

Kluwer Arbitration Blog

CBAr 23rd International Arbitration Conference: Arbitration and Infrastructure

Catarina de Farias Paese (BMA – Barbosa Müssnich Aragão Advogados) · Saturday, September 28th, 2024

From 1st to 3rd September 2024, the Brazilian Arbitration Committee—CBAr held its 23rd International Arbitration Conference (“23rd CBAr IAC” or “Conference”) in Brasília, Brazil’s federal capital. The theme of this year’s Conference was “Arbitration and Infrastructure.”

The Organizing Committee, composed of both the current and previous CBAr Board members, succeeded in providing a program that addressed various critical topics: (i) the most common contractual discussions in infrastructure contracts; (ii) environmental issues arising in arbitration disputes; (iii) the involvement of public administration in commercial arbitrations; and (iv) the necessary communication between arbitration and the judicial system.

Below, we address the most relevant discussions from the first day of the Conference.

What is the Nature of “Take-or-Pay” Clauses? How Do Non-Indemnity Clauses and Clauses on the Limitation of Indemnity Work in Infrastructure Contracts?

The Young Arbitrators panel’s theme was “Autonomy and Heteronomy in Infrastructure Contracts.” The discussion, moderated by [Telma Lisowski](#) (Attorney, Demarest Advogados) and [Maúra Polidoro](#) (Attorney, Manesco, Ramires, Perez, Azevedo Marques Sociedade de Advogados), focused on two main issues:

1. The economic function, risk allocation, and legal nature of take-or-pay clauses, led by [Luísa Quintão](#) (Attorney, Justen, Pereira, Oliveira & Talamini Advogados) and [Márcio Vasconcellos](#) (Attorney, King & Spalding); and
2. The dichotomy between private autonomy and mandatory rules in the application of non-indemnity clauses and indemnity limitation clauses in infrastructure contracts, discussed by [Adriana Sarra](#) (Partner, Toledo Marchetti Advogados) and [Bruno Barreto de A. Teixeira](#) (Partner, LCDM Advogados).

On the topic of take-or-pay clauses, Ms. Quintão introduced the debate by offering a panoramic view of their application under Brazilian law. Ms. Quintão explained that this type of clause is widely used in infrastructure agreements to guarantee payment for a minimum amount of a resource. Disputes involving take-or-pay clauses usually stem from a buyer’s refusal to pay the

minimum amount when consumption falls short, while the seller insists on enforcing the minimum payment.

Resolving such disputes depends on the legal nature attributed to the take-or-pay clause: whether it has a purely obligational nature or should be treated as a liquidated damages clause. In the first case, the buyer is obligated to pay the minimum amount, whereas in the second case, the clause might be adapted pursuant to Articles 112 and 113 of the [Brazilian Civil Code](#). Ms. Quintão then referenced Brazilian jurisprudence, particularly from the Superior Court of Justice (STJ) and the São Paulo Court of Appeals, to indicate that take-or-pay clauses are generally considered to have an obligational nature.

Mr. Vasconcellos examined take-or-pay clauses from an international perspective, focusing on the American legal system. Mr. Vasconcellos emphasized that, beyond the legal debate over the nature of such clauses, they serve a critical function in ensuring a return on investments in infrastructure projects. Since payment for these projects is often deferred, the clauses guarantee a minimum payment to sellers, which allows them to repay investors. Mr. Vasconcellos stressed the importance of carefully drafting these clauses to avoid interpretative confusion in case of disputes.

Turning to the topic of non-indemnity clauses and indemnity limitation clauses, Ms. Sarra focused on their application in Brazil, noting their frequent use in infrastructure contracts to allocate risks between the parties. She emphasized the importance of precise language to avoid ambiguities. Finally, Ms. Sarra discussed the legal challenges surrounding the enforcement of these clauses, particularly concerning issues of fraud, gross negligence, and public policy violations.

Mr. Teixeira discussed these clauses from an international perspective, noting that the concept of these clauses, which originates in international practice, must be adapted to the Brazilian context. He mentioned the [FIDIC contracts](#) and Article 7.1.6 of the [UNIDROIT Principles](#) as examples of the broad use of non-indemnity clauses and indemnity limitation clauses. Mr. Teixeira also provided a brief analysis of four publicly available arbitration awards that discussed the use of this type of clauses : (i) [Reficar v. CB&I](#) (previously discussed [here](#)); (ii) [Janúba v. Trina Solar](#); (iii) [International Engineering & Constructions v. Baker Hughes Energy Services](#); and (iv) [Devas Multimedia v. Antrix Corporation](#).

