Kluwer Arbitration Blog

12th ICC Brazilian Arbitration Day: An Open and Honest Conversation about ADR and Arbitration Evolution

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On 7 March 2024, the National Branch ("ICC Brasil") and the ICC Court of Arbitration ("ICC Court") held the 12th ICC Brazilian Arbitration Day ("ICC BAD" or "Conference") in São Paulo. Since its inception in 2015, the ICC BAD has enjoyed consistent success, and in 2024 arbitration practicing lawyers and clients had further reasons to celebrate: the 10th anniversary of ICC Brasil.

The 12th ICC BAD featured the first woman President of the ICC Court, Ms. Claudia Salomon (President, ICC Court), in a fireside chat with Mr. Eduardo Damião Gonçalves (Partner, Mattos Filho Advogados; Vice-President, ICC Court), and many other attractions: 3 panels, 1 keynote speech, 19 speakers and 489 delegates (for more details, please see the Conference program). The 12th ICC BAD focused on the evolution of alternative dispute resolution ("ADR"), M&A disputes, and the evidentiary process, fostering open and honest dialogue among stakeholders and clients.

We address below the most relevant discussions held during the Conference.

The Evolution of the ICC Court: A Continuous Search for Dialogue

Through a retrospective reflection of the ICC Court's history, Ms. Ana Serra e Moura (Deputy Secretary-General, ICC Court), opened the Conference. Her remarks were preceded by a warm welcome by Mr. Gabriel Costa (Associate General Counsel, Shell Brasil Petroleo Ltda) and Ms. Gabriella Dorlhiac (Executive Director, ICC Brasil), and underscored the significance of dialogue in defending the future of the ICC Court against illegitimate attacks. Indeed, dialogue is not only a means of resolving conflict but also a vital tool for safeguarding the future from the threats of ignorance, extremism, and injustice.

By reaffirming its commitment to an open and constructive dialogue with clients and arbitration practitioners, the ICC showed why it continues to be one of the leading international arbitration institutions. As Ms. Serra e Moura pointed out, in 1923, the ICC Court was established in Paris by a group of entrepreneurs, aiming to provide clients with an efficient dispute resolution mechanism. In that same year, the ICC Court administered its first arbitration. A few years later, the ICC Court assumed a pivotal role in transforming arbitration into a truly international conflict resolution mechanism, leading to the adoption of the 1958 New York Convention on the applicability and

recognition of foreign arbitral awards.

More than 100 years have passed since its creation, resulting in remarkable achievements: the ICC Court has administered more than 28,000 cases in more than 120 cities around the world and has established headquarters not only in Paris but also in Hong Kong, New York, São Paulo, Singapore, and Abu Dhabi.

Fireside Chat with Ms. Claudia Salomon: Breaking Barriers as the First Female President of the ICC Court

The ICC Court is ever evolving towards fostering diversity while maintaining its essence and goal of providing a truly international and neutral dispute resolution system. This commitment was enhanced in the unique opportunity of a fireside chat between Ms. Claudia Salomon and Mr. Eduardo Damião Gonçalves.

As President of the ICC Court, Ms. Salomon mentioned the three different hats she wears: (i) working alongside the Secretariat to ensure the quality of the work done daily in the management of ICC arbitrations; (ii) serving as the chief ambassador of the organization, which is an opportunity not only to speak, but also to listen and understand whether the ICC Court is meeting and exceeding the expectations of the stakeholders; and (iii) mainly directed at strategy to ensure the ICC Court is well-positioned for the future.

In conclusion, the takeaway that remains is that the ICC Court is not just an arbitral institution. Founded with a mission to promote access to justice and the rule of law, its services ultimately ensure peace and prosperity through cross-border trade. The fireside chat with Ms. Claudia Salomon reaffirmed the institution's unwavering commitment to these principles, while also highlighting its adaptability and vision of shaping the future of ADR.

ADR and Arbitration in Evolution: a Change of Mindset within Brazil?

The intersection between arbitration and other forms of ADR is constantly undergoing changes to meet the needs of the market. This was precisely addressed by the panelists Ms. Fernanda Barjud (Legal Director, AMBEV), Mr. Flávio Bianchi (Federal Consultant in Economic Regulation at the Federal Attorney General's Office), Ms. Paula Linhares Karam (Senior Litigation and Arbitration Lawyer, Petrobras), and Mr. Raphael Lang Silva (Counsel, Secretariat of the ICC Court), in the panel "*ADR and Arbitration in Evolution*", moderated by Ms. Marie-Isabelle Delleur (Counsel, Clifford Chance).

