Kluwer Arbitration Blog

CAM-CCBC Arbitration Congress XI Edition: The Highlights You Don't Want to Miss

Raquel Macedo Moreira (RMM Dispute Resolution) · Saturday, November 16th, 2024

On October 14, 2024, CAM-CCBC hosted the XI edition of its Arbitration Congress in São Paulo. As usual, the Congress kick-started the São Paulo Arbitration Week, setting in motion a week of insightful discussions and valuable networking opportunities across the city.

If you couldn't make it or had to leave early (we've all been there), here's what you might have missed.

Opening Remarks: CAM-CCBC's Latest news

Rodrigo Garcia da Fonseca, CAM-CCBC President, kicked off the event with a warm welcome. He presented an overview of the institution's recent achievements: 100 new arbitrations in 2024 alone, and a significant partnership with JusMundi to publish selected arbitration awards—more on that later.

Keynote: The arbitrator's active role in the future of arbitration

Edna Sussman's keynote addressed the changing role of arbitrators, tracing their journey from amateurs to skilled managers. She posed thought-provoking questions on how arbitrators should contribute to efficient dispute resolution. According to live audience polls, Brazil is ahead of the game. Meaning that proactive arbitration strategies are already implemented, or at least considered, in Brazil.

During the speech, Edna discussed several key efficiency measures that, although admittedly not groundbreaking, if implemented continuously and correctly, can shape the future of arbitration. These comprised: early case management conferences with the parties, mediation windows, bifurcation of issues, narrowing contested issues, mid-arbitration reviews, and the tribunal's issuance of their preliminary views, meaning instigating the parties with probing questions at – let's say, after the evidentiary hearing, to give them a sense of what the tribunal is thinking.

First Panel: Investment Funds in Arbitration

Moderated by Juliana Botini, this panel opened with Marina Copola (Commissioner from the Securities and Exchange Commission of Brazil – CVM) outlining key aspects of CVM's Resolution 175, which plays an important role in clarifying the roles of asset managers and fiduciary administrators.

Ana Carolina Weber followed with an examination of the complexities introduced by investment funds in arbitration. She questioned the sufficiency of the information made available, whether arbitrators had a duty to disclose personal investments, as well as the scope of an arbitration clause provided in the bylaws of an investment company.

Next, Priscilla P. Rodrigues highlighted Brazil's robust investment framework, stressing the need for ongoing education for both foreign investors and arbitrators. The goal, she mentioned, is to ensure that foreign investors are aware of the Brazilian investment framework's advantages. Likewise, she pointed out the importance of an arbitrator being knowledgeable enough to differentiate damages arising from a specific choice of risk allocation from the losses of an investment mismanaged or affected by a professional's malpractice.

Finally, Thierry Tomasi shared his experience with investment funds in France, noting how cultural differences can shape disputes, particularly around contract negotiation and document production. He also expressed curiosity about the effectiveness of the "carta arbitral" in facilitating communication between arbitral tribunals and courts. As provided by Article 22-C of the Brazilian Arbitration Act, "carta arbitral" is a letter that may be issued by the arbitrators asking the judicial courts to offer assistance or impose compliance with an act requested by the arbitrator.

Before Lunch: CAM-CCBC's Awards Get Published

Just before lunch, Ana Flavia Furtado said she was fulfilling her dream of hosting a talk show while she interviewed Rodrigo Fonseca (CAM-CCBC's president) and Jean-Rémi de Maistre (Jus Mundi's CEO and co-founder). The theme was their partnership in building a database that uses AI to summarize and publish awards selected by the CAM-CCBC (some anonymized, some in full). In Rodrigo's words, the partnership strikes a balance between confidentiality and transparency, as the CAM-CCBC may publish anonymized decisions if the parties do not authorize the disclosure of the award. According to Rodrigo, this is in line with his description of the parties' most common wishes: that they can see all awards published, but not their own.

Second Panel: Airport Concessions Clearing to Take-off

The moderator, Gary Birnberg, began the discussion with a historical introduction to concession practices in the world of airports.

He was followed by Rupert Choat KC's insightful overview of the common legal frameworks governing airport concessions and the complexities involved. Drawing from his extensive international experience, he highlighted the valuable lessons that can be learned from airport concessions around the world. Rupert shared several examples of key features in concession

contracts from different jurisdictions, including fixed and unfixed values in concession contracts, the level of concession fees, minimal capital investment requirement, duration of the concession and even the level of intervention of the public sector. While referring to challenges he has encountered in his practice, Rupert emphasized that while the legal framework is crucial and often shaped by local culture, many potential issues can be effectively addressed through careful contract drafting.

