

XVII Rio de Janeiro International Arbitration Conference: Will Flexibility of Arbitrations Surface Again?

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On May 9, 2023, the Arbitration Channel, a pioneer Brazilian institution in the dissemination and promotion of arbitration internationally, held the XVII Rio de Janeiro International Arbitration Conference (“Rio Arbitration Conference” or “Congress”), curated by João Bosco Lee (Lee Taube Gabardo Sociedade de Advogados, Partner) Lauro Gama (Lauro Gama Advogados Associados, Partner) and Maurício Almeida Prado (MAP Negotiation and Arbitration, Partner). The Congress was the opening event of a series of conferences on ADR, held in Rio de Janeiro, from 9 to 12 May.

The 17th edition of the Rio Arbitration Conference gathered over 368 delegates from all over the world, and 22 speakers of 9 nationalities. The Congress had four panels, one keynote speech delivered by Deva Villanúa (Devarbitration, Partner; ICC Court of International Arbitration, Vice-President), and one Rapport de Synthèse by Maria Claudia Procopiak (Procopiak Arbitration, Partner). In a nutshell, the Rio Arbitration Conference sparked thoughtful discussions on “Procedural Innovations in International Commercial Arbitration and the Brazilian Practice” and made the audience reflect on the reasons why such innovations are required by arbitration stakeholders.

Opening Remarks: Will artificial intelligence take over our jobs?

Ms. Villanúa opened the Congress with an important and straightforward question of whether arbitration practitioners will still be needed in the future of dispute resolution. Will artificial intelligence take over? Will parties outsource the decision-making function to predictive algorithms? How will we still add value to arbitration considering the deep innovations witnessed over the last years and, particularly, in the last months?

As reported here, artificial intelligence (“AI”) model is one “created directly from data by an algorithm, meaning that humans, even those who design them, cannot understand how variables are being combined to make predictions”. In 2023, the world turned its attention to the impressive milestones AI-based tools have reached. For instance,

- ChatGPT, an AI tool which interacts in a conversational way, was used by Colombian judge in February 2023 when deciding whether an autistic child’s insurance should cover all of the costs of his medical treatment;
- Rocketeer, the “first” AI trademark lawyer, was released in 2021. According to its website, it can predict the correct outcome of a conflict between trademarks 90% of the time, “better than most experienced

trademarks lawyers”; and

- Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), an AI-based tool, has been constantly used by U.S. courts to assess the likelihood of a defendant becoming a recidivist. As a matter of fact, in 2017, the Wisconsin Supreme Court upheld a sentence issued by the Wisconsin Department of Correction in the case *Loomis v. Wisconsin*, which convicted Mr. Eric Loomis to six years of imprisonment and five years of extended supervision, based (among other evidence) on a COMPAS risk assessment.

Indeed, there is plenty of room for discussion on the boundaries that must be imposed on such technology, whether regulations shall be created to make AI accountable for its mistakes and which improvements must be fostered to decrease the risks of biased decisions.

If it will replace our jobs or not, that is a matter still for divination, but AI will certainly be an essential part of the next procedural innovations that will be used in arbitration, and it will certainly promote profound and significant changes sooner than we think. With that in mind, Ms. Villanúa set the perfect stage for the panelists to discuss the procedural innovations that are now available in different phases of the arbitration, particularly during arbitrators' nomination, definition of issues to arbitrate, evidentiary phase and hearing.

What does the present hold for nomination of arbitrators and definition of issues to be arbitrated?

Following the opening ceremony, the panelists Ms. Maria Inês Sola (Pan American Energy LLC, Senior Legal Counsel), Ms. Karina Goldberg (Ferro, Castro Neves, Daltro & Gomide Advogados, Partner) and Mr. Ari MacKinnon (Cleary, Gottlieb Steen & Hamilton LLP, Partner) discussed “Choosing the arbitrators: interviews, lists, rankings, etc.”, presided and moderated by Mr. Eduardo Damião Gonçalves (Mattos Filho, Partner).

