

11th ICC Brazilian Arbitration Day: 100 Years of the ICC Court

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On 9 March 2023, the International Chamber of Commerce (“ICC”), the National Committee (“ICC Brasil”) and the ICC Court of Arbitration (“ICC Court”) held the 11th ICC Brazilian Arbitration Day (“ICC BAD” or “Conference”) in São Paulo. This Conference is organized since 2015, aiming at enhancing practical and theoretical discussions on trend topics related to national and international arbitration. Despite its inherent success over the years, in 2023, practicing lawyers, in-house counsel, magistrates, legal directors and arbitrators had an additional reason to gather together at the ICC BAD: the celebration of the 100th anniversary of the ICC Court.

The special edition of the ICC BAD featured four panels, two keynote speeches, twenty-three speakers and welcomed more than 420 delegates. In a nutshell, the 11th ICC BAD was remarkable for allowing the participants to reflect on the past development of arbitration and the contributions of the ICC to this process, while encouraging them to decide on the future we shall hope for dispute resolution in Brazil and abroad.

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

“La mémoire est l’avenir du passé” – Paul Valéry

The French poet and critic Paul Valéry, born in the small village of Sète, once said that “memory is the future of the past” (courtesy translation from French). With that in mind, we begin this coverage pointing out ICC’s last century achievements detailed by Mrs. Daniel Feffer (President, ICC Brazil), John W.H. Denton (Secretary General, ICC), Alexander Fessas (Secretary General, ICC Court) and Ms. Patricia de Figueiredo Ferraz (Regional Director for Latin America, ICC Court) during the morning sessions of the Conference. This analysis allows us to better understand the future we may

be led in the next 100 years.

In 1923, the ICC Court was established in Paris under the leadership of founding ICC Chairman and French Minister of Commerce Etienne Clementel, known as the “Merchants of Peace”. As explained by Mr. Feffer, the creation of the ICC Court sought to enable access to justice and the rule of law, and to promote diversity in a truly international and neutral ecosystem. 100 years have passed, and there is no doubt that the ICC Court has achieved its objectives; for instance, since its creation:

- ICC Court has played a leading role in making arbitration the preferred method for resolving disputes between parties from any country or jurisdiction;
- more than 27,000 arbitral proceedings have been administrated;
- more than 6,000 awards have been scrutinized;
- eight different versions of its arbitration rules have been released;
- numerous reports on wide range of topics (g., parties' and arbitral tribunals' conduct of the arbitration, recent technologies, climate change) have been published;
- five new offices have been opened worldwide; and
- female appointees made up 37% of the Court's total arbitrator appointments in the last released statics (according to Ms. Ferraz, in 2015 the percentage of women arbitrators confirmed or appointed in ICC cases was only 10.4%).

The accomplishment of the ICC's Court endeavors in the Brazilian market is also clear. In 2017, the ICC Court opened its office in São Paulo; only six years have gone by and the São Paulo office under the leadership of Ms. Ferraz has more than 196 proceedings registered, whereas statistics released in 2022 ranked Brazilian parties as the 2nd most common

nationality in ICC arbitration proceeding for the 3rd years. On the political side, the São Paulo office together with ICC Brazil have been actively engaged with the Brazilian government to not only support them in the fight against climate change, but also assure an effective renewable energy transition in the country. In other words, a strong evidence of the country's risen role in the international market.

This outcome, of course, was a result of the restless work done by members of the ICC Secretariat and the Court ("Team") over the years. As described by a distinguished group of panelists who addressed the structure and daily activities of the ICC Court and the Secretariat¹), the Team has devoted all its time and efforts to (i) ensure the enforceability and quality of arbitral awards, while: (ii) creating uniformized rules for arbitration, (iii) ensuring adequate decisions on challenge of arbitrators, and (iv) developing projects in the region.

Well, if the past was built on solid foundations, which allowed international arbitration to expand across the globe, what future we might hope for the next 100 years? Below you may find some guidance.

The ICC Centenary Declaration on Dispute Prevention and Resolution

On 19 January 2023, the ICC issued a declaration setting out a vision to lead dispute resolution for the next century – the ICC Centenary Declaration on Dispute Prevention and Resolution. Even though the ICC's founding mission to ensure access to justice and promote the rule of law will continue to be the force driving into the next century, Mr. Fessas clarified in his opening speech that the ICC Court also pledge to:

- hold fast to its belief that an independent and neutral dispute prevention and resolution process, free from influence and political dynamics, is key to enabling business and investment;
- adopt sustainability measures to minimize ICC's own

environmental footprint by reducing energy consumption and waste;

- support bold action to tackle climate change;
- improve transparency in the dispute prevention and resolution process;
- among many other commitments.

As a matter of fact, the ICC Court has already taken a big step towards greater transparency. It is worth remembering that the ICC Court & Jus Mundi joined forces in September last year to make ICC arbitral awards freely available to the global legal community (for more details please see [here](#)). Mr. Fessas and Ms. Ferraz informed that this partnership will also ensure the publicity of arbitral proceedings involving Brazilian public entities in accordance with article 2, § 3o, of the Brazilian Arbitration Act. (Law 9.307 of 1996).

