Kluwer Arbitration Blog

CBAR 22nd International Arbitration Conference: The Ideal Arbitrator, Arbitrability and Diversity

Enrico Mazza (FCDG Advogados) · Saturday, October 28th, 2023

On 14 September 2023, the Brazilian Arbitration Committee — CBAr hosted the 2nd day of its annual International Arbitration Conference, following this year's overarching theme on "Arbitration and Business Contracts".

In recent years, Brazil has seen a resurgence of the study of business contracts as a particular type. Because business transactions (often, international or cross-border) are at the forefront of arbitration disputes, the theme is undeniably relevant. The 2nd day of Conference shed light on the interplay between substantive law and arbitration on different levels, ranging from the choice of arbitrator to the choice of law; the different kinds of contracts and parties that submit their dispute to arbitration; and the different nature of disputes referred to arbitration.

Below is a report of some of the highlights of the second day of the conference.

Business contracts and the arbitrator: is there a "business" justice standard?

"*Arbitration is only as good as the arbitrator*". This *cliché* shared by arbitration practitioners underlay the discussions of the first panel, moderated by Prof. Cristiano Zanetti and composed of Mr. Mark W. Friedman (Partner, Debevoise & Plimpton), Prof. Franco Ferrari (New York University) and Prof. Giuditta Cordero-Moss (University of Oslo).

Mr. Friedman discussed the qualities of the ideal adjudicator of business disputes. Drawing on Richard Dworkin's work on the "Judge Hercules" — the all-knowing, all-powerful and infinitely-patient jurist —, Mr. Friedman shared his insights on the expected characteristic of the "arbitrator Hercules": *integrity*, or the ability to fit the social and political context, the larger system in which they operate. This larger system is the international arbitration community. According to Mr. Friedman, Arbitrator Hercules could achieve integrity by exercising seven virtues: honor flexibility; make parties feel heard and understood; understand the true motivation of the parties; respect the business context; act efficiently; do not fear their authority; make the award meaningful.

Prof. Ferrari focused on the issue of applicable substantive law — specifically, dealing with contractual interpretation — in the context of international arbitration. He questioned the dogma

that, because international arbitration exists in a transnational, "delocalized" space, it allows for the application of an ethereal body of "transnational substantive rules" to fill gaps or correct deviations in the national law applicable to the dispute. This discretion, Prof. Ferrari defends, may be granted by national law, but is not a direct result of the nature of international arbitration (which, as he stated, is ultimately grounded in national law). His exposition finished with the following provocation: if the application of a different national law than the one chosen by parties (say, Swiss Law instead of Brazilian Law) could lead to annulment of an award, why would the application of this so-called transnational law be any different?

Prof. Cordero-Moss enlightened the panel with a practical view to the issue of choice of arbitrator, with a focus on the impacts of different legal backgrounds on the construction of contractual rules in international arbitration. In showing the results of the pilot empirical project on "Construction of Contracts in International Arbitrator" (reported here), conducted with 100 arbitrators from different backgrounds (civil law, common law or dual background), she confirmed that "*only to a small extent*" does international arbitration ensure uniform contractual construction. In fact, to highlight some of the results (spoiler alert!), she showed that most practitioners tend to be deferential to solutions provided in national law, rather than apply a wholly self-sufficient contract, or some sort of transnational business law (that, agreeing with Prof. Ferrari, does not "*float somewhere in the air*"). We are excited for the main study!

To conclude, we must cite Prof. Zanetti's closing remarks of the panel, according to which "*justice is the constant and perpetual desire to give everyone what they need*". That is, indeed, what arbitrators (Hercules or otherwise) should strive to achieve when resolving business disputes.

A necessary topic: Black Sisters In Law

Ms. Dione Assis (Partner, Galdino & Coelho Advogados) presented the important work of the Black Sisters in Law. This association was founded by Ms. Assis and is composed of over 1,800 black female lawyers, from Brazil and abroad. The Black Sisters in Law is a networking platform for these practitioners, where they discuss job opportunities, provide mentoring sessions, and share overall solidarity among each other. The presentation was met with a standing ovation by attendants.