Music, a Highly Sought-After Event, and Dialogue with the Judiciary

To set the evening's tone, the [Instituto Reciclando Sons](#) performed Brazilian MPB classics. The group, based in Brasília, aims to use education, including musical arts, as a tool for social inclusion and resocialization.

[Debora Visconte](#) (Partner, Visconte Advogados; CBAr President) delivered the opening remarks. In her first year as President, Ms. Visconte noted the Conference's growth and explained that the theme of the 23rd CBAr IAC—infrastructure—was chosen due to its critical importance for Brazil's development. Ms. Visconte briefly traced the history of the infrastructure debate, from ancient civilizations such as the Aztecs, Greeks, Incas, and Romans to modern-day discussions on sustainability. She emphasized the role arbitration plays in addressing environmental challenges.

[Ricardo Villas Bôas Cueva](#) (Justice, STJ) followed with a speech, highlighting the vital communication between arbitration and the judiciary. Justice Cueva first recalled how, 40 years

ago, arbitration was seen as an outdated practice, but the passage of the Brazilian Arbitration Act (Law No. 9,307/1996), and its constitutionality affirmed by the Supreme Court, led to its development. He also mentioned the relevance of Law No. 13,129/2015, which expanded arbitration's scope, especially in infrastructure-related disputes involving public administration.

Justice Cueva emphasized CBAr's pivotal role in promoting a dialogue between public and private sectors, citing the 2023 "Arbitration and Judiciary" event at the STJ as an example. This event, which brought together private and public actors to discuss arbitration's development, was so successful that it is already confirmed for a second edition in 2024, to which he extended an invitation to all attendees.

How Can Arbitration Contribute to Environmental Protection?

The final lecture, delivered by [Juan-Fernández Armesto](#) (Partner, Armesto & Asociados), was titled "Arbitration and Infrastructure Contracts." As Ms. Visconte previously noted, Professor Armesto's reputation precedes him, given his extensive work and own document production schedule (previously covered [here](#)).

For his lecture, Professor Armesto was tasked with exploring the relationship between sustainability, infrastructure, and disputes involving environmental aspects. Drawing from Deb Chachra's book "How Infrastructure Works: Inside the Systems that Shape Our World," Professor Armesto explored the environmental impact of infrastructure, particularly the high levels of energy consumption and greenhouse gas emissions that come with it. Professor Armesto cited a striking statistic: 79% of global greenhouse gas emissions come from infrastructure projects. This, he argued, underscores the reality of climate change, which is already in progress and largely human-driven.

Professor Armesto highlighted the [2015 Paris Agreement](#) (also reported [here](#)), noting the difficult position of Latin American countries that must balance infrastructure development with environmental protection. He referred to this situation as a "Catch-22," predicting that arbitration and international law would be called upon to help mitigate these competing interests.

Looking ahead, Professor Armesto foresees future international legislation prohibiting fossil fuel use, raising questions about who will bear the resulting financial losses. Professor Armesto referenced [Vattenfall v. Federal Republic of Germany](#) as a leading case on the subject (previously discussed [here](#)).

Professor Armesto also highlighted [Verein KlimaSeniorinnen Schweiz and Others v. Switzerland](#) (previously discussed [here](#)) as evidence that local legislation will need to adapt to meet the expectations of the Paris Agreement. In this context, the push for enforceability (even if not derived from the Paris Agreement itself) may come from shareholders and investors, especially if companies commit to reducing their emissions in line with the Paris Agreement and later fail to uphold those commitments.

In closing, Professor Armesto predicted that arbitration would become increasingly influenced by climate change concerns. Professor Armesto suggested that arbitrators may eventually prioritize climate considerations over the strict application of contracts (*pacta sunt servanda*), proposing a new guiding principle: *in dubio pro climate*. This could lead arbitrators to revise or even terminate

contracts that fail to comply with evolving environmental standards.

Conclusion

The 23rd CBAr International Arbitration Conference reaffirmed its status as one of the most significant arbitration events in Brazil and Latin America. The discussions held on the first day ranged from technical analyses of infrastructure contracts to the broader environmental implications of arbitration, reflecting the dynamic and evolving nature of the field.

Professor Armesto's conclusion—that climate change may soon reach a point of no return—resonated deeply with an audience facing the harsh reality of Brazil's current drought, with Brasília's humidity levels now comparable to those of the Atacama Desert ¹⁾.

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References

Artificial Intelligence, in the form of the app Transcriber, has been used in the preparation of this ?1 post to transcribe the recording of the panel organized by the Young Arbitrators. In addition, ChatGPT has also been used to help shorten the post.

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