

Kluwer Arbitration Blog

First ICC Arbitration Conference in the South of Brazil Marks a Milestone

Nathalia Fasolo (JBLEE Advogados) · Monday, August 7th, 2023

In 2023, the **ICC International Court of Arbitration** (“ICC Court”) celebrated 100 years as the world’s leading arbitral institution. To celebrate this milestone, on 25 May 2023, the ICC Court and the National Committee of Brazil (“ICC Brazil”) organized the **First ICC Arbitration Conference in the South of Brazil** (“ICC South Conference”).

The ICC South Conference continued the success of previous editions held in the North-East of Brazil, drawing a diverse audience of lawyers, in-house counsel, arbitrators, and students to a filled auditorium. The event featured one interview, three panels and 20 speakers, providing delegates with an opportunity to reflect on the historical progression of arbitration and the pivotal role played by the ICC Court in this journey.

The key highlights of the Conference are presented below.

Reflecting on the Past and Shaping the Future: Insights from Interview with the Vice-President of the ICC Court

The ICC South Conference took place in Curitiba, Brazil – a city of great significance in the country’s arbitration history. Three decades ago, Curitiba hosted a momentous gathering, where over three hundred individuals convened for a national convention to deliberate on the Brazilian Arbitration Act (“BAA”) project. This event unfolded within the context of the “Operation Arbiter”, spearheaded by Mr. Petrônio Muniz, with the aim of securing the approval of the BAA. After a rigorous four-year struggle in the chambers of the National Congress, the BAA entered into force (**Law 9.307 of 1996**), marking a milestone achievement (for more details please see [here](#)).

It was against this backdrop that the interview of Mr. **Eduardo Damião Gonçalves** (Partner, Mattos Filho, Vice-Chair to the ICC Commission on Arbitration and ADR) commenced. Mr. **João Bosco Lee** (Founding Partner, JBLEE Advogados) inquired about the transformations witnessed in arbitration since the enactment of the BAA. Mr. Damião stated that since then, Brazil has emerged as a prominent player in the international arbitration community, as evidenced by the statistics from the ICC Court, which further solidified Brazil’s position in the global arbitration landscape (as recently addressed [here](#)).

This consolidation resulted from multiple factors. On the one hand, it stemmed from the BAA

itself, its adoption by users, and the Judiciary's support in rendering proper decisions regarding arbitration. On the other hand, it was fostered through national promotion, notably through the **Brazilian Arbitration Committee** ("CBAr"). Currently, the CBAr's primary goal is to strengthen the relationship with the Brazilian Judiciary, in order to address existing challenges. Mr. Damião concluded by asserting that the evolution of arbitration lies in its unwavering pursuit of consolidation, where occasional setbacks – such as the **controversial bill** ("anti-arbitration bill") set to amend the BAA (as previously covered [here](#)) – serve as stepping stones towards further progress.

A Century of Growth and Innovation at the ICC International Court of Arbitration

The first panel of the conference, moderated by Ms. **Eliane Carvalho** (Partner, Machado Meyer Advogados), focused on the functioning of the ICC Court and its Secretariat, highlighting the key innovations in the ICC Court and the **ICC Arbitration Rules** ("ICC Rules").

Mr. **Gustavo Scheffer da Silveira** (Partner, Tauil & Chequer Advogados) emphasized the distinct roles fulfilled by the ICC Court and its Secretariat. He pointed out that while the Secretariat performs typical secretarial tasks, the Court, comprised of members from 20 different nationalities, holds the authority to make crucial administrative decisions. These decisions include determining the arbitration venue, ensuring the arbitrators' independence and impartiality, and scrutinizing arbitral awards.

Mr. **Fabiano Robalinho** (Partner, Sergio Bermudes Advogados) addressed the scrutiny process conducted by the ICC Court. With 195 members, including 17 Vice-Presidents and 167 Court members from 121 countries, the ICC Court fosters a global cultural exchange and serves as a vast arbitration database. Committee sessions, with a minimum quorum of three members, occur weekly to address various decisions, including the scrutiny of arbitral awards. Special sessions, involving at least six Court members, focus on reviewing awards involving States. The scrutiny process consists of three phases: (i) an initial review by a case counselor, (ii) a private session, and (iii) a final scrutiny by the Court, resulting in approved drafts, drafts with comments or drafts sent back for improvement. The Court's role is to propose suggestions to enhance award's quality and enforceability.

Ms. **Debora Visconte** (Founding Partner, Visconte Advogados) presented the emergency arbitrator procedure introduced in the **2012 ICC Rules (Article 29)**, applicable when urgent interim measures cannot wait for the constitution of the arbitral tribunal. The procedure applies to signatory parties of the arbitration agreement, except for pre-2012 agreements, opt-outs, or treaty-based arbitrations. It is important to note that the emergency arbitrator's order does not undergo Court scrutiny. In general, the ICC emergency arbitrator proceedings last 16 days. As pointed out by Ms. Visconte, the Court has experience in, amongst others, anti-suit measures and asset preservation, particularly in the energy, construction, engineering, and transportation sectors. Notably, Latin American parties represent 32% of the cases.

