

CAM-CCBC Arbitration Congress IX Edition: Tribute to Dr. Straube, General Program & Future of Independence and Impartiality in Arbitral Proceedings

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On 17 and 18 October 2022, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada held its IXth Arbitration Congress ("IX CAM-CCBC Congress" or "Congress") in São Paulo. The Congress is the opening event of what became the Sao Paulo Arbitration Week ("SPAW"): a collaborative calendar for law firms, universities, associations, and institutions to organize and promote ADR events in Sao Paulo. The 5th edition of SPAW set a record: it registered 35 events from 17 to 23 October 2022.

The IXth CAM-CCBC Congress was also the largest CAM-CCBC's in-person event in history; it gathered over 540 delegates from all over the world, and 26 speakers from 7 nationalities. The Congress' Program was carefully designed to tackle hot topics of present and future of arbitration, while reflecting CAM-CCBC's practical experience (managing over 1.400 arbitration proceedings in the last 10 years), and keeping its commitment to a diverse lineup of speakers.

The Congress held 5 panels, and 2 keynote speeches delivered by Professor Giuditta Cordero-Moss and Bernard Hanotiau. It also launched the CAM-CCBC's New Arbitration Rules and CAM-CCBC New Generation Commission's (Newgen) interactive research on diversity, privilege, and inclusion conducted.

Below we detail (i) the highlights of the Conference's opening remarks, and (ii) Prof. Cordero-Moss' main discussions on independence and impartiality of international adjudicators.

Opening Remarks and Tribute to Dr. Frederico Straube

Ms. Eleonora Coelho, CAM-CCBC's President, opened the IXth CAM-CCBC Arbitration Congress by praising the privilege of holding in-person events after two years of online conferences and webinars. As her mandate as president will come to an end in the first semester of 2023, Ms. Coelho took a stroll down memory lane and brought out some key CAM-CCBC developments in the last 3 and a half years.

She mentioned how CAM-CCBC reacted promptly to the pandemic. In sum, CAM-CCBC issued rules for electronic proceedings and guidelines for virtual hearings; and enabled the use of new dispute resolution tools such as expedited arbitration rules; emergency arbitrator proceedings; and dispute boards.

Ms. Coelho highlighted CAM-CCBC's commitment to transparency, diversity, sustainability, and best practices in international arbitration. In 2022, for instance, the Center published the "CAM-CCBC Facts and Figures 2020-2021" reporting its relevant data and initiatives. In the same year, CAM-CCBC proudly announced gender parity among those appointed as chairperson or sole arbitrator.

Under Ms. Coelho's leadership, CAM-CCBC also became a signatory of the Green Pledge. The Congress itself followed several recommendations set forth by the Green Protocol for Arbitration Conferences, and the event even received a carbon neutral certification.

Then, Ms. Coelho shed a light on the controversial bill ("anti-arbitration bill") set to amend the Brazilian Arbitration Act ("BAA"). As previously covered here, the bill aims to (i) forbid arbitrators from acting in more than ten ongoing arbitrations, (ii) prohibit the constitution of identical or partially identical arbitral tribunals; (iii) impose a duty of disclosure to arbitrators under minimal doubt; (iv) prevent arbitral institutions' Executive Committee or Secretariat members from acting as arbitrator and/or counsel in cases administered by the institution they are affiliated with; and (v) determine the publication of data related to arbitral proceedings and awards. On this matter, Ms. Coelho believes that such a bill is a harmful initiative against an arbitration-friendly jurisdiction such as Brazil. Keynote speakers, Giuditta Cordero-Moss and Bernard Hanotiau, also voiced their concerns regarding the bill.

To close her remarks, Ms. Coelho paid an emotional tribute to former CAM-CCBC's President Frederico Straube, who passed away earlier this year. Mr. Straube was a remarkable figure that played an important role on the development of arbitration in Brazil and paved the way for CAM-CCBC's internationalization process by supporting ICCA initiatives, sponsoring the Willem C. Vis Moot, and drafting the 2012 CAM-CCBC Arbitration Rules in accordance with international standards.

What the future holds for independence and impartiality in international arbitration?