The past practice of arbitrators' appointment was essentially based on previous acquaintance and feedback from colleagues, while technology has made its way in the nowadays approach. For instance, ChatGPT, among other functions, seems to help parties to come up with a list of potential arbitrators, according to Mr. Gonçalves introductory speech.

As a client, Ms. Inês confirmed that selecting the right arbitrator is the most difficult and important decision in an arbitration, because “it will obviously seal your future”. In this process, parties normally resort to rankings (such as Chambers & Partners, Legal 500 and Who's Who Legal) and internal selection's criteria (e.g., amount in dispute, availability of arbitrators, expertise, etc.) to make the most appropriate choice. Although rankings seem to be a useful tool to nominate arbitrators (as it is public and free), all panelists agreed nonetheless that they do not provide deep information on candidates, but only short details on their past activities.

Parties might also use platforms such as Kluwer Profile Navigator, Arbitrator

Intelligence, and Jus Mundi Connect to obtain insights based on data-driven information on arbitrators' previous arbitrations and awards, potential conflict of interest and relationship with parties, counsel and co-arbitrators.

Among these options, interviews turned out to be the most controversial decision-support tool. Because clients also want to engage in the nomination process, as pointed out by Ms. Goldberg and confirmed by Ms. Inês, more and more often clients and in-house or external counsel join ex-parte meetings with potential arbitrators to not only check their suitability to the case, but also brainstorm prospective presiding arbitrators for the tribunal.

In this context, great care is required to ensure that such interviews do not compromise the integrity of the arbitral process. As Ms. Goldberg indicated, it is advisable to inform the opposing party and co-arbitrators (if applicable) about this practice, or reach an agreement on protocols to be adopted. When no formal or written protocols can be made, Mr. Mackinnon added that it is always advisable to contact institutions, check the applicable law, and discuss with clients the suitability and admissibility of interviews with arbitrators.

But what are the innovations witnessed in the process of defining the issues to be arbitrated?

This was the topic for the panel formed by Ms. Ndanga Kamau (Ndanga Kamau Law, Partner), Mr. Andrés Jana (Jana & Gil Dispute Resolution, Partner), and Mr. Juan Pablo Argentato (ICC International Court of Arbitration, Managing Counsel), moderated by Mr. Rodrigo Garcia da Fonseca (FSL Advogados e Associados, Partner) and presided by Mr. Octávio Fragata (Rennó Penteado Sampaio Advogados, Partner).

Even though issues to be arbitrated shall be defined as earlier as possible, Mr. Jana and Mr. Argentato correctly indicated that parties usually are not able to do so, either because they do not have a complete overview of the case, or because evidence is still pending to support their claim. Accordingly, techniques such as Kaplan Opening and Scott Schedule are getting more and more popular.

Ms. Kamay clarified that Kaplan Opening is inspired by the golden age of English advocacy and tends to be a hearing after the first round of written submissions and witness statements, but prior to the main hearing itself. In her opinion, the Kaplan Opening engages the arbitral tribunal to analyze the case in an early stage of the arbitration and, as such, it can raise issues to the parties, stimulating discussions for settlement and increasing chances of quicker and better awards. In this process, the arbitral tribunal may also use the Scott Schedule, a columnar presentation of the issues to be decided and the position of each party on the issues, to be better equipped to conduct a fair and efficient process.

What does the present hold for evidence production in international arbitration?

The panelists Ms. Ina Popova (Debevoise & Plimpton, Partner), Mr. Stephan Adell (Adell & Merizalde, Partner), Mr. Pedro de Nápoles (PLMJ, Partner) and Mr. Felipe Sperandio (Clyde & Co LLP, Legal Director) discussed the "Producing evidence: full package, witness statements, Redfern Schedule,

Armesto Schedule, Document Production Facilitator, Expert Reports, Sachs Protocol”, presided by Ms. Juliana Krueger Pela (Krueger Pela, Partner).

Among other topics, Ms. Popova touched upon the need of written factual witness statements and highlighted that those that are a mere copy-paste of the parties' pleadings are not helpful for the arbitral tribunal. With respect to cross-examination, Ms. Popova indicated that it is inefficient to have many witnesses testifying on the same subject, which exposes the witnesses to inconsistencies.