Lastly, Ms. **Maria Claudia Procopiak** (Founding Partner, Procopiak Arbitration) discussed the expedited procedure provisions ("EPP") in the **ICC Rules (Article 30 and Appendix VI), included in 2017 and amended in 2021**, which offer a streamlined arbitration process. The EPP applies automatically if certain requirements are met, such as an arbitration agreement post-dating

1 March 2017 and a dispute value up to US\$ 3 million. Parties can also opt-in by agreement. The procedure entails (i) proportional time and costs, (ii) no terms of reference, (iii) a conference within 15 days, (iv) a decision based on documents with the option for a hearing, (v) limits on document production and written submissions, and (vi) a final award within 6 months. As shared by Ms. Procopiak, from March 2017 to December 2022, the ICC administered 524 expedited procedures, comprising 371 opt-in requests, 118 cases settled by agreement, 146 cases applying automatically, and 23 opt-out cases.

Advancing Arbitration: Trends and Imperatives

The future of arbitration presents a dynamic landscape marked by emerging trends and challenges, such as embracing technology, leveraging artificial intelligence (“AI”), promoting diversity, and improving transparency. Additionally, the rise of public administration in arbitration adds a new dimension to the discourse. Understanding these key aspects becomes crucial for shaping the future of dispute resolution.

In the panel “The future of arbitration: main trends and challenges”, moderated by Ms. **Elisa Schmidlin Cruz** (Partner, XVBM Advogados), Mr. **Andre Luiz Cavalcanti** (Legal Counsel, Shell Brazil Petroleum Ltd.) sustained that, as AI becomes more prevalent, arbitration rules must adapt, since integrating technology tends to reduce costs and save time in the proceedings. Looking ahead, Mr. Cavalcanti envisions that contracts will incorporate dispute resolution mechanisms that leverage AI. Ms. **Elis Wendpap** (Independent Lawyer and Consultant) emphasized the crucial role of diversity in decision-making processes. The underrepresentation of women, particularly in leadership positions, perpetuates biases in promotion and hiring.

As pointed out by Ms. Wendpap, the ICC has implemented gender equity and inclusion policies, acknowledging the correlation between diversity and innovation. Mr. **Guilherme Rizzo Amaral** (CEO, Souto Correa) outlined three measures to increase transparency in arbitration: enhancing governance in arbitral institutions, improving disclosure of arbitrator’s availability, and clarifying the duty of disclosure for conflicts of interest. Mr. Amaral also underscored the importance of aligning Brazilian practices with international standards to protect arbitration from legislative and judicial challenges, such as the anti-arbitration bill. Finally, Mr. **Guilherme Nitschke** (Partner, Tozzini Freire) attributed the rise of public administration in arbitration to the dual nature of public and private spaces. This growth is evident in infrastructure contracts and sector-specific legislation, prompting the need for arbitration in these areas. The 2015 BAA reform (**Law 13.129 of 2015**) and the Public Procurement Law (**Law 14.133 of 2021**) have brought about specific peculiarities in arbitrations involving public administration, such as arbitrability, applicable law, arbitral institution selection, publicity, and financing challenges.

Perspectives on Conducting an Effective Arbitration Procedure

In arbitration, ensuring an effective procedure is a paramount objective for all parties involved. In the panel “How to conduct an effective arbitration procedure?”, moderated by Mr. **Raphael Lang Silva** (Counsel, ICC Court), different perspectives were shared. Mr. **Rodrigo Martini** (Legal Director, Technit Engenharia e Construção S/A) highlighted the importance of managing

arbitration from its inception within the contract. Ms. **Leila Cuéllar** (Chief Prosecutor of the Coordination of Legal Studies, PGE-PR) addressed the recent regulatory developments in Paraná that govern arbitration involving the public administration (**Decree 10.086 of 2022**), as well as the proactive preparations undertaken by the Prosecutor's Office to prepare its staff for arbitration. Ms. **Ane Elisa Perez** (Founding Partner, Perez, Giannella, D'Avola) emphasized the role of counsel in striving for a successful arbitration process, which included engaging legal and technical experts from the outset of the arbitration. Lastly, Mr. **Rodrigo Gabardo** (Founding Partner, R. Gabardo Advocacia e Arbitragem) highlighted the responsibility of arbitrators in ensuring efficiency throughout the proceedings, delivering timely decisions that meet parties' expectations for justice while balancing due process concerns.

Conclusion

The First ICC South Conference marked a historic moment in the celebration of the ICC Court's centenary, showcasing its unwavering commitment to innovation in arbitration and forward-thinking approach. The event underscored the importance of addressing the needs of all parties involved in arbitration, alongside adapting to the evolving landscape of trends and challenges, including technology integration, diversity, and transparency. The Conference fostered an engaging environment for advancements and invigorated the collective determination to shape the future of dispute resolution.

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