Kluwer Arbitration Blog

International Arbitration Without Limits? Navigating Impossibilities in Arbitral Proceedings

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On May 14, 2024, the traditional Rio de Janeiro International Arbitration Conference promoted by Canal Arbitragem, under the academic coordination of João Bosco Lee, Lauro Gama, and Maurício Almeida Prado, was held at the auditorium of the Fundação Getúlio Vargas ('FGV-RJ'). Conceived nearly 20 years ago by two of the greatest authorities in national arbitration, José Emílio Nunes Pinto and Pedro Batista Martins, the Rio de Janeiro Conference has reached its XVIII edition, firmly established as one of the main forums for debate on arbitration in Brazil.

This year's event brought together speakers from different backgrounds and jurisdictions to discuss 'impossibility in international arbitration' ('*o impossível na arbitragem internacional*'), one of the most sensitive topics in transnational arbitral proceedings.

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

Opening And Keynote Lecture – Impossibility in International Arbitration

After the opening remarks by Lauro Parente from Canal Arbitragem and Sérgio Guerra from FGV-RJ, Lauro Gama, on behalf of the academic coordinators of the Conference, introduced the topic chosen to steer the day's debates: impossibility in arbitration. According to Professor Gama, the concept of impossibility in arbitration pertains to complex situations that hinder the initiation, continuation, or proper development of the arbitral proceedings. The variety of situations that fall under this definition seems to indicate the complexity of the topic: there are countless potential impossibilities in arbitration.

Given the multitude of scenarios that could constitute potential impossibilities, it is no surprise that José Ricardo Feris began the keynote lecture by emphasizing the challenge of scientifically identifying the origins of these impossibilities. According to Feris, impossibilities could be traced back to the imperfect exercise of party autonomy, which typically occurs at a very early stage of the commercial-legal relationship binding the parties that choose arbitration (i.e., at the signing of the arbitration agreement).

Feris argued that the correct approach to impossibilities depends on the cooperation between the parties (or, in its absence, with the Judiciary), notwithstanding resorting to the use of legitimate (and as representative as possible) international soft law tools. He concluded that, if no one is

obliged to do the impossible (*ad impossibilia nemo tenetur*), only the synergy between arbitrators, arbitral institutions, and national courts can properly handle impossibilities and ultimately safeguard the institute.

Obstacles in the Constitution, Functioning, and Jurisdiction of the Arbitral Tribunal

Under the guidance of Gisela Mation and Michelle Grando, the first panel of the event addressed obstacles that, although do not represent the general rule in arbitration, as highlighted by the speakers, require the attention of stakeholders.

Ana Serra e Moura discussed obstacles arising from the drafting of the arbitration agreement that impede the proper constitution of the arbitral tribunal. Drawing from her experience at the ICC, Serra e Moura highlighted the main errors:

- Imprecision in naming the arbitral institution: parties often incorrectly name the arbitral institution in the arbitration clause. For example, clauses might state 'disputes shall be settled by arbitration under the rules of the Chamber of Commerce of Paris', which is a non-existent institution.
- Use of hybrid clauses: parties sometimes include hybrid clauses that mix elements from different arbitration rules or institutions.
- Attempts to over qualify the arbitrator: parties might include overly specific qualifications for arbitrators in the arbitration clause, making it difficult to find suitable candidates who meet all criteria.

Building on Serra e Moura's observations, Pedro Metello de Nápoles recalled other obstacles from his personal experience when parties and lawyers try to excessively control certain aspects of the proceedings:

- Length/extension: setting unrealistic deadlines that complicate the proceedings and create unnecessary hurdles.
- Cost/expenses: attempts to strictly control costs, which may render arbitration unfeasible.

His recommendation was clear: 'less is more', advising against over-regulating every foreseeable scenario. To address such obstacles, Serra e Moura also recommended keeping it simple and using the standard models suggested by established arbitral institutions, which have stood the test of time and endured numerous adversities.

Following this, Galina Zukova commented on cases where the designated arbitral institution no longer existed or was non-functional when the arbitration clause was invoked, which was described as a common international issue. The final topic of the panel was external factors that might pose obstacles to arbitrations (*e.g.*, geopolitical issues, wars, crises, pandemics). Zukova acknowledged the particular difficulty in cases involving jurisdictions with political constraints, which could, on the one hand, impose potential or unconscious ideological restrictions on arbitrator candidates, and, on the other, jeopardize the equally fundamental right of the parties from those countries to access justice. However, it was still noted that leading arbitral institutions are increasingly overcoming practical obstacles by closely collaborating to administer procedures involving sanctioned parties and countries, thus avoiding payment blockages.

Court Intervention in Situations Where the Arbitral Tribunal Exceeds its Jurisdiction or Exercises Improper Jurisdiction

Moderated by André Marini, the following panel delved into the topic of improper use of jurisdiction by arbitrators and arbitral tribunals. Andrea Carlevaris examined the limits to arbitrators' jurisdiction, particularly regarding interim relief. Considering, in this context, the almost universal principle of concurrent jurisdiction of arbitral tribunals and national courts, Carlevaris covered situations in which arbitrators cannot exert jurisdiction – such as when the *lex arbitri* excludes such power or when the measure is directed against a third party (*e.g.*, a bank or an insurance company).

