

Kluwer Arbitration Blog

CBAr 23rd International Arbitration Conference: Technical Evidence, Foreign Investment, and Sustainability in Infrastructure Disputes in Brazil

Luis Pereira · Saturday, September 28th, 2024

Continuing the central theme of the CBAr 23rd International Arbitration Conference, focused on discussing “Arbitration and Infrastructure,” the two panels held on September 3rd, 2024 were focused on the rendering of technical evidence in infrastructure disputes and the impact of foreign investment and sustainability in Brazil—topics of great complexity, yet essential for the continued development of Brazilian practice in infrastructure disputes.

The first panel of the day, moderated by Ms. [Adriana Braghetta](#), was entitled “Technical Evidence in Infrastructure Arbitrations” and was divided into three major fronts: (i) the difficulty of proving causation in infrastructure disputes, presented by Ms. [Gisela Sampaio da Cruz Guedes](#), (ii) technical evidence of delays of project schedules, presented by Mr. [Vincent Lefeuvre](#), and (iii) methodologies for calculating productivity loss in infrastructure related arbitrations, presented by Mr. [André Steagall Gertsenchtein](#). The second and final panel, which concluded the CBAr 23rd International Arbitration Conference, was moderated by Mr. [Fernando Serec](#) and was entitled “The Future (of the Past) of Foreign Investment, Infrastructure, and Sustainability in Brazil,” presented by Ms. [Elena Landau](#) and Ms. [Karla Bertocco Trindade](#).

The main highlights from these panels are outlined below.

Technical Evidence in Construction Arbitrations: What to Prove and How to Do It?

a) Legal Wing: Proof of Causality in Infrastructure Disputes

On September 3rd, Ms. Gisela initiated the discussions by explaining the complexity of proving causation in infrastructure disputes. She emphasized that these disputes often involve various types of contracts (ranging from “simple” construction contracts to more complex EPC contracts), which are typically long-term contracts, part of a chain with various subcontracts, and naturally filled with gaps that require resolution throughout the project.

The complexity of proving causation, as shown by [research conducted by the Brazilian Federal Court of Accounts \(“TCU”\) in 2019](#), was exemplified by the fact that 47% of construction projects

in Brazil are stalled due to technical issues, which often result in judicial or arbitral disputes.

Addressing the problem of establishing causation in such disputes, Ms. Gisela highlighted five common causality issues in infrastructure disputes: (i) defining concurrent causation and interruption of the causal link, usually due to unforeseen events and/or force majeure, (ii) discussions regarding project schedules and determining who caused the delay, (iii) disputes involving causes of productivity loss and calculation methodologies, (iv) cases involving accidents in large-scale projects and their causes, and (v) distribution of damages among the jointly liable parties.

Considering these common issues, how can the link between the alleged damage and the unlawful act be proven? Despite the reluctance of arbitrators and judges to do so, due to the fear of making equity-based rulings, Ms. Gisela pointed out that sometimes causation must be proven through a judgment of probability, based on analyzing the most likely scenario given the existing evidence. This process relies on that technical evidence—such as project documents, technical reports, and other data—forming the so-called “naturalistic causation.” After a logical evaluation of this evidence, the decision-maker can identify what Ms. Gisela referred to as “normative causation,” i.e., the legal framework applied to the set of facts and information identified through technical evidence.

In addition to highlighting the complexities of proving normative causation, Ms. Gisela suggested that creating a multidisciplinary dispute board could facilitate proving causation, thus avoiding (i) the buildup of conflicts, and (ii) the loss of records related to project issues over time.

b) Technical Wing: Proof of Impact on Schedules and Productivity Loss from Expert’s Perspective

Once the legal foundations for technical evidence in infrastructure disputes are established, Mr. Lefeuvre, who led the second panel on September 3rd, explained in detail all the processes and sub-processes involved in the “life” of an infrastructure project (e.g., inputs, outputs, resources, interfaces, timelines, costs, etc.).

