Kluwer Arbitration Blog

CBAr 22nd International Arbitration Conference: CISG in Brazil, UNIDROIT Principles in Corporate Arbitrations, and the Arbitrator's Role in Strengthening Business Contracts

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From 13 to 15 September 2023, the **Brazilian Arbitration Committee – CBAr** held its 22nd International Arbitration Conference ("22nd CBAr IAC" or "Conference") in Rio de Janeiro. Considering that arbitration is most commonly adopted in business contracts, this year's Conference focused on "Arbitration and Business Contracts".

In the three-day event, the **Conference program** covered issues such as (i) business contracts and the arbitrator, (ii) business contracts and arbitration proceedings, (iii) arbitrability and business contracts, (iv) arbitration and contractual imbalance, (v) arbitration in regulated sectors (electricity and oil and gas) and specific business areas (agribusiness and sports), (vi) the United Nations Convention on Contracts for the International Sale of Goods ("CISG") in Brazil, and (vii) the International Institute for the Unification of Private Law ("UNIDROIT") Principles in corporate arbitrations.

Below are the key topics addressed on the Conference's first day.

YOUNG Practicioner's Event

The 22nd CBAR IAC held the traditional Young Practicioner's Event, in which two panels took place.

The first panel, hosted by speakers **Bernard Potsch** (Partner, Batista Martins Advogados), **Maria Beatriz Rizzo Delamuta** (Attorney, Xavier Gagliardi Inglez Verona Schaffer Advogados), and **Verena Moura Waisberg** (Deputy Counsel, ICC), and moderated by **Rafael Branco Xavier** (Attorney, Judith Martins-Costa Advogados), consisted of a review of the first eight years since the CISG was ratified in Brazil (**Decree 8.327 of 2014**).

Mr. Xavier highlighted CBAr's initiatives towards the promotion of CISG's application in Brazil. Even before CISG was enacted in the country, CBAr was responsible for the creation of a **study group about CISG** (2013), which resulted in the publication of an in-depth **analysis report on the application of the CISG by Brazilian State Courts** and in a **series of events addressing CISG**

and Brazilian Contractual Law, followed by the publication of a **book composed by a collection of articles on the subject**.

Mr. Potsch then presented an updated analysis on how Brazilian State Courts applied the CISG between August 2020, and June 2023. Among 288 cases mentioning the CISG, only four expressly applied the CISG: (i) the Chicken's Feet Case, (ii) the Three-phase Motors Case, (iii) the Kiwi Case, and (iv) the Lindner Case. While the first three cases only referred to the CISG as customary or soft law, the last one did not mention the basis for its application.

Mr. Potsch also verified that the CISG is mostly used as a support for Brazilian Courts to apply concepts and institutes that are provided in the convention, especially those related to the (i) duty to mitigate the loss (223 out of a total of 288 cases) and (ii) fundamental breach (52 out of 288 cases). It is important to note, however, that while the CISG is probably most applied in arbitration proceedings, which are confidential in most cases, a possible distortion of the statistics on application of the CISG in Brazil might exist.

With regards to the duty, burden, or responsibility to mitigate loss, Mrs. Waisberg first explained how such institute must be comprehended individually vis-à-vis the CISG and Brazilian Law. Under the CISG, Mrs. Waisberg indicated the existence of an express provision regarding such duty, burden or responsibility, i.e. Article 77 of the convention. Under the Brazilian Civil Code, even though such duty, burden, or responsibility is most applied based on article 422 (good faith as a legal standard), it could also be grounded based on article 187 (prohibition to the abuse of rights) and article 945 (contributory negligence). In that sense, Mrs. Waisberg encouraged the reflection on whether reference to the CISG by Brazilian State Courts would be necessary in domestic cases, considering that the basis for the institute's application can be found in Brazilian Law.

Mrs. Delamuta, in its turn, analyzed fundamental breach, provided in article 25 of the CISG, as a means of guaranteeing termination of the contract as a last resort remedy. Mrs. Delamuta then compared the concepts of fundamental breach and definitive default provided in the paragraph of article 395 of the Brazilian Civil Code. Lastly, Mrs. Delamuta raised some reflection points about whether Brazilian State Courts should resort to the notion of fundamental breach to decide domestic cases and whether the notions of fundamental breach, provided in the CISG, and definitive default, provided in the Brazilian Civil Code, are equivalent, since the criteria for the characterization of each one is different.

The second panel, hosted by speakers **Ana Teresa Boscolo** (Attorney, ContiCraveiro Advogados), **Ana Morales Ramos** (Attorney, De Brauw Blackstone Westbroek), **Marcel Engholm Cardoso** (Attorney, Chaffetz Lindsey LLP), and moderated by **Osny da Silva Filho** (Partner, Salama, Silva Filho; Professor, FGV São Paulo), focused on the application of the UNIDROIT Principles in arbitrations.