Following this, James Hosking addressed the progressive role of emergency arbitrators in transnational proceedings, highlighting their importance during the material impossibility of a not-yet-constituted arbitral tribunal. Drawing from his experience with the ICC Arbitration and ADR Commission Report on Emergency Arbitrator Proceedings, Hosking emphasized that, in his view, the emergency arbitrator must be seen and understood as 'a different animal' than the subsequently constituted arbitral tribunal. He noted several differences, including the deference given to the ultimate arbitral tribunal, the fact that the decision issued is subject to local law, and that it takes the form of an order rather than an award.

Marie-Isabelle Delleur examined anti-suit injunctions and other disruptive court interventions that prevent arbitral tribunals from exercising jurisdiction. In this context, Delleur highlighted recent challenges faced by UK courts involving cases in which parties contend that supervenient sanctions and other geopolitical constraints have fundamentally altered the circumstances under which they originally consented to arbitration, ultimately questioning whether consent, the cornerstone of arbitration, remains valid and binding.

Leonardo de Campos Melo analyzed a complex case involving Petrobras in the Operation Car Wash scandal ('Operação Lava-Jato'), in which minority shareholders initiated an arbitration against the Federal Government as the controlling shareholder. In his view, such example can be considered an exception to the consolidated case law in Brazil stating that arbitrators and arbitration chambers cannot be listed as parties or codefendants in set aside proceedings.

Protecting the Integrity of the Arbitral Proceedings

Moderated by Natália Mizrahi Lamas and chaired by Gustavo Schmidt, the following panel examined efforts and discussed less orthodox measures, such as relocating the seat of arbitration to a safer jurisdiction, to preserve the integrity of arbitral proceedings.

Sofia Martins noted that, when an arbitrator faces an anti-suit injunction, the tribunal's response depends on who the order is issued against. If the order is issued by one party against the other, the affected party must decide whether to comply with the judicial decision, as the tribunal is rigorously not bound by it. As stated by Martins, the situation becomes more problematic when the order is issued against both the party and the tribunal members. Martins highlighted that the order may have little impact if issued in a foreign jurisdiction but can be more disruptive if the arbitrators have significant stakes. In any case, she emphasized that protecting the integrity of the procedure

begins with the choice of the seat.

Christian Albanesi elaborated on precautions to be considered by arbitral tribunals, such as including a liability waiver in the terms of reference and obtaining professional liability insurance. He also provided recommendations for arbitral tribunals when dealing with recalcitrant parties or guerrilla tactics:

- Setting expectations: clarifying at the outset that dilatory practices will not be tolerated.
- Incorporating guidelines: using IBA guidelines or other best practices in the terms of reference or procedural order no. 1.
- Avoiding 'due process paranoia': maintaining neutrality and avoiding overreacting to dilatory tactics.
- Addressing and sanctioning misconduct: imposing cost sanctions for misconduct, either during or at the end of the case.
- Excluding counsel: only in extreme cases, considering the exclusion of counsel, what is increasingly being incorporated into the regulations of arbitral institutions.

Lastly, Alex Wilbraham focused on measures for tribunals when a third-party funder is involved. Despite longstanding skepticism towards third-party funding, Wilbraham urged arbitrators to address their participation calmly, ensuring confidentiality, investigating potential conflicts, and managing other practical aspects of arbitration without hesitation.

Anticipating the Arbitral Tribunal's View on the Dispute as a Way to Promote Settlement Between the Parties

Flávia Bittar opened the panel by stating how challenging it would be, from a Brazilian legal perspective, to have an arbitral tribunal anticipate its views on the dispute to encourage settlements. Moderator Renato Beneduzi noted that the panel aimed to explore the limits of this 'bold' conduct by arbitral tribunals, questioning the implications and potential binding nature of such preliminary views.

Outlining the German legal perspective, Anna-Katharina Scheffer noted that under German law, judges have a procedural duty to promote settlements at all stages of the procedure, resulting in a more favorable approach to tribunals expressing preliminary views. Therefore, she recommended precautions for arbitrators in this effort, such as obtaining written agreement, clearly stating the preliminary nature of the view, recording meetings, and being thoroughly prepared.

From a common law background, Henry Burnett highlighted the role of mediation as a more natural mechanism for facilitating settlements. He expressed skepticism about arbitrators, as quintessential adjudicators, offering preliminary views, suggesting it could be controversial and pose risks to the enforceability of the award, especially with parties from different legal backgrounds.

Moving back to a diverse civil law framework, Matthieu de Boisséson noted that expressing preliminary views without party consent under French law could be seen as a breach of the principle of secrecy of deliberations. He distinguished between procedural matters, where some interaction with the parties is expected, and merits, where limits are stricter, stating that, in any case, party consent is central to this issue.

Conclusion: Arbitration Without Limits Is Impossible

As became clear at the end of the Conference, the traditional scope of what is considered impossible in international arbitration is indisputably being narrowed. However, a thorough examination of the limits of impossibilities is still necessary to ensure the legitimacy of arbitration. Hence the inescapable conclusion, pointed out by Isabela Lacreta, who was tasked with delivering the 'rapport de synthese,' is that 'arbitration without limits is simply impossible.'

At the end of the Conference, lawyers, arbitrators, and other stakeholders left better prepared to tackle the challenges posed by impossibilities in arbitral proceedings. Far from exhausting the topic, the 2024 International Arbitration Conference in Rio de Janeiro concluded, leaving fertile ground for further debates at the next edition, scheduled for May 13, 2025!

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