One cannot overstate the importance of diversity and inclusion in arbitration and other fields of law. And what are words without concrete deeds?

Arbitrability and business contracts: (where) do we draw the line?

Business transactions are seldom restricted to individual interests. Rather, they usually touch upon several other matters of public policy — be it the protection of third parties, diffuse interests, or the maintenance of the economic order. The third panel of the day, moderated by Prof. Carmen Tiburcio (Universidade do Estado do Rio de Janeiro) and composed of Prof. Luis Renato Ferreira da Silva (Partner, TozziniFreire Advogados), Prof. Daniela Gabbay (Partner, Daniela Gabbay Resolução de Conflitos) and Ms. Dominique Brown-Berset (Partner, Brown&Page), addressed these subjects where public and private interests intersect, and issues of arbitrability that may surface when there is a choice to resolve disputes by arbitration.

Prof. Luis Renato Ferreira da Silva kicked off the panel by discussing the arbitrability of adhesion contracts and contracts where there is economic dependence of one of the parties. Adhesion contracts were traditionally seen as the imposition of contractual terms by one party over another. Nowadays, they are more related to interests of agility in contracting, rather than imbalance of bargaining powers. There can be adhesion contracts without economic dependence, and vice-versa. But this third category (cleverly called "B2-lowercase-b contracts", where both parties are businesses, but there is asymmetry of power between them) bears new issues of contractual law: to what extent can (or should) the Law protect the weaker party to these contracts — including from their choice to arbitrate?

Prof. Ferreira da Silva drew important considerations from the Brazilian Arbitration Act's rule regarding adhesion contracts and the validity requirement that arbitration agreements be stipulated in a separate document or be given emphasis in the main contract. Therefore, Prof. Ferreira da Silva suggests, one should look more into substance rather than form to find if a specific validity requirement of form should be enforced to protect the weaker party in contracts where there is economic dependence, even if they are not adhesion contracts *per se*.

Daniela Gabbay addressed issues of arbitrability and antitrust law. This matter has been in the spotlight for quite some time, ever since the well-renowned 1985 *Mitsubishi v. Soler* case, in which the Supreme Court of the United States decided that parties can arbitrate statutory claims, including those arising from mandatory law, such as the Shearman Act. However, the matter is far from resolved. As Mrs. Gabbay highlighted, the European Union Court of Justice has rendered conflicting decisions on the arbitrability of tortious liability for unlawful cartel and for abuse of dominant power as recently as 2015 and 2018. In the center of the debate are questions all too common to arbitration: public *vs.* private enforcement, limits of concurring jurisdictions and authorities, wording and scope of arbitration agreement etc. However, as Daniela pointed out, data shows the increasing use of arbitration as a dispute resolution mechanism in Competition Law agreements governed by Brazilian law, as well as the increasing authority of arbitral decisions rendered in these cases, dispensing the need for confirmation by public authorities.

Lastly, Dominique Brown-Berset talked about arbitrability of environmental issues. Another hot-topic in international arbitration, and widely discussed in the context of ISDS, commercial arbitration of environmental disputes is expected to become more prevalent as companies encompass ESG commitments into their business dealings. In this sense, in 2019, the ICC issued its Report on Resolving Climate Change Related Disputes through Arbitration and ADR, a must-read on the topic (as reported here and here). Mrs. Brown-Berset mentions ESG representations and warranties, environmental obligations, the proliferation of new business standards for banks and investors (e.g., the Equator Principles), and voluntary ESG compliance as potential issues that may give rise to arbitration in future years. The arbitrability of these issues, as Mrs. Brown-Berset defends, should be presumed, but ultimately remains a matter governed by the applicable law.

Conclusion

The puzzling questions and prolific debates of the 2nd day of the CBAr Annual Conference are sure to keep ringing in practitioner's minds for the foreseeable future. Issues of choice of law, choice of arbitrator, arbitrability and the ever-tangible tension between consent and adjudication in regard to business contracts permeated not only the panels, but also coffee breaks and workshops of this day,

confirming the importance of the topic. I am sure that they were also a key point of discussion at the CCBC Fellowship Celebration later that evening!

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

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