Kluwer Arbitration Blog

CAM-CCBC Arbitration Congress IX Edition: Regulating Corporate Law Disputes

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The IXth Edition of the CAM-CCBC Arbitration Congress took place on 17 – 18 October 2022, in São Paulo, Brazil. The congress brought together practitioners to discuss "the today and the tomorrow" of the arbitration market.

After two years of pandemic, the convention provided a unique forum to debate a wide range of topics, including the regulation of corporate disputes, which is the central subject of this article. The panel was moderated by Paula Forgioni (Forgioni Advogados, Partner; USP Faculty of Law, Professor) and the guest speakers were Juliana Krueger Pela (Advocacia Krueger Pela, Partner; USP Faculty of Law, Professor), Marcelo Barbosa (Brazilian Securities and Exchange Commission, Former President), and Rouven Bodenheimer (Bodenheimer, Partner).

Regulating Corporate Law Disputes

Paula Forgioni opened the panel by explaining that Brazil is pioneer in arbitration of corporate disputes. But the question to but begin with is the following: should commercial disputes be better regulated? Ms. Forgioni stated that while arbitration is beneficial for the economy and the development of the country, the challenge is to find the right measure of regulation while avoiding the temptation to regulate too much. She also stressed that there are differences between collective arbitration and mere corporate law disputes, concepts that are often confused.

Rouven Bodenheimer, based on a comparative law perspective, mentioned that the regulation of corporate law disputes is challenging in almost all jurisdictions. In Germany, according to the §1030 (1) CCP, any claim involving an economic interest ("*vermögensrechtlicher Anspruch*") can be subject of an arbitration agreement. Nevertheless, until 1996 there were no corporate arbitration disputes in Germany. In April 2009, an important decision of the German Supreme Court held that shareholder disputes are arbitrable if the arbitration agreement fulfills the following requirements: (i) there must be consent of all the shareholders to arbitrate their disputes; (ii) the opportunity to participate must be ensured for all shareholders; (iii) there must also be guaranteed equal opportunity of the shareholders to participate in the appointment of the arbitral tribunal; and (iv) lastly, all the proceedings must be consolidated before the same tribunal. If these requirements are not met, then the arbitral award is invalid pursuant to §138 of the BGB.

The DIS Supplementary Rules for Corporate Disputes codified those requirements. According to these rules, all the shareholders must be named in the request for arbitration, must be invited to join and participate, and if any shareholder decides not to join, it must be informed about all the procedural acts during the arbitration. The DIS Rules also have special rules on the appointment of arbitrators and rules on consolidation of jurisdiction in case of parallel proceedings. In Mr. Bodenheimer's opinion, the DIS Rules reflect most of the concerns of the legislators, regulators, and practitioners.

Juliana Krueger Pela reiterated the terms of Resolution 80 of the Brazilian Securities and Exchange Commission ("CVM"), which provides that publicly traded companies should disclose information on judicial and arbitration claims based on corporate or securities market legislation, or on the rules issued by the CVM. The purpose of the rule is to improve the mechanisms for protecting investors and minority shareholders by allowing them to take knowledge and assess claims that could potentially affect them. The communication obligation applies to corporate claims in which the issuer, its shareholders, or its managers appear as parties and which (i) involve rights or diffuse interests, collective or homogeneous individual; or in which (ii) a decision may affect the legal sphere of the company or other securities' holders who are not parties to the process.

In Ms. Pela's opinion, regulation is urgent and there is no room for questioning its relevance. Those involved should only debate what regulatory strategies should be used. For instance, one of the questions to be answered is what should the source of the regulation be, because it can be the CVM, the company itself, or arbitration institutions.

In the same sense, players must also discuss what will be the content of the regulation and the means through which shareholders will be informed about the initiation of the arbitration proceeding. Another issue is to determine how will the arbitral tribunal be selected, the cost allocation, and mechanisms to prevent simultaneous and conflicting awards. Ms. Pela also addressed the possibility of publication of arbitral awards and, consequently, a possible mitigation of confidentiality. Ms. Pela recommended the reading of the OCDE Report on Private Enforcement of Shareholder Rights, which presents a comparison of selected jurisdictions and policy alternatives for Brazil.

