Kluwer Arbitration Blog

Georgetown Brazilian Arbitration Day: Report on the Current Brazilian Arbitration Landscape

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Organized by the Georgetown International Arbitration Society and the Georgetown Brazilian Law Association, in cooperation with the Arbitration Channel, the I Georgetown Brazilian Arbitration Day took place on April 8, 2022. The first edition of the conference discussed some of the main topics of interest in international arbitration as well as the latest developments in arbitration in Brazil.

The recording of each panel can be accessed in the Arbitration Channel page on Youtube.

Introduction

The keynote speaker, Professor Anne Marie Whitesell (Georgetown University Law Center, Washington DC), opened the conference reminding the audience that Brazil nowadays is one of the leading examples for how arbitration can flourish and be effective. Professor Whitesell stated that this is, in part, due to the number of Brazilian lawyers interested in international arbitration and seeking to specialize on the subject. Professor Whitesell then started the program by sharing her excitement about the enormous advancements and developments that have taken place in international arbitration in Brazil in recent years.

Is Brazil a truly arbitration-friendly jurisdiction? Current challenges and next steps for Brazil to become a more popular seat of arbitration

Mr. Lucas Passos (LL.M Candidate at Georgetown University Law Center, Washington DC) moderated the first panel of the day, and provoked the panelists Mrs. Ana Carolina Beneti (Beneti Advocacia, São Paulo), Mr. Jose Sanchez (Vinson & Elkins LLP, New York), Mrs. Laura França Pereira (Three Crowns LLP, Washington DC) and Mr. Marcelo Roberto Ferro (Ferro, Castro Neves, Daltro & Gomide, Rio de Janeiro) on giving their views on the state of play of arbitration in Brazil.

Mrs. Beneti commenced her presentation by stating that Brazil is a force to be reckoned with in the field. Although the history of arbitration is recent in Latin America, when compared to other

countries in the region, Brazil has been a case of success. Mrs. Beneti shared that the latest ICC Report placed Brazil as the preferred seat for arbitration in Latin America and 5th place worldwide, 2nd place in terms of number of parties for 2020 and 2021, and 5th place in number of arbitrators.Mr. Ferro presented an overview of recent – and controversial – decisions by the Superior Court of Justice ("STJ") in relation to conflict of jurisdiction ("*conflito de competência*"), a unique device to Brazil where an incidental motion is filed in proceedings when a conflict arises between two competent adjudicatory bodies. In 2022, the STJ admitted a conflict of jurisdiction motion discussing a conflict between two arbitral tribunals. Mr. Ferro warned that this could represent a denial of the competence-competence principle in the country. Another relevant decision was issued in 2019 by the STJ, in relation to a case involving the state-owned Petrobras, where the STJ reopened the discussion on whether state-owned companies are authorized to arbitrate, which had been extinct with the amendment to the Brazilian Arbitration Act (BAA) in 2015 that expressly included a provision authorizing state-owned companies to have recourse to arbitration (BAA, Article 1, paragraph 1).

Mrs. Laura França Pereira (Three Crowns LLP, Washington DC) followed with a presentation on the potential for Brazil to become even more prominent in international arbitration as a seat involving foreign parties. Mrs. Pereira commented that even though data shows that arbitration proceedings seated in Brazil have grown 20% over the past few years, only 8% involved foreign parties.

With the growth in Investor-State Disputes throughout Latin America, Mrs. Pereira stated that Brazil may effectively host ISDS cases, as the country offers superior arbitration regulation compared to neighbor countries. Brazil's solid track record for recognition and enforcement procedure, neutrality and impartiality of local courts as well as a modern and well drafted national arbitration statute should aid Brazil's case for being a preferred seat.

Closing the first panel of the conference, Mr. Jose Sanchez (Vinson & Elkins LLP, New York) commented on how Brazil is a significant player in international arbitration, as well as on the trend to conduct arbitration proceedings in Portuguese and governed by Brazilian law. With Brazil being the largest economy in Latin America with great prospects of investment growth, the Brazilian market is significant for the economic activity of the region, which directly impacts the dispute resolution market. Mr. Sanchez also commented on how courts in different states in Brazil are highly deferential to arbitrators' findings of their own jurisdiction – something not seen elsewhere in the region. Mr. Sanchez concluded that Brazil is a world-class jurisdiction and the best choice for a seat in Latin America.