Following the opening ceremony, the Congress hosted the keynote speech on "Independence and Impartiality in International Adjudication" delivered by Professor Giuditta Cordero-Moss (University of Oslo). Over the past years, Professor Cordero-Moss has conducted an extensive analysis of reports from different countries on this subject. Although her conclusions will be presented at the International Academy of Comparative Law in October 23-27, 2022, in Asuncion, she provided the Congress' delegates with a first-hand presentation on her study.

Professor Cordero-Moss started her lecture remembering that independence and impartiality are fundamental principles in adjudications in general, and are laid down in national and international laws, transnational soft laws, arbitration rules, code of conducts and are part of the due process, the rule of law and public policy.

One could say that these two concepts are very often applied together. However, she mentioned that the UK Supreme Court ("Court") recently mitigated arbitrators' duty to act independently on a decision dated

November 27, 2020. In *Halliburton Company v. Chubb Bermuda Insurance Ltd*, the Court ruled on the involvement of one arbitrator (Mr. Kenneth Rokison QC) in three arbitrations arising out of the Deepwater Horizon disaster in the Gulf of Mexico (previously covered [here](#) and [here](#)).

To what is relevant to the present discussion, Halliburton defended a presumption that an arbitrator should never accept appointments in multiple arbitrations involving crossover issues and one common party without disclosing these facts. Chubb, in turn, argued that the relevant test to remove an arbitrator is solely based on whether there are justifiable doubts as to the arbitrator's impartiality – not independence.

The UK Supreme Court agreed with Chubb and dismissed Halliburton's appeal. Among other reasons, the Court stated that:

“[t]he 1996 Act contains no provision which directly addresses the arbitrator’s independence and prior knowledge, but it imposes the centrally important obligations of fairness and impartiality. Therefore, an arbitrator would be in breach of the requirements of the 1996 Act if his or her lack of independence compromised the duties of fairness and impartiality” (at §126).

This interpretation was later confirmed by the UK Law Commission. In 2022, the UK Law Commission published a Consultation Paper to update the Arbitration Act 1996 (the Act), where it states that:

“[a] duty of independence is express in some foreign legislation and in some arbitral rules. Nevertheless, we are not persuaded that it is a virtue in itself. To this extent, we tend to agree with the DAC that what matters is impartiality. If the arbitrator is impartial, and is seen to be impartial, it should not matter whether they have a connection to the parties before them”

The English interpretation of arbitrators' duties to be impartial set the stage for additional interesting discussions. For instance, she detailed the scope of waivable and non-waivable challenges. Also, Professor Codero-Moss listed practices in certain types of arbitration, such as maritime, sports or commodities arbitration, where arbitrators are often chosen from a smaller or specialized pool of individuals. (see, for instance, IBA Guidelines on Conflicts of Interest in International Arbitration, Orange List, item 3.1.3, footnote 5). Considering that it is almost impossible to achieve complete independence in these areas, arbitrators' competence and expertise are often prioritized over potential issues arising from repetitive appointments, as she confirmed. She also correctly argued that arbitrators with notable experience will have encountered many professionals and actors in their field, and, as such, absolute separation might seem not easily achievable.

Among other topics discussed, Professor Cordero-Moss touched upon Brazilian party leaders' anti-arbitration bill to amend the BAA. Considering the discussions set forth above, she criticized the proposed prohibition for arbitrators to act in more than ten ongoing arbitrations. She couldn't be clearer: restrictions to parties' right to choose an arbitrator doesn't correspond to international practice. It is up to the parties to decide whether they want to appoint an arbitrator, including to assess the pros and cons of their adjudicator being currently appointed in more than ten arbitral proceedings.

In light of the above, it seems that the UK Supreme Court decision and the Brazilian anti-arbitration bill demonstrate how discussions on independence and impartiality are on the rise in international arbitration nowadays. They also predict a rather controversial future for arbitration, which shall be subject of intense, but fascinating debates by the arbitration community.

Conclusion

As we longed for the return of in-person events, the CAM-CCBC Arbitration Congress proved to be an excellent opportunity to bring the arbitral community together to debate the today and the tomorrow of arbitration. In its first day, the Congress provided an important floor for meaningful discussions on independence and impartiality. As we know, restrictions of parties' right to appoint an arbitrator are at the epicenter of the Brazilian controversial anti-arbitration bill.

*This article was written by our Dispute Resolution Lawyer, Aécio Filipe Oliveira and Ana Flávia Furtado. The text was published on the Kluwer Arbitration Blog on November 11, 2022. [Click here to check.](#)

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