr. Matthieu de Boissésón (Arbitrator, Matthieu de Boissésón, London and Hong Kong), Mr. Miguel de Almada (Partner, MLGTS, Lisbon), Prof. Dr. Nadia de Araujo (Partner, Nadia de Araujo Advogados/PUC-Rio, Rio de Janeiro), Mr. Ricardo Ranzolin (Partner, Silveiro Advogados, Porto Alegre), and Ms. Sofia Ribeiro Mendes (Arbitrator, Lisbon).

As arbitration practitioners and Portuguese speakers, we practice arbitration according to the tones and nuances of our cultures. Like Fernando Pessoa and Machado de Assis, we live in our own political, economic and social environment. Acknowledging that arbitration could be designated “*lusophone*” depends on an increasing effort towards contributing, interacting and understanding: this is our role as “translators” of different legal cultures in arbitration.

We met, in this first edition, in Paris, the city of lights, a place of meaningful encounters. Just like Pessoa and Machado, we too have become translators. We have reciprocally translated our own particularities and multiple potentialities. And this experience like the literary encounter of Pessoa and Machado can inspire and produce new lusophone perspectives in arbitration. Portugal as an international destination and Brazil as a developing country clearly present opportunities and potentialities. Angola and Mozambique although needing economic and legal infrastructure present important resources for the international trade. These countries present a whole world to explore and to translate. May Camões’ language, which brought together in a poem Machado and Pessoa, be used as a tool for this task. In 2019, we shall continue this fruitful exercise in the Second Edition of the Lusophones’ Arbitration Meeting.

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References

The poem *The Raven* is one of the most well-known works of Edgar Allan Poe. The English text has its own musicality and uses many figures of speech, which make translation a real challenge.

?1 The translations of the Brazilian writer Machado and of the Portuguese writer Pessoa have been examined by the Brazilian writer Carlos Heitor Cony, “As traduções de o Corvo”, *Jornal Folha de São Paulo*, Editoria de Opinião (20 April 1997).

?2 See DAVID, René. *Os grandes sistemas do Direito contemporâneos* (Martins Fontes 2002).

?3 REALE, Miguel. *Fontes e modelos do Direito* (Saraiva 1994).

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