All panelists concurred that Brazil indeed is an arbitration friendly jurisdiction, but challenges to arbitration practice in the country still exists, and efforts to further improve the system in Brazil are still warranted.

The Brazilian litigation culture: Impressions from international arbitrators

The second panel, moderated by Mr. Leandro Felix (Machado Meyer Advogados, São Paulo), kicked-off the panel by asking questions regarding the differences between Brazilian and international arbitration practice to each member of the panel, composed of Mr. Hermes Marcelo Huck (Huck Otranto Camargo, São Paulo), Mrs. Maria Claudia Procopiak (Procopiak Arbitration,

London), Mr. José Gabriel Assis de Almeida (J.G. Assis de Almeida Advogados, Rio de Janeiro) and Mr. Mauricio Gomm Santos (GST LLP, Miami).

On the advantages and disadvantages of lawyers who practice both litigation and arbitration, Mr. Huck pondered that arbitration is a much more light and flexible process than litigation, and that lawyers working exclusively in this field understand this and behave accordingly. In this regard, Mrs. Procopiak commented that arbitration is a type of litigation and that practicing advocacy skills, be it in litigation or arbitration proceedings are advantageous. However, practices exclusive to litigation should not be replicated in arbitration. Likewise, Mr. Gomm warned the audience on the risks of bringing too much of a domestic and litigation mindset to arbitration proceedings.

In relation to the main differences between legal submissions, Mr. Huck considered that cultural differences might impact the style or even content of a legal submission, but the art of legal writing is to be clear, objective and understandable, without being tiresome. Mr. Gomm also advised against the abuse of citation of case law and scholarly opinions and the use of passive voice by civil law practitioners.

In terms of different approaches to the taking of evidence, witness testimony, cross-examination, and the conduct of hearings, Mr. Huck opined that different cultures and different approaches to each case affect counsel behavior, but in practice, no basic difference in evaluating evidence between domestic and international arbitration exists. Mrs. Procopiak shared her view that common law tradition prevails when it comes to the production of evidence in international arbitration.

In turn, Mr. Gomm stated that with more foreign practitioners, lawyers and arbitrators fine-tuning their Portuguese skills, the common law and civil law systems receive inputs from one another and meet halfway, creating what he called the phenomenon of “internationalization of the Anglo-Saxon system”. In regard to document disclosure issues, Mr. Almeida stated that the key point for counsel is to anticipate potential conflicts and where the evidence can be gathered from and stored throughout the parties’ contractual relationship.

Concerning the differences in term of time frame for arbitration proceedings, Mr. Almeida stated that international arbitral tribunals usually have a higher degree of predictability and efficiency when compared to domestic cases.

Finally, Mrs. Procopiak and Mr. Gomm addressed the fact that arbitration is a melting pot for international practitioners, bringing together professionals from different backgrounds, experience and culture. Both agreed that various language skills are a must in order to break into the market.

Enforceability of foreign arbitral awards and international judicial cooperation

The third panel was chaired by Antonia Azambuja (Machado Meyer Advogados, Rio de Janeiro), the panel was composed of Mrs. Carmen Tibúrcio (Barroso Fontelles, Barcellos, Mendonça & Associados, Rio de Janeiro), Mrs. Emily Westphalen (Herbert Smith Freehills, New York), Mr. Fabio Peixinho (Tauil & Chequer Advogados in association with Mayer Brown, São Paulo) and Mrs. Marcela Kohlbach (ICC YAF Representative for Latin America, Rio de Janeiro).

Mrs. Tibúrcio provided an overview of the Brazilian legal system regarding the recognition and

enforcement of foreign arbitral awards. She presented statistics showing the number of cases filed before the STJ regarding the recognition of US arbitral awards in Brazil and addressed important practical issues. She was followed by Mrs. Westphalen, who analyzed recognition and enforcement proceedings under a US perspective by addressing the relevant provisions of the Federal Arbitration Act ("FAA"), the requirements for the confirmation of arbitral awards and defenses to the enforcement of arbitral awards in the US.