To give a broader perspective of how parties can make use of "*the right tool in the toolbox*" in the context of disputes, Mr. Lang Silva provided an overview of the dispute resolution services rendered by the ICC. For instance, he gave insights on the use of mediation, dispute boards, expert determination, accessory services within arbitration (*e.g.*, the suggestion of experts upon request of the arbitral tribunal), and Documentary Instruments Dispute Resolution Expertise (DOCDEX – mechanism specifically for disputes in the banking industry). Mr. Lang Silva also highlighted how mediation is still less used by Latin American parties than European ones, and suggested tools to change this mentality (such as including mediation windows provisions in the arbitration

procedural timetable).

In Brazil, however, a study coordinated by Center for Access to Justice, Process and Dispute Resolution Means (Najupmesc) at Fundação Getúlio Vargas' Sao Paulo Law School and Canal Arbitragem in 2023, showed that the use of mediation in Brazil has grown in the last 10 years, especially during the pandemic, in 2020 and 2021 (see here). For example, in 2012, the seven mediation chambers in question received 26 requests for mediation, while in 2021 there were 120 requests. The number of mediation processes initiated went from 22 in 2012 to 90 in 2021. According to the study, "*the most common disputes were related to business contracts, corporate demands, construction and energy*".

In any event, Ms. Barjud noted that mediation windows provisions in the arbitration procedural timetable could indeed enable parties to start mediation without fearing the risk of appearing weak in their own positions. As for the prevention of potential disputes, Ms. Barjud highlighted the AMBEV's shift towards settlement or avoidance of disputes altogether. This shift creates a more cost-efficient legal department, and ultimately allows more time and energy to be directed at the creative process itself.

On that note, Mr. Bianchi added the challenges of fostering a mindset shift within the Public Administration, considering the barriers to reaching settlement agreements in this sector. Responding to an audience question, he emphasized that parties who wish to make agreements with the Public Administration only must demonstrate the settlement advantages, because legislatively no adjustment is needed. Federal legislation dictates that, except for cases of willful misconduct and corruption, managers are not held responsible for agreements.

All in all, the panelists agreed that the increasing use of mediation and negotiation imply a change of mindset within Brazil, although there is still much room for growth.

M&A Disputes in Evolution: Current Trends and Future Prospects

The panelists Mr. Stephan Adell (Partner, Adell & Merizalde), Ms. Carmen Martinez (Partner, Three Crowns LLP), Ms. Sheila Neder Cerezetti (Partner, Neder Cerezetti Advocacia), and Ms. Juliana Krueger Pela (Partner, Krueger Pela Advocacia e Arbitragem) delved into the future of M&A Disputes in a panel moderated by Mr. Cristiano de Sousa Zanetti (Partner, Cristiano Zanetti Advogados).

M&A negotiations are one of the most complex negotiations there are, and they usually comprise four stages: (i) the acquisition stage, (ii) the negotiation stage, (iii) the signing of the transaction documents, and (iv) the closing stage. As exposed by Mr. Adell, starting at the negotiation stage, there are several situations that could lead to a dispute, such as breach of confidentiality or exclusivity. Such disputes do not necessarily mean that the transaction has come to an end, especially if they do not significantly impact the parties' primary interest.

As for the interim period between the signing and the closing stage, Ms. Martinez explained that being such a delicate moment, "*time is of the essence*" in structuring dispute resolution clauses directed for these conflicts, as well as in structuring the dispute itself. For example, med-arb clauses with lengthy timetables may be incompatible with time-sensitive disputes, or requests for interim relief that are not actually based on urgency, as it may ultimately delay a final and

enforceable solution. By contrast, expedited procedure can be a useful tool to which counsel not always turn to.

Addressing specifically pricing and earn-out clauses, Ms. Krueger Pela explained that such clauses are not a mechanism for the *revision* of the price, but rather for its *determination*, if the informational asymmetry between the buyer and the seller creates the need for part of the purchase price to become dynamic and contingent. Ms. Krueger Pela stated that earn-out disputes are extremely common due to its very nature. However, these disputes do not necessarily result from carelessness drafting but often stem from the informational asymmetry between buyers and sellers or fall within a risk rationally calculated by them.

Another relevant clause in the context of disputes is the *buy or sell* clause. According to Ms. Neder Cerezetti, the *buy or sell* clause is a mechanism to address disagreements within a company, by means of the sale of the shares of one of the shareholders. In this case, the sale of the shares is triggered by the enforcement of the buy or sell clause, rather than the contract. Mr. Zanetti questioned the enforceability of the *buy or sell* clauses under Brazilian law, due to the fact that it might result from an unilateral condition imposed by one of the parties (the allegedly existence of a disagreement). Ms. Neder Cerezetti agreed that there are situations in which buy or sell clauses are deemed unenforceable because of the unilateral condition imposed by one of the parties, but there are others in which the disagreement itself can be regarded as a bilateral condition precedent.