After an opening remark by Mr. Silva Filho, Mrs. Boscolo made a brief explanation of the history behind the creation of the UNIDROIT Principles and stated that the principles are tailor-made for international commercial transactions.

Mrs. Boscolo highlighted the preamble of the UNIDROIT Principles, which sets forth non-exhaustive general rules for applying those principles in international commercial contracts. According to Mrs. Boscolo, the preamble allows recourse to the UNIDROIT Principles by express provision by the parties (in case the parties explicitly provide that the contract shall be governed by

it), by implicit choice (for instance, in case the parties provide that the contract shall be governed by general principles of international private law or *lex mercatoria*) or even in cases the contract lacks a choice of law.

However, in the last case, it would be necessary for the arbitrators to request the parties to speak on the matter beforehand. Lastly, Mrs. Boscolo mentioned the importance of the UNIDROIT Principles to support interpretation and supplement international uniform law instruments, such as the CISG, or domestic laws, or even as a model for international and domestic laws. In its turn, Mr. Cardoso and Mrs. Ramos presented a study regarding UNIDROIT Principles application, respectively, in international commercial arbitration and investment arbitration cases.

Opening Remarks: Arbitration, Business Contracts and CBAr's Initiatives

"*A arbitragem é cria do contrato e o contrato é cria da arbitragem*" ("arbitration is the offspring of the contract, and the contract is the offspring of arbitration"). With that emblematic sentence, CBAr President, André Abbud, officially opened the Conference, emphasizing how studying about the interaction between arbitration and business contracts helps to learn more about arbitration itself.

Mr. Abbud announced the CBAr guidelines on the arbitrator's duty of disclosure, which was a result of intense work by CBAr's board of directors, with the assistance of authors, arbitral institutions, associates and the responsible for the Brazilian Arbitration Law's preliminary draft. As Mr. Abbud stated, the guidelines are made to guide practitioners on such an important issue and confirm that no changes to the Brazilian Arbitration Law on this matter are necessary – a reference to the current attempts to promote dangerous and needless changes to the Brazilian Arbitration Law (reported here and here).

However, Mr. Abbud asserted that not all criticism represents an attack. Reasoned criticism is helpful for the constant evolution of arbitration. Accordingly, arbitration practitioners must keep its ears wide open and distinguish between criticism and attack, to take advantage of the former and combat the latter.

Mr. Abbud also drew attention to CBAR's policy action in favor of arbitration. In recent months, CBAr signed a technical cooperation agreement with BNDES (*Banco Nacional de Desenvolvimento Econômico e Social*), appeared as *amicus curiae* in several cases and closely followed the progress of more than a hundred bills of law.

After thanking the more than 600 people present at the event, Mr. Abbud invited everyone to join CBAr's initiatives.

Opening Lecture: The Role of Arbitrators in Strengthening Business Contracts

In the opening lecture, Prof. Judith Martins-Costa stated that the arbitrator takes the most difficult challenge while judging a case: analyzing the provisions of the contract in light of the evidence, in an ethical and professional manner. In business contracts, private autonomy and good faith are polarized by business dynamics, making the arbitrator's activity even more complex.

Prof. Martins-Costa drew attention to the specificities of the arbitrator's role when compared to the state judge: the arbitrator, when well chosen, is a specialist in the matter involved in the arbitration and, as such, must know the detail involved in the case; the arbitrator has more flexibility than the judge to create procedural rules; the arbitrator must be even more careful in applying the law because he does not have the same immunity as the judge has and because his decision is not subject to appeal; the arbitrator must guarantee legal certainty and act prudently in order to avoid his award being null.

Prof. Martins-Costa also emphasized the specificities of domestic and international arbitration. While in domestic arbitration, the applicable law is that indicated by the parties, in international arbitration, the arbitrator may be faced with different legal traditions and backgrounds and must interpret the contract from a cosmopolitan and comparative perspective, without being contaminated by his or her previous experience.

Although it is commonly said that arbitration is worth what the arbitrator is worth, Prof. Martins-Costa stated that arbitration is worth also what the parties and the arbitral institutions are worth. Even so, the arbitrator is the center of the procedure, as his performance determines the outcome of the dispute. Therefore, Prof. Martins-Costa affirmed that the arbitrator holds the key to strengthen or weaken business contracts depending on his or her conduct.

Conclusion

The 22nd CBAr IAC not only allowed friends and colleagues to meet in person, but also brought to light important aspects regarding the interaction between arbitration and business contracts. Once again, the traditional CBAr International Arbitration Conference was worth applauding.

Follow along and see all of Kluwer Arbitration Blog's coverage of the CBAr 22nd International Arbitration Conference here.

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