Kluwer Arbitration Blog

CAM-CCBC Arbitration Congress IX Edition: Publication of Arbitral Awards – The Future or Utopia?

Lucas Diniz (Rodrigo Mendes Advogados) · Wednesday, November 2nd, 2022

Between 17-23 October 2022, the São Paulo Arbitration Week ("SPAW") was held with multiple events in different parts of the biggest city of Latin America. The SPAW is a collaborative event, organized by Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM-CCBC"), and is conceived as a calendar for law firms, universities, associations, and institutions to promote events in a productive environment in benefit of the development of ADRs in Brazil.

As a tradition, SPAW was opened by the CAM-CCBC Arbitration Conference ("Conference"). At its IXth edition, this year's Conference aimed at discussing *the today and the tomorrow of arbitration*. Addressing some of the most relevant challenges faced by the arbitral community nowadays, the event provided an excellent debate with renowned practitioners, as it is reflected in the Conference program.

The purpose of this post is to bring some highlights about the subject of the 4th Panel of the Conference ("Panel"), which discussed the "*Publication of Arbitral Awards: The Future or Utopia?*" The Panel was moderated by Professor Sheila C. Neder Cerezetti (Partner, Neder Cerezetti Advocacia), and counted on excellent lectures presented by Ank Santens (Partner, White & Case), Jean-Rémi de Maistre (Co-Funder & CEO, Jus Mundi), and Rose Rameau (Professor of Law and Independent International Arbitrator & Mediator).

Publication of Arbitral Awards: The Future or Utopia?

The Panel began with Professor Cerezetti's introductory notes calling the audience's attention to the fact that publication of *awards* is only one of the many issues when it comes to the duality between confidentiality vs. transparency in arbitral proceedings. Professor Cerezetti posed some open-ended questions for the panelists to bear in mind during their presentations.

The first lecture was given by Mrs. Santens, who briefly presented an overview on the history and the current state of play of publication of arbitral awards. Before touching the basis on commercial arbitration, she highlighted how publicity has always been the rule in Maritime Law and in Sports Court; then she mentioned the development of publication of awards in the ISDS, highlighting NAFTA cases, the amendment of the ICSID Rules in 2006 and the creation of the UNCITRAL

Rules on Transparency in Treaty-based Investor-State Arbitration, which is adopted in over one hundred of investment treaties, from which forty three are already in force.

After this introduction, Mrs. Santens highlighted that the current stage of publication of arbitral awards in commercial arbitration has a much different landscape than in investment arbitration, since it deals with private parties and private interests. Despite these discrepancies, as pointed out by Mrs. Santens, even in commercial arbitrations, we are seeing a movement towards transparency. In this regard, Mrs. Santens briefly analysed some arbitration rules, categorizing them in three groups, namely:

1. institutions with strict rules on confidentiality of awards (for instance, the Swiss Arbitration Rules (2021), the SIAC Arbitration Rules (2016), and the LCIA Rules (2020));
2. institutions in between confidentiality and publication of awards (such as the HKIAC Rules (2018), the ICDR Rules (2021), and the ICC Rules (2021)); and
3. institutions pro publication (such as the ICSID Rules (2022), the CAM-CCBC Rules (2012), and CAMARB Rules (2019)).

Mrs. Santens, then, concluded by saying that, although we are seeing a movement towards transparency in commercial arbitration, there is still room for more publication of awards and a lot to be considered in such regard. Following a question from Professor Cerezetti, Mrs. Santens also explained that there is much less publication of procedural orders, for instance, when compared to awards. This is reflected by the fact that most arbitral institutions do not even mention publication of procedural orders in their arbitration rules, but exclusively the publication of arbitral awards (ICC, ICDR and ICSID would be one of the few examples that provide for publication of POs). However, Mrs. Santens pointed that we are seeing a trend towards the publication of decisions rendered by arbitral institutions themselves, as the LCIA has been doing since 2006 with decisions on challenge of arbitrators (and also HKIAC, albeit its rules are not ‘pro publication’).

The second presentation was made by Mrs. Rose Rameau, who discussed the main objectives sought with the publication of awards.

First, considering her perspective as a professor, Mrs. Rameau mentioned the importance of publication of awards for academic purposes, which allows us to dive into the multiple juridical issues that may arise in an arbitration. *Second*, in regard to ISDS, she mentioned the importance of publication of awards for the purpose of: (i) an investor’s decision of where to invest (*e.g.* an investor may not choose a State wherein his investment is very likely to be expropriated); or (ii) a State’s decision of whether to accept a certain investor in its territory (*e.g.* the evaluation of an investor’s conduct before granting permission for such investor). *Finally*, Mrs. Rameau mentioned the importance of publication of awards for the purposes of advising clients or as a helpful source for arbitrators’ decisions. He pointed out, however, that there is an important difference between caselaw in commercial and investment arbitration.

The third presentation was in charge of Jean-Rémi de Maistre, who discussed the use of publication of arbitral awards and how it could be helpful for arbitration practitioners. He mentioned that, despite foreseeing confidentiality as something theoretically and potentially beneficial, publicity of awards and documents can be very helpful in the creation of a more secure arbitral environment. That is precisely the scope of Jus Mundi, created as a global platform aiming at providing a source of comprehensive and reliable data for each area of international law and arbitration. Professor Cerezetti asked how the arbitral community can reach a balance between

transparency and confidentiality. Mr. Maistre said that, although it is certain that some aspects about arbitral procedures must be kept confidential, some degree of transparency is crucial for a better and more predictable arbitral system. Mr. Maistre believes that it is possible to reach "*the best of both worlds.*" Depending on how the information is disclosed, transparency may not create any harm, especially because one is not talking about publicizing all the information of an arbitral procedure, but rather only necessary ones, such as the tribunals, counsel, experts, industry, etc.

At the end of the debate, Professor Cerezetti concluded that this rich discussion is extremely important, especially considering the moment the Brazilian arbitration community is facing right now, with the threat of a controversial amendment to modify some dispositions of Brazilian Arbitration Act ("BAA") (previously covered here).

Conclusion

In light of the excellent Panel, we may conclude that the arbitral community desires a degree of transparency (as recently pointed out by CBAr's-IPSOS Research). The CBAr's-IPSOS Research (2021) is a research conducted by the Brazilian Arbitration Committee, along with Ipsos Institute, that aimed at investigating the degree of satisfaction of the multiple players involved in the arbitral proceedings. Seventy-three per cent (73%) of the participants have indicated they are willing to publicize the awards of the proceedings they are involved, as long as some information are kept confidential. Hence, more discussion is necessary to find the right balance between transparency and confidentiality in the arbitral procedures.

Follow along and see all of Kluwer Arbitration Blog's coverage of IX CAM-CCBC Arbitration Congress here.

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