Mr. de Nápoles noticed that most of arbitrations involving Brazilian parties include an expert evidence phase and, as such, Mr. Adell stressed the usefulness of the Sachs Protocol. In sum, Sachs Protocol offers the tribunal the possibility to consult with the parties at an early stage in the proceedings, allowing them to provide the tribunal and the opposing party with a list of candidates who they consider could act as an expert. Because the parties participate in the process of choosing the experts, the Sachs Protocol puts to rest any debate on possible diverging standards of impartiality and independence. In addition, considering that the experts are ultimately appointed by the tribunal, the parties will usually employ their best efforts to propose competent names while the arbitral tribunal itself is actively engaged with the experts from the very beginning of the proceedings.

When it comes to the Redfern Schedule, the panelists pointed out that the parties shall provide guidelines at the outset of the arbitration on how to deal with privilege issues, because it is treated differently depending on each jurisdiction. The discussion ended up with an interesting reflection on the IBA Rules: frequently arbitration practitioners misinterpret the IBA Rules, since they forget that these rules are only guidelines – just as the other techniques mentioned above – and, as such, they can be adapted to the reality of each case.

But do arbitrators consider innovations to be helpful with respect to the evidentiary hearing?

The panelists Ms. Athina Fouchard (AFP Arbitration, Independent Arbitrator), Mr. Cristián Conejero (Cuatrecasas, Partner), Mr. José Ricardo Feris (Squire Patton Boggs, Partner), Mr. André de Luiz Correia (Correia, Fleury, Gama e Silva Advogados, Partner) and Ms. Adriana Braghetta (Adriana Braghetta Advogados, Partner) offered valuable tips on this topic.

As to Post-hearing Meetings (arbitrators' meetings after the evidentiary hearing), on the one hand, Mr. Conejero highlighted the importance of saving time immediately after the hearing, as there is an issue of memory collection and, at this time, it is possible to discuss specific issues in detail. On the other hand, if the tribunal's deliberations only start after the presiding arbitrator finishes the first draft of the arbitral award, Mr. Feris correctly stressed that there is no longer room for a proper discussion. For him, the golden rule is to make sure that co-arbitrators are allowed the opportunity to express their views before the president of the arbitral tribunal starts drafting the award.

When discussing the Pro-Memoria prepared by the parties, Mr. Feris explained that it is a way of facilitating the arbitrators' understanding of the case and it can take many shapes, such as a PowerPoint presentation prepared for the Opening Statement or skeleton arguments. He pointed out key aspects for the Pro-Memoria to be effective, including focusing on the

strength of the case and on different issues that the arbitral tribunal must answer to decide the dispute. Ms. Braghetta added that the Special Meeting for parties to present their cases one month before the evidentiary hearing is also very useful for arbitrators. The panelists agreed on the need for arbitration practitioners to be creative and on how innovations are welcome when it comes to the evidentiary hearing.

Conclusion

The Congress provided an important floor for discussions on procedural innovations in international arbitration and allowed the audience to conclude that they are now required because arbitral proceedings may no longer be considered an efficient dispute resolution mechanism to some stakeholders.

As Ms. Procopiak concluded, (i) ranks and digital platforms for nomination of arbitrators, (ii) Kaplan Opening and Scott Schedule for definition of issues to be arbitrated, (iii) written factual witness statements, Sachs Protocol, Redfern Schedule for document production, and (iv) Pro-Memoria for evidentiary hearings are tools that share the common goal to enhance quicker and better decisions by arbitral tribunals. How can they do that? Simply, by allowing flexibility to resurface in arbitration.

However, true increase in the effectiveness of the arbitral proceedings may only be reached if there is a real exchange between parties, counsel, and arbitrators to identify the best procedural options for each case.

****This article was written by our Dispute Resolution Lawyer, Aécio Filipe Oliveira and Mariana Almeida Issa. The text was published on the Kluwer Arbitration Blog on June 24, 2023. [Click here to check.](#)**

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