Kluwer Arbitration Blog

X CAM-CCBC Arbitration Congress: Green Transition, Artificial Intelligence, Evolution of Arbitral Institutions & The Future of International Arbitration

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On 16 and 17 October 2022, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada held its X Arbitration Congress ("X CAM-CCBC Congress" or "Congress") in Sao Paulo, Brazil. The Congress opened this year's Sao Paulo Arbitration Week ("SPAW"): a collaborative calendar for law firms, universities, associations, and institutions to organize and promote alternative dispute resolution-related events in Sao Paulo.

The second day of the X CAM-CCBC Congress featured three discussion panels and one keynote speech delivered by Mr. Horacio Grigera Naón focusing on the future of international arbitration. On that day, CAM-CCBC's Secretariat also announced the new members of the Management Committee of CAM-CCBC's under-40 association, New Generation CAM-CCBC ("NewGen CAM-CCBC"). The Congress ended with closing remarks by CAM-CCBC's vice presidents Mr. Ricardo Aprigliano and Ms. Silvia Rodrigues Pachikoski.

Below is an overview of two panel discussions.

Panel 1: Green Transition and the Future of Energy Arbitration

Mr. **Gabriel Seijo**, partner at Cescon Barrieu and the panel's moderator, opened the discussions stating the importance of having a panel focused on green transition due to the rising impact of these discussions on society.

Ms. **Maria Madalena Porangaba**, legal and safety manager of the Brazilian Electricity Commercialization Chamber ("CCEE"), then made a presentation on the green transition in Brazil and conflict resolution within the CCEE. Ms. Porangaba noted that the data shows a steep increase in renewable sources in the world's energy matrix, especially in the electrical matrix. In 2023, Brazil reached 94% of renewable production in its electrical matrix.

In relation to the energy transition in Brazil, Ms. Porangaba noted that technological development is key, and that investments in smart grids may increase efficiency of energy distribution. She also noted that Brazil has great potential to produce green hydrogen, comparing Brazil's position

towards green hydrogen to the UAE's position towards oil.

Regarding dispute resolution, Ms. Porangaba mentioned that all conflicts within CCEE (between CCEE and any of its adhering agents or amongst the adhering agents themselves) are subject to an arbitration agreement. In March 2023, a new arbitration agreement entered into force, and its main features are the following:

1. *Diversity of arbitration institutions*: FGV is no longer the only institution that can administer arbitrations within CCEE; CCEE is promoting competition between arbitration institutions aiming at higher quality of service-providers.
2. *Mechanism for market protection*: Given the nature of CCEE-related arbitrations, when a matter may impact the broader market, the arbitrators should decide which party should provide a guarantee to the entities that may be affected.
3. *Standardization of case law*: CCEE recognizes the importance of maintaining a database of the arbitral decisions to promote transparency concerning the application of regulatory rules. Based on its experience in previous cases, CCEE intends to foster other alternative dispute resolution methods.
4. *Limited scope of the arbitration agreement*: Some matters have been expressly excluded from the scope of the arbitration agreement. An example is any controversy over energy fees associated with the commercialization of energy.

Ms. Porangaba noted that, so far, eight Arbitration Centers have been certified by CCEE to manage these disputes (CAM-CCBC, CBMA, FGV, CAMARB, CIESP-FIESP, CAESP, ICC Brasil and ARBITAC).

Subsequently, Mr. **Julio Bueno**, partner at Pinheiro Neto Advogados, spoke on new trends in disputes involving renewable energy. He mentioned that Brazil has significant tradition in hydropower construction and operation, which explains the existence of wide range of local disputes regarding these issues. Mr. Bueno also noted that construction and infrastructure-related conflicts represent a large percentage of the conflicts within the energy sector at a global level. He noted, however, that recent legislation aiming at reducing carbon and greenhouse gas emissions, such as the Kyoto Protocol and the Paris Agreement, and the general global trend towards clean energy will give rise to new types of disputes, such as conflicts related to the decommissioning of oil platforms.

Mr. Bueno also noted an increase in the search for funding and financing infrastructure projects within the energy sector. These economic and financial incentives will lead to contracts that will govern green transition targets, which may impact pre-existing expectations. The same can be said in relation to regulatory changes and social demand for more aggressive measures in relation to green transition.