Mrs. Kohlbach focused on the failure to disclose and impacts on the enforceability of arbitral awards. She addressed the *Abengoa v. Ometto* case, where issues of public policy were raised regarding the neutrality and impartiality of the arbitrators. In spite of this precedent, the STJ took a different turn in *Levi Strauss v. Ganaderia Brasil*, where the Court only analyzed whether the formal requirements of the enforcement proceedings were met, since its analysis should not overrun the merits of the case.

In his presentation, Mr. Peixinho discussed whether state courts could grant enforcement of arbitral award if the award was set aside in the seat of arbitration. Finally, he spoke about the problems that arise from "enforcement races" of arbitral awards in different jurisdictions as a result of the absence of a harmonized international approach to deal with this issue.

Corruption in international commercial arbitration: Key issues and Brazilian specificities

The last panel, moderated by Mrs. Mônica Murayama (LL.M Candidate at Georgetown University Law Center, Washington DC), focused on corruption in arbitration, and was composed of Mr. Carlo Verona (Demarest Advogados, São Paulo), Mrs. Érica Franzetti (King & Spalding LLP, Miami; Georgetown University Law Center, Washington DC), Mrs. Michelle Grando (White & Case LLP, Washington DC), Mr. Pedro Jardim de Paiva Barroso (Petrobras, Rio de Janeiro) and Mr. Rafael Francisco Alves (MAMG Advogados, São Paulo).

Mrs. Franzetti and Mr. Barroso discussed whether allegations and possible findings of corruption could impact the jurisdiction of arbitration tribunals and concluded that it would occur when corruption affects the consent to arbitrate or the arbitrability of the dispute. They added that, unless the arbitration clause itself is tainted by corruption, allegations or findings of corruption should not impact the jurisdiction of an arbitral tribunal. They further explained that the jurisdiction analysis considering corruption allegations is different in commercial and investment disputes.

Mrs. Grando and Mr. Barroso addressed that there are different views on the standard of proof for proving corruption. Some argue that there should be a high standard of proof, such as the criminal standard of beyond reasonable doubt or the clear and convincing evidence standard. However, others argue that the standard of the preponderance of evidence should apply. Regardless, a party can rely on circumstantial evidence or red flags to prove corruption.

Mrs. Franzetti and Mr. Barroso discussed parallel proceedings, since it is common that internal or administrative criminal investigations be undertaken concerning entities or individuals involved in corruption allegations during the pendency of an arbitration. Mrs. Franzetti argued that there are tribunal decisions confirming that corruption findings in administrative or internal proceedings are not binding on an arbitral tribunal, but may be treated as probative evidence of corruption.

Mr. Verona and Mr. Alves addressed the duty of the arbitrators to corruption investigations. The

speakers discussed different views on whether arbitrators have a *duty* to disclose and to investigate *sua sponte* potential corruption practices and to report potential acts of corruption to authorities – or, contrarily, the arbitrator would only have *powers* to investigate and report, but no duty. Mr. Rafael Alves also addressed the topic of misuse of arbitration for the corrupt purposes or money.

Lastly, Mrs. Grando commented on the annulment of arbitral awards on corruption grounds, which can occur when there is corruption in the arbitral proceeding, highlighting that courts are asked to analyze these issues based on public policy grounds, which serves as grounds for annulment.

Conclusion

The First Georgetown Brazilian Arbitration Day provided insightful discussions on a variety of important topics in international arbitration and arbitration in Brazil, as well as under an international and comparative law perspectives, which was obtained by the participation of brilliant Brazilian and non-Brazilian practitioners and arbitrators. In so, the question raised in the first panel can be answered affirmatively: Brazil is an arbitration friendly jurisdiction, given its modern and solid legal framework, limitations on state courts intervention in arbitration and the strong influence of international arbitration principles and institutes.

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