Following, Tiago Souza Pereira, Director-President of the National Agency of Civil Aviation ("ANAC"), presented data showing a steady increase in airport concession contracts containing arbitration clauses, accompanied by a decrease in contentious disputes. The decline in disputes, he argued, is driven by two factors: the high cost of arbitration compared to litigation and the final and binding nature of arbitral awards, which prompts public authorities to ensure their legal positions are solid. Ana Maria Rovai, legal director of CCR, also revealed that adding arbitration agreements to those contracts was a strategy to boost foreign investor confidence, and suggested that the next step might be to integrate dispute boards into the dispute resolution framework. Tiago further added that the ANAC does prefer amicable dispute resolution mechanisms, which can be seen from the fact that six out of seven arbitrations in which the ANAC is currently involved are suspended due to the parties' attempt to negotiate.

Jennifer Haworth McCandless concluded the discussion by addressing the challenges of cross-jurisdictional arbitration. She emphasized that the complex legal frameworks typical of airport concessions can often involve parties from multiple jurisdictions or even multiple arbitration clauses within a single agreement. This can lead to overlapping or conflicting legal frameworks. One example she cited was the right to arbitrate under both a commercial contract and an investment treaty, raising key questions: Do two different tribunals represent an advantage or a drawback? Is having "two bites of the apple" beneficial or problematic? Does coordinating parallel disputes offer strategic advantages or create complications? As Jennifer pointed out, strategy plays a critical role in navigating these complexities in airport concession dispute resolution.

Third Panel: The Travelling of Rules of Evidence

In this panel moderated by Guilherme Carneiro Nitschke, the discussion kicked off with a summary of the Brazilian perspective on the taking of evidence. André de Luizi Correia took us through the Brazilian Code of Civil Procedure, the Brazilian Constitution, and some statutory law provisions concerning the burden of proof and the means that constitute evidence.

Travelling from Brazil to China, Fei Lu, addressed the rules of evidence from the perspective of Chinese law. She pointed out that, differently from other legal systems, in China, there is a heavy reliance on written evidence and that a verbal statement in Chinese culture means no guarantee – apparently there is even a famous saying about it. Likewise, cross-examination is not very developed there. Towards the end, she questioned whether there is (or even should be) a "correct" approach to evidentiary rules across different legal systems.

Moving from national to international perspectives, Prof. Renato Nazzini argued that the distinction between civil and common law traditions is sometimes overstated in international arbitration, as arbitrators typically apply specific national laws rather than broader legal traditions. In his speech, a few propositions were examined, namely that, in the evolution of international

arbitration common law has prevailed; the finding of whether the burden of proof is procedural or substantive is driven by the applicable law; many misconceptions about civil or common law derive from taking concepts out of context; and the metaphysics of the burden of proof reveal that many rules often considered unique to one legal tradition ultimately operate similarly in practice.

Finally, mindful of being the last panelist of the day, Marike Paulsson decided to shake things up. She left the stage and, while walking amongst the audience, presented some compelling criticisms of the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules). Points made included the use of 'emotional' language ("[…] if a party insists […]") as well as the target to address a problem that is not really a problem in arbitration. Particularly, she pointed out that the crisis that arbitration faces is rooted in arbitrators' pools, on ethics issues, and not on issues of fact or expert witnesses and examination. Then, she talked about the importance of preparing for cross-examination, which includes a deep dive into the audience, i.e., the arbitrator, as well as a thorough knowledge of the case file. In her words: the party who wins the case is the one who knows the file best. At last, she made clear the importance of the integrity of the expert, pointing out that a person – her included – can only lose their reputation once.

Conclusion – Call to Action: Build Bridges to an Inclusive and Diverse Arbitration

The day concluded with Silvia Pachikoski's note that a conference such as this, with more than 600 professionals from around the world, and in a global city such as São Paulo, paints the picture that they want to see in arbitration: diversity. Diversity in gender, nationality and background as the foundation for integrating perspectives and building bridges that will help build a bright future for arbitration.

Follow along and see all of Kluwer Arbitration Blog's coverage of the XI CAM-CCBC Arbitration Congress here.
