

CBAr 21st International Arbitration Conference: Arbitration, Corporate Law & ESG

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Authors

Aécio Filipe Coelho Fraga de Oliveira

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Dispute Resolution Aécio Filipe de Oliveira

From 28 to 30 September 2022, the Brazilian Arbitration Committee – CBAr held its 21st International Arbitration Conference (“21st CBAr IAC” or “Conference”) in Rio de Janeiro. Considering the rising number of arbitration proceedings related to corporate disputes, the subject of this year’s Conference was “Arbitration and Corporate Law”.

The 21st CBAr IAC was a success. It featured 6 panels, 4 workshops, and welcomed more than 600 delegates and 52 speakers from all around the world. The Conference program reflects the Organizing Committee’s objective to deepen participants’ knowledge on latest discussions involving crossover issues between: (i) arbitration, (ii) M&A agreements, (iii) shareholders’, directors’, and officers’ liability, as well as (iv) confidentiality obligations.

We address below the most relevant discussions held on the first day of the Conference.

Dicebamus hesterna die...

Because it was the very first CBAr’s in-person event since the COVID-19 pandemic, Mr. Abbud officially opened the Conference with the Latin expression “dicebamus hesterna die” (or in English “as we were saying yesterday”).

This expression dates to the 16th century poet, scholar and humanist, Professor Fray Luis de León, who studied at the venerable University of Salamanca. In the 1570s he was sent to prison by the Spanish Inquisition for alleged heresies related to his translation and commentary work. After four years of confinement his name was cleared, and he was allowed to resume teaching at the University of Salamanca. Legend has it that at his first class he simply began his lecture with the expression dicebamus hesterna die and then continued the lesson without mentioning the exile period he had to face.

Likewise, Mr. Abbud wished to make passing acknowledgment of the long period of isolation that arbitration practitioners had to experience due to Covid-19. Most importantly, he wanted to point out that science, academia, and knowledge always remain, regardless of difficult times, such as the pandemic – as the 21st CBAr IAC further demonstrates.

CBAr faced other challenges while organizing this year’s Conference. For instance, on July 6, 2022, Brazilian party leaders sought to call for a vote on a controversial bill to amend the Brazilian Arbitration Act (“BAA”) on an urgent basis (previously covered here). Considered as a threat to arbitration in

Brazil, Mr. Abbud thanked many institutions, including the United Nations Commission on International Trade Law – UNCITRAL, for helping raise awareness of the bill's risks and disadvantages.

Mr. Abbud then explained the importance of the Conference's theme. According to Professor Selma Lemes' 2022 empirical research named "Arbitragem em Números e Valores", corporate law is the most frequent subject matter of arbitrations in Brazil. No doubt that the Organizing Committee made a good decision when choosing this theme for the 21st CBAr IAC's discussions.

Arbitration & ESG: will these three letters save the planet? What is arbitration's role in this process?

One of the Young Arbitrators panels' major themes was "Arbitration and ESG: the impacts on arbitration of climate litigation, human rights and new corporate governance". Zora Lyra (Counsel, World Bank) moderated the discussions conducted by Lucas Diniz (Attorney, Rodrigo Mendes Advogados), Elis Wendpap (LL.M, New York University), and Clara Serva (Partner, TozziniFreire Advogados).

The Economist's article named "ESG should be boiled down to one simple measure: emissions" set the stage for the panelists' exchanges. Speakers addressed the vital task of defining standards to encourage companies to act responsibly. They further examined whether society should be limiting its attention to companies' environmental policies only (letter "E" of ESG), or rather joining the environmental, social and governance (letters "ESG") finance trend.

Mr. Diniz believes that all ESG's factors are intimately connected and ultimately represent essential human rights of any society. If one seeks to boil them down to one single factor (environmental criterion – letter "E" of ESG – for instance), the fight towards creation of meaningful change for business will fragment and weaken, at least from a juridical perspective. Although Ms. Serva understands the importance of the Economist's position, she believes that in countries such as Brazil where 15% of the population starves, it is not only important, but necessary to assess a company's behavior based on ESG criteria (as a whole).

But, what is arbitration's role in this process?

Ms. Wendpap explained that the assessment of companies' behaviors and policies based on ESG may become a recurrent subject of arbitral proceedings. As she clarifies, the company's purchasing price or the contract's final value can be calculated, among other factors, "according to ESG criteria".

Ms. Serva added that arbitration might also arise from violation of representations and warranties on ESG obligations. For instance, the seller can state that no discriminatory conduct is undertaken in the company acquired, which later reveals to be false.

In 2019, the International Chamber of Commerce ("ICC") task force issued a report named "Resolving Climate Change Related Disputes through

Arbitration and ADR” (“ICC Report” – also reported on Kluwer Arbitration Blog [here](#)). In this context, the ICC Report clarifies arbitration’s role in this process. For instance, it defines and explains what sort of disputes related to climate change can be submitted to arbitration, as follows:

1. contracts relating to the implementation of energy or other systems transition, mitigation or adaptation in line with the Paris Agreement commitments;
2. contracts that do not have a specific climate subject matter but where a dispute involves or gives rise to an environmental issue; and
3. specific agreements entered into to resolve existing climate change or related environmental disputes, potentially involving impacted groups or populations.

Accordingly, as Mr. Diniz correctly pointed out, it is important that lawyers become familiar with this growing and important field of law and start suggesting contractual provisions that can help reduce parties’ violation of climate change goals’ obligations. This is the right thing to do, and attracts foreign investments, as explained by Ms. Serva.

The panel agreed, however, that arbitration practitioners will face many challenges to expand the use of arbitration to climate change disputes (e.g. issues related to arbitrability, disclosure, confidentiality, and transparency). For instance, in June 2022, the Center for Climate Change Economics and Policy (CCCEP) and the Grantham Research Institute on Climate Change and the Environment published a report named the “Global trends in climate litigation: 2022 snapshot” (the “2022 snapshot Report” –discussed [here](#)).

The 2022 snapshot Report demonstrates that there are climate change cases, for instance, that:

1. challenge the implementation or ambition of climate targets and policies affecting the whole of a country’s economy and society;
2. seek to integrate climate standards, questions, or principles into government decision-making with the dual goal of stopping specific harmful policies and projects and making climate concerns more mainstream among policymakers;
3. challenge the flow of public money to projects that are not aligned with climate action;
4. challenge a government or other entity for failure to take the impacts of climate change into account when developing policies or facilities; and
5. damages for climate impacts are sought from defendants based on an alleged contribution to climate change harms, among others.

As a result, many of these disputes might not be submitted to arbitration in

different jurisdictions.

In any event, it is important to remember that Latin America has many reported cases on this subject and certainly will play an important role in future related discussions. Indeed, the 2022 snapshot Report registered 47 Latin American new cases in 2022. Thus, it is highly important to encourage discussions on the intersections between ESG, climate change disputes and arbitration.

Conclusion

We were missing the return of in-person events. Fortunately, Congress' first day allowed friends and colleagues to meet once again in the beautiful (but rainy at this time) city of Rio de Janeiro, while enhancing delegates' attention to important topics discussed worldwide.

Follow along and see all of Kluwer Arbitration Blog's coverage of CBAr 21st International Arbitration Conference [here](#).

*This article was written by our Dispute Resolution Lawyer, Aécio Filipe Oliveira, and was published on the Kluwer Arbitration Blog on October, 18 2022. [Click here](#) to check it out.

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Aécio Filipe Coelho Fraga de Oliveira