In conclusion, Mr. Zanetti remarked that, over 100 years after the founding of the ICC Court and 5 years after the opening of the Secretariat's office in São Paulo, it is safe to say that Brazilians "*did not just enter arbitration to stay but entered to thrive*".

Evidentiary Process in Evolution: Techniques to Enhance Arbitration Efficiency

How to be efficient and expeditious in the evidentiary process? This was the subject of the discussion engaged by the panelists Ms. Cecilia Azar (Partner, Galicia Abogados), Mr. Eduardo Flores (Professor, Department of Accounting and Actuarial Sciences at FEA/USP), Mr. Nilo Sérgio Gaião Santos (Federal Prosecutor and Coordinator of the National Arbitration Team, Federal Attorney General's Office), and Ms. Sofia Martins (Chairman of the Board of the Portuguese Arbitration), moderated by Ms. Adriana Braghetta (Partner, Adriana Braghetta Advogados).

Recognizing the pivotal role of arbitrators in ensuring arbitration's efficiency, Ms. Azar initially suggested inviting parties to refine the dispute from the outset. This could involve listing disputed and undisputed facts as early as possible during initial submissions, such as when drafting the terms of reference or the first procedural order. Additionally, she recommended adopting common law best practices on document production, emphasizing the need for limitations on document load and clear requirements at the document production stage. Ms. Azar also raised the question of whether providing parties with full opportunities to present their case imposes an unreasonable burden in terms of time consumption and disclosure demands. Furthermore, she advocated for holding a preliminary hearing on the merits of the case at an early stage of arbitration. This, she believed, could enhance efficiency by allowing counsel to reassess their case considering questions posed by the tribunal.

Mr. Flores, in turn, highlighted the importance of engaging experts at the pre-litigation stage to

develop a sound strategy for the dispute and to assist in gathering and organizing initial document submissions. Addressing arbitrations held without tribunal-appointed experts, Mr. Flores contended that this approach can be effective if party-appointed experts deliver impartial reports. Mr. Santos echoed this sentiment, asserting that arbitrations conducted without tribunal-appointed experts lead to much more efficient proceedings. He emphasized the proactive role arbitrators must assume in avoiding the expansion of expert proceedings. Ms. Martins also contributed to the discussion by endorsing 'hot-tubbing' as a valuable method for testing the impartiality of expert reports. She also underscored that arbitrators have the authority to request party-appointed experts to reach agreements on certain aspects of the dispute.

In summary, the panelists provided valuable insights into these and other techniques for enhancing arbitration efficiency, underscoring the importance of proactive measures and clear procedures in streamlining the evidentiary process.

Duty of Loyalty in Arbitration: Principles and Best Practices

The conference was concluded by the keynote speech delivered by Mr. João Bosco Lee (Founding Partner, JBLEE Advogados) on the duty of loyalty in arbitration. Mr. Lee asserted that the duty of loyalty must be applicable not only to the conduct of the arbitrators, but also to that of the parties and their counsel, inspired by the French Code of Civil Procedure and considering it an accessory duty to the obligation to act in good faith.

Specifically on the conduct of counsel towards the arbitral tribunal and counterparties, Mr. Lee provided several examples of breach of the duty of loyalty, which can delay the proceedings and ultimately put the enforceability of the award at risk. Also, he emphasized the importance of arbitrators' duty of loyalty towards fellow tribunal members and, most importantly, towards their *mission* as arbitrator, stressing the need to refrain from: (i) resigning without motive, (ii) failing to render a decision on a disputed matter, or (iii) failing to deliberate with his or her fellow arbitrators.

Finally, Mr. Lee highlighted the importance of taking the duty of loyalty seriously. This is paramount for the continuing growth of arbitration in Brazil, and the maintenance of the Brazilian arbitration practice as one highly regarded and trusted globally.

Conclusion

Dialogue plays a pivotal role in shaping the future of arbitration, and the 12th ICC BAD provided an ideal platform to delve into this discourse, as enhanced by the closing remarks delivered by Ms. Patrícia Ferraz (Director of Arbitration and ADR – Latam, ICC Court). Throughout the conference, participants engaged in robust discussions, reflecting on the substantial achievements made in the past century while contemplating the evolving landscape that clients and arbitration practitioners aspire to navigate.

The conference tackled pressing questions that resonate deeply within the field of arbitration. Discussions revolved around changes in mindset sought in ADR and arbitration, the current trends and prospects in M&A disputes, as well as techniques that may drive counsel and arbitrators

towards greater efficiency. Moreover, the exploration of whether a duty of loyalty exists in arbitration, and if so, how it manifests in practice, added another layer of complexity to the discourse. These fundamental questions formed the cornerstone of the 12th ICC BAD, providing attendees with valuable insights and perspectives. As we eagerly await the next conference, we anticipate further enriching discussions and insights that will continue to shape the trajectory of arbitration.

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