From the perspective of an engineering expert, he provided key guidelines regarding the causal chains typically disputed by the parties to determine liability for schedule impacts (primary and intermediate causes and their effects on the schedule). He also discussed possible methodologies that can be used to calculate the excusability and compensability of schedule delays, which are often subject to technical evidence.

Mr. Lefeuvre highlighted two methodologies for calculating the indirect costs of impacted schedules (among the various methods experts may adopt): (i) the “as-planned, as-impacted” methodology, used to assess the excusability of schedule impacts, allowing the expert to “isolate” the delay from other schedule milestones, and (ii) the “as-built, as-collapsed” methodology, which helps the expert assess the compensability of schedule impacts by subtracting the delay from the as-built timeline.

Continuing the technical wing of the first panel, Mr. Gertsenchtein clarified the distinction between production (the total amount produced) and productivity (the amount produced multiplied by the time taken to produce it) and discussed their relevance to technical evidence in infrastructure

disputes. He then introduced some common methodologies for calculating productivity loss in infrastructure disputes (e.g., “total cost method,” “comparative methods,” among others). According to Mr. Gertsenchtein, these methods aim to separate the portion of productivity loss attributable to the contractor from that attributable to the employer. In this sense, Mr. Gertsenchtein identified the “Measured Mile” method as the most suitable, since it enables the comparison between the “impacted productivity” with “natural productivity” (*optimal* productivity, without impacts), making it the only methodology capable of analyzing the contractor’s productivity loss, not just the employer’s one.

While the Measured Mile methodology is the most appropriate for calculating productivity loss, Mr. Gertsenchtein pointed out that it requires the availability of a relevant “section” (or “mile”) to be used as a parameter, which is not always available, depending on the project under analysis.

Foreign Investment and Infrastructure: How to Provide Legal Certainty to Foreign Investors Interested in Brazil?

Domestic investments by the Brazilian government are insufficient to meet the infrastructure needs, making foreign investors’ participation essential for the regular development of the national economy.

With this premise established by the moderator Mr. Fernando Serec, the final panel of the Conference began. Ms. Elena Landau initially highlighted how legal (in)security can affect the attraction of foreign investments in Brazil. Political risk, for example, marked by frequent changes in legislation and government interference in infrastructure contracts, can impact the efficiency of contracts with the Public Administration and, consequently, deter foreign investors.

She also noted the importance of some factors considered by investors when deciding whether to invest in Brazil, including the following:

1. Is the country a member of the Organization for Economic Cooperation and Development (“OCDE”)?
2. Does it have a genuine sustainable development policy?
3. Does it have fiscal sustainability and stable exchange rate policies?

According to Ms. Landau, the answers to these questions are crucial for investors to decide whether to invest in Brazil. Although much has improved in terms of regulation, Brazil’s political and legislative framework still occasionally leaves foreign investors uncertain.

Supporting Ms. Landau’s points, the final speaker of the day, Ms. Karla Bertocco Trindade, emphasized that investors tend to prefer placing their capital in countries that are “OCDE” members and/or have investment-grade ratings—both of which Brazil has yet to achieve. She added that, beyond political risk, the regulatory, exchange rate, the engineering, and socio-environmental risks are also considered when investors decide whether to direct their resources to Brazil. Despite these instabilities, there are still successful examples of foreign investment in Brazilian companies, such as the recent [privatization of “SABESP” – São Paulo State Water and Sanitation Company](#).

Conclusion

In conclusion, the CBAr 23rd International Arbitration Conference, which focused on “Arbitration and Infrastructure,” provided valuable insights into the complexities of arbitration in Brazil’s infrastructure sector. Overall, these debates underscore the ongoing development and refinement required in the arbitration practices and the need for Brazil to continue fostering an environment conducive to foreign investment and sustainable growth.

Follow along and see all of *Kluwer Arbitration Blog*’s coverage of CBAr 23rd International Arbitration Conference [here](#).

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