Companies in transition: total attention on ESG and renewable energy transaction

Companies are in a transition – that is a fact. They are either influenced by the renewable energy transition process, or by society's demands for corporate policies based on ESG. This was precisely the main theme of discussions held by the panelists Mr. Carlos Almiro de Magalhães Melo (Sustainability ESG & Risk Management Director, BRK Ambiental), Ms. Débora Yanasse (Partner, Tauil & Chequer Advogados in association with Mayer Brown), Ms. Juliana Domingues (Attorney General, CADE), and Ms. Aisha Nadar (Partner, Advokatfirman Runeland), in the panel “Companies in transition: disputes of the recent past and near future”, moderated by Mr. Pedro Batista Martins (Partner, Batista Martins Advogados).

On the one hand, green hydrogen has been gaining ground and expanding its possibilities. According to Mr. Yanasse, Brazil may play an important role in this sector, because it has potential to become one of the world's largest producers of green hydrogen. In her words, “green hydrogen is the petroleum of the future”, as hydrogen can be used domestically in various industrial sectors, from food to

fertilizers, replacing carbon-intensive fuels. It can also be applied to balance the power grid by absorbing renewable electricity in periods of high generation and low demand (please see more information [here](#)). Ms. Yanasse added that disputes will certainly arise from implementation of this projects and from contracts on commercialization of energy.

On the other, arbitration will play a big role on companies' behaviors and policies based on ESG (as previously reported [here](#)). For instance, (i) parties' violation of climate change goals' obligations, (ii) company's purchasing price or the contract's final value calculated according to ESG criteria, and (iii) violation of representations and warranties on ESG obligations will certainly become a recurrent subject of arbitral proceedings. As Ms. Nadar explained, ESG is "no longer matter of soft law, but rather matter of responsibility and potential liability". Accordingly, we may also see claims in the future arising out of misleading ESG credentials of products (also known as "greenwashing"). Although parties may not resort greenwashing disputes to arbitration (at least most of the time in her view), collateral claims affecting the supply chain will certainly be resolved before arbitral tribunals.

Arbitration in transition: is resolving disputes with a new mindset trending?

The transition in arbitration itself was also subject of discussions engaged by the panellists Ms. Chiann Bao (Independent Arbitrator), Ms. Maria Rita Drummond (Legal Vice President, Cosan), Jose Ricardo Feris (Partner, Squire Patton Boggs), and moderated by Mr. André de Luiz Correia (Founding Partner, CFGS Advogados).

Because volatility is intrinsic in trading and commodity market, Ms. Drummond informed that expedited arbitration is on the top priority of companies, such as Raízen. She confirmed that it proved to be an efficient method of dispute resolution, which allows parties to quickly move forward with their businesses and commercial relationships. Ms. Drummond and Ms. Bao agreed with Mr. Correia that there is room for expedited arbitration in claims with high

amount in dispute. Often, there are disputes of millions of dollars in which their subject matter is not complex at all. As such, they can be resolved in a procedure with limited document production and short deadlines.

The panellists then discussed the importance of dispute boards. This type of alternative dispute resolution is very helpful in avoiding future litigations/arbitrations. With first-hand experience on this matter, Ms. Drummond noticed that construction issues were easily and early solved through dispute boards, because evidence were produced and analysed by experts almost instantaneously. Ms. Bao also added that in Asia dispute boards are normally used by government bodies in telecommunication disputes.

Mr. Feris concluded the panel mentioning an important development for construction arbitration: the Building Information Modelling ("BIM"). BIM is a process for creating and managing information on a construction project throughout its whole life cycle. As part of this process, a coordinated digital description of every aspect of the built asset is developed, using a set of appropriate technology. If created during the construction, it provides the parties and the arbitrator with a more objective and empirical measuring stick for comparing the parties' intent with a project's completion.

Many questions though arise from this subject: Do arbitrators have the required knowledge to manage this tool? Do arbitral institutions have the adequate server provider to store all the information uploaded on the BIM? If parties have not created a BIM during the construction, is it worth to do so in the arbitration? These are some of the questions discussed during the panel that we may need to answer very soon.

Conclusion

The past and future of arbitration are connected. Solid achievements reached in the last century provided us with the necessary experience to build a meaningful portfolio of dispute resolution methods for our clients. However, new technology, new sort of claims, and new forms of dispute

resolution have already arisen and will arise in the next decades. As dispute resolution services practitioners we must be prepared for these changes.

Quoting Mr. José Emilio Nunes Pinto's passionate endnote speech, the ICC Court – or “the Queen” is an example of institution that, although completed 100 years, “has never been old”. To the contrary, the ICC Court has always played a vanguard position to adopt new trends faced by its time, while advocating for an impartial venue for its clients. As Mr. Pinto's listed, artificial Intelligence has never been a problem, neither language, nor cultural differences. Accordingly, it is our mission not to shift this premise!

*This article was written by our Dispute Resolution Lawyer, Aécio Filipe Oliveira. The text was published on the Kluwer Arbitration Blog on April 7, 2023. [Click here to check.](#)

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