Mr. Bueno shed light on the **2022 Queen Mary Survey Report on the Future of International Energy Arbitration**, which pointed to a rising need for a "tailor-made" way of resolving energy disputes. That would involve (i) specific arbitration rules (such as securities and insurance-specific rules); (ii) procedural tools focusing on time-efficiency, in light of existing time-related issues in traditional energy disputes; (iii) specialization by counsel, parties and experts to deal with matters relating to (a) platform decommissioning, (b) corporate governance and responsibility, (c) technological innovation, (d) socioenvironmental issues in business disputes, among others.

Mr. **Erik Franco**, General Counsel of Engie Peru, noted that he participated in the elaboration of the ICC Report on Climate Change (also reported here). He pointed that disputes revolving around climate change are not new topics neither in terms of substance nor of procedure. Nonetheless, he emphasized that the context is new, the volume is different, and the subject-matters are taking new edges.

He proposes to classify these types of disputes according to the subject-matter:

1. *Investments, divestments, and remediation*: These are the classic disputes we already find in international investment arbitration.
2. *Mitigation and adaptation measures*: Disputes arising from new obligations created to enable the fulfillment of targets in relation to the green transition.
3. *Insurance*: Disputes emerging from changes in the criteria for insuring certain assets along the away.
4. *Related to change in circumstances (force majeure)*: Disputes related to interpretative changes in law or in contractual clauses as to what is unforeseeable and uncontrollable.

Ms. **Lucinda Low** spoke on governmental efforts to address climate changes and the impact on investment and commercial arbitration, particularly in relation to human rights, ESG and corporate social responsibility. On top of political pressure, there is litigation pressure. She mentioned the case *Urgenda Foundation v. State of the Netherlands*, in which the Dutch government was ordered to reduce its greenhouse emissions.

In addition to litigation, Ms. Lucinda Low mentioned three recent broad requests to International Courts for Advisory Opinions due to climate change and State's obligations:

1. *2022 Advisory Opinion Request to ITLOS*: Signed by the Commission of Small Islands States in relation to the effects of climate change in the maritime environment.
2. *2023 Advisory Opinion Request to the Inter-American Court of Human Rights*: Signed by Chile and Colombia regarding the scope of state obligations when responding to climate change under international human rights law.
3. *2023 UN General Assembly Advisory Opinion Request to the International Court of Justice*: Fostered by the small island state of Vanuatu with regard to the obligations of States in respect of climate change under international law and the legal consequences in cases where harm has been done.

Ms. Low mentioned ISDS cases where public policy issues have already arisen (*ICSID, Urbaser v. Argentina*; *ICSID, Bear Creek Mining v. Peru*). She also referred to the more than 50 cases against Spain due to energy regulatory changes concerning EU targets.

In the commercial sector, Ms. Low mentioned the increase of legal and contractual obligations concerning business and human rights, ESG, and corporate responsibility. Thus, a growth in the number of arbitrations relating to compliance, insurance, supply chain and a range of disputes focusing on a mix of soft and hard law is to be expected.

The last panelist, Ms. **Natalie Reid**, partner at Devevoise & Plimpton LLP, addressed the future of energy arbitration and issues arising from energy transition from the perspective of the traditional energy companies who have built their portfolios and operations based on non-renewable energy sources. Ms. Reid noted issues such as friction between commercial players, unresolved tensions in commercial and stakeholder relationships and gaps between expectation and reality.

Ms. Reid pointed that major energy companies that have traditionally relied on non-renewable sources are often "caught in between"; they are facing both the traditional energy-related disputes plus the ones associated with regulatory change aiming at green transition. The lack of clarity as well as conflicting requirements in the applicable regulation as to how these companies will achieve the required environmental targets also pose challenges to these companies within the green transition. Further, in the face of slow progress by governments in dealing with green transition, society has put more pressure in the change of corporate behavior leading to well-known public litigations concerning the obligations among and between States—conflicts may concern constitutional matters, human rights, torts, and even "green-washing" disputes. In addition, while the major companies are under an increase demand from several stake holders—including funders—to become green, they are also under a frequent market demand for traditional non-renewable energy; and spikes in demand and price may significantly strain commercial relationships.

Finally, the panelists answered questions from the public on (i) the restructuring of arbitration proceedings due to the impracticability of a "one-size-fits-all" method, (ii) the possibility of using other extrajudicial means to green disputes, such as assisted negotiation, mediation, dispute boards and (iii) the mostly positive reaction from players to the CCEE's new arbitration clause. This was followed by Mr. **Gabriel Seijo**'s request that the attendees sign the Green Arbitration Pledge.