Lastly, Marcelo Barbosa highlighted that the B3 (the official stock exchange of Brazil) launched in 2000 the "Novo Mercado", which is a high corporate governance segment which prescribes the need of the inclusion of arbitration clauses in the bylaws for companies that are seeking to be listed in this branch of the stock exchange. Mr. Barbosa stated that back in the day, nobody questioned if the market was ready for the collective arbitration issues that would arise, so that nothing was foreseen in the regulation in this regard.

Nevertheless, within the scope of publicly held companies, some information is relevant to be disclosed, because, in practice, this announcement may impact company's share price and influence shareholders' investment decisions. Who defines what is an "*ato ou fato relevante*" (relevant act or fact) is the CVM itself, as per its Instruction 358.

The reason behind the abovementioned CVM Resolution 80 is that company costs can interfere with shareholders' rights. On this point, the CVM considered itself competent to regulate this issue, but the Commission has its competence restrained to the stock market and its powers are limited by law. Based on this restrictions, Mr. Barbosa has doubts if the CVM is competent to establish the regulation. Yet, the panelist said he believes that third-party funding of arbitrations is

an issue that has the potential to be re-examined by regulator.

Conclusion

The first day of the CAM-CCBC Arbitration Congress is usually dedicated to exploring the current status of arbitration in Brazil and the world, and this year was not the exception. The panelists pointed out that the decision to regulate corporate law disputes is not easy. Usually, as far as regulation is concerned, less is more. At the same time, a well-regulated market can attract investments due to the increase in security and predictability which lower transaction costs.

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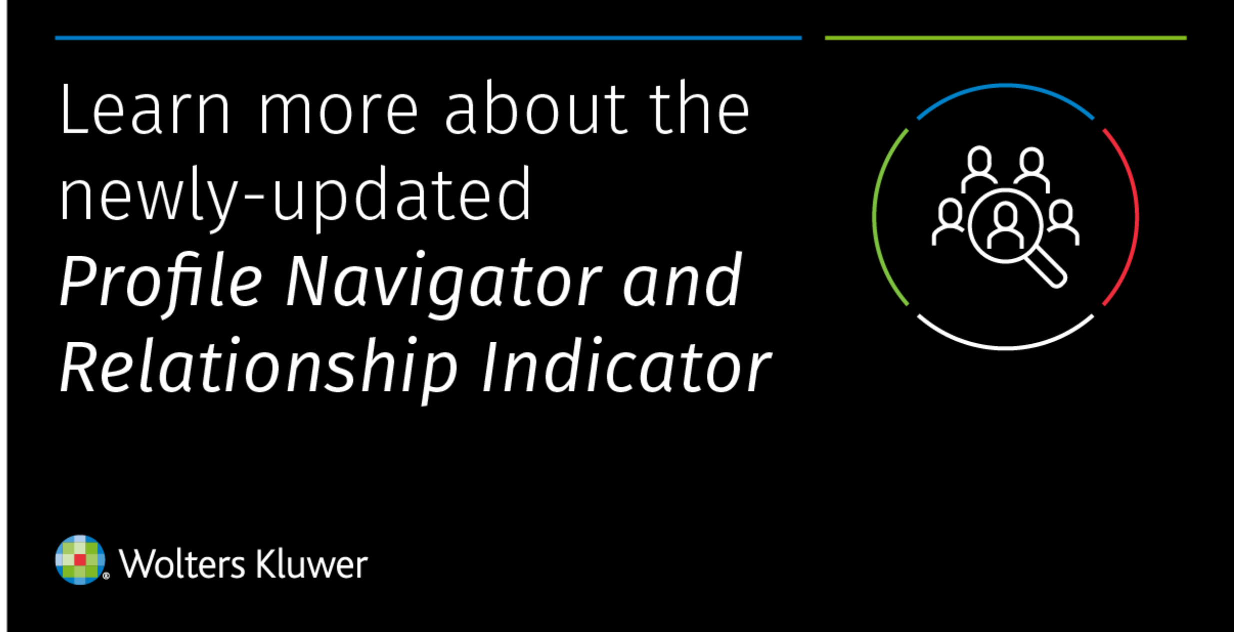

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