Panel 2: NewGen Panel: Artificial Intelligence: Do Lawyers Dream of Electric Sheep?

Panel 2 was conceived and organized by NewGen CAM-CCBC's Management Committee.

Mr. **Guilherme Quintana**, from Manassero Advogados, initiated the discussion on artificial intelligence by referring to Brazil's Legislative Bill 2338/2023 on the use of artificial intelligence in Brazil. He also gave examples of the application of AI in arbitration, particularly in relation to cost estimation, organization of hearings, simultaneous translation or summary, document organization, legal research, nomination of arbitrators, document review, drafting of legal documents, review of decisions and even the possibility of decisions being drafted by AI.

In this context, Mr. Quintana suggested that new types of problems will arise. For instance, if AI is putting together an arbitrator's profile and assessing disclosures made in the context of an appointment, there may be an increased risk of privacy breaches. One should also consider the effects of deep fake in the production of documents and the resulting additional burden of double-checking the information. Finally, the use of machine learning to forecast judgments may ultimately raise issues of equality of arms, especially when parties have unequal access to AI tools.

Ms. **Bianca Longo**, from JusMundi, commented on the evolution of AI legal tools, which happened in three waves: (i) the first wave (2000-2011) was the introduction of certain AI-driven tools, such as Workflow, e-Discovery, Docusign etc.; (ii) the second wave (2012-2018) consisted of softwares to manage cases, store data and review contracts such as Disco, Ontra, Premonition, Legalist etc; (iii) the third wave (2019-today) was when AI started imitating human behavior, like assistants and co-counsel softwares, namely CaseText, Harvey and so on. She also presented the application of AI in arbitration in the context of JusMundi (JusConnect and Conflict Checker).

Ms. **Aline Dias,** from Franco Leutewiler Henriques Advogados, then addressed the impact of AI in the arbitration practice. She started by stating that a significant part of the discussion is still

theoretical because AI is constantly evolving, and its potential impacts are unpredictable. There is still few cases dealing with AI-related issues and Ms. Dias mentioned a few:

1. *The Tay case (2016)*: Related to Microsoft's profile created to navigate on Twitter and interact with users. In short time, the AI was corrupted by the users and started sending out violent messages.
2. *The Samsung case (2023)*: Samsung's engineers inserted confidential information regarding an internal formula on ChatGPT, which was then leaked.
3. *The Avianca case (2023)*: Counsel relied on case law that did not exist. The references had been created by ChatGPT and the counsel received court sanctions for arguing based on cases that were not real.

In terms of concrete and immediate actions to deal with the rise of AI, arbitral tribunals may give specific guidance in relation to access to technology and discuss reimbursement of reasonable costs, including the costs related to the use of AI tools early in the proceedings.

The last panelist, Mr. **Thiago Sombra**, from Mattos Filho, presented two recent key examples of the impact of AI in society. The first example was the impact of the Brazilian video advertisement of a motor vehicles company featuring an AI-generated Elis Regina (a famous Brazilian singer who died in the 80s) driving a car and singing; which amounted to administrative litigation before the Brazilian National Council for Advertising Regulation (CONAR), and motivated Brazil's Legislative Bill 3592/2023, that proposes guidelines for the use of deceased people's image and voice with the aid of AI. The second example concerned the use of AI in an advertisement video during the Women's World Cup to mask women's goals as if they were men's. As part of a campaign against gender bias, the public was later informed that the goals had actually been scored by women.

In the context of rising disputes involving cyber-security issues and the impacts of AI in arbitration, Mr. Sombra noted that it is important to have the right questions in mind when dealing with AI, as it will take human and critical thinking to find the answers.

This panel ended with a few questions from the audience in respect of AI labelling and watermarking for liability purposes and developments in Brazil on the use of AI and technology for the categorization of disputes and identification of cases.

Conclusion

The second day of the X CAM-CCBC Congress confirmed that arbitration will face new challenges, be them in relation to climate change and artificial intelligence be them due to the renewed resistance to the application of international law over national or regional law. The overall message is clear: the way forward relies on the collaborative spirit – among arbitral institutions, law firms, practitioners, academics and stakeholders worldwide – that is essential to international arbitration. Finally, arbitration practitioners need to stay up to date with evolving substantive and procedural law as well as with practical issues that may arise in the future.

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