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I.

COVID-19'S NEW REALITY

Santos beach photographed in black and white during a cloudy day, Brazil | William Rodrigues Dos Santos

VIRTUAL HEARINGS: AN ETHICAL LOOPHOLE?

By Fernanda Cominato Nemr

I. Introduction

With the spread of COVID-19 and the installation of a pandemic completely unprecedented in the modern era, the legal industry was forced to rapidly adapt to the changing circumstances. Home office, virtual meetings and lack of physical copies of documents became a quick reality, much to the dismay of certain practitioners.

Around March or April, when the pandemic began, many practitioners chose to delay certain obligations, rather than adapt to the new scenario. As such, while many were already discussing the possibility and practical consequences of virtual or remote hearings, for example, others chose to reschedule or delay proceedings, in an attempt to remain in-person.

Now, with New Year's Eve just around the corner, fact is that what has been repeatedly called "the new normal" is here to stay. Not only is the pandemic relentless, but this very particular year has changed people's views on the internet and its impacts in all areas of Society – including, of course, arbitration proceedings.

In light of this changing scenario, it is fundamental to study and develop the consequences of online proceedings in international and domestic arbitration. Most importantly, counsel and arbitrators alike must discuss and determine how to avoid letting proceedings come to a stop, and how to get the best results from virtual hearings.

Under this scenario, one must note that the use of technology in international arbitration was only sped-up by the pandemic but did not come straight from it. For example, in a 2018 survey conducted by White & Case LLP, it became clear that videoconferencing was frequently used in arbitrations, and that practitioners already thought it should become more common.

Any person working or dealing with arbitration will agree that the hearing is probably the most important event in the entire proceeding. It is the counsel's chance to present its

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parties case, call the arbitrator's attention to important facts and documents, and produce irreplaceable evidence. It is also the moment when technical and factual arguments are put face to face, so that the tribunal can better understand where the differences and inconsistences lay. There is no doubt that the atmosphere and utility of a hearing must be preserved, no matter the circumstances.

Because of that, this article is based on the premise that it is – at least as a general rule – preferable to have a virtual hearing than to have no hearing at all. Thus, the focus here from will not be to discuss whether or not to hold a virtual hearing, but how to guarantee that the virtual hearing goes according to plan. For that, we rely on the motion for debate held in the SIAC Congress this year: "*This House believes that Virtual Hearings are just as effective as In-Person Hearings*"[1]. While 54% of viewer respondents voted against it, we do believe that it is – at least partially – true. Or, at least, it is *sufficiently effective*, when in-person hearings are impossible.

Additionally, this article will also not discuss whether or not virtual hearings are possible in different arbitral institutions. As has been substantially discussed in the past few months[2], we believe that the arbitrator's discretionary powers to rule on procedural issues – within, of course, the limits of the *lex arbitri* and the institutional rules – include the powers to hold hearings virtually. Also, considering the developments of the pandemic, many arbitral institutions have released notes or statements clarifying the possibility of virtual hearings, thus ending the discussion in many forums.

Among the many issues that could be discussed when it comes to virtual hearings – such as practical and technical aspects – one comes to mind first: the potential ethical issues of being apart. This is one of the main arguments "against" virtual hearings, and seems to be one of the most highlighted problems of our "new normal": how to guarantee ethical behavior when parties, counsel, arbitrators and witnesses are not in the same room?

For that, we will first provide a brief panorama of ethics in international arbitration and, then, apply such premises to virtual hearings, analyzing the potential ethical issues that can arise. Lastly, we will discuss suggestions on how to resolve the issues, particularly in light of the material published by arbitral institutions during the past few months and the Seoul Protocol.

II. An overview of ethics in international arbitration

Prof. Catherine A. Rogers has defined international arbitration as an "ethical no-man's land", particularly due to the lack of clarity in the applicable rules or laws[3]. This very same concern was echoed by William Park in 2014, when he stated that "*although no playing field will be perfectly level, some remain less than others. Cross-border arbitration may appear rigged against advocates that respect procedures not observed by the other side*".[4]

This type of concern is not only posed by scholars studying and discussing international arbitration but is also present in the everyday life of attorneys working with arbitration. In particular, it is a question often asked by clients. Away from the state courts and with no clear and direct ethical rules, how can we guarantee that the proceedings will be fair and square?

This article does not intend to be the end of all discussion on ethics in international arbitration. It is not a treaty and does not intend to be extensive. Because of that, we will not analyze all the theoretical aspects surrounding ethics in international arbitration.

Thus, this article will consider, as a baseline, the fact that, irrespective of what ethical rules and norms are considered to be applicable to a certain arbitration proceeding, there are certain standards that should be taken into account in all hypothesis. More than anything, all participants in the arbitration proceedings must, within the realms of possibility, be comfortable that the arbitration is being conducted within best ethical practices, and in a fair manner.

In light of that, we believe that it is always important for the ethical grounds to be clear within the proceedings. When ethical rules are not clear, arbitrators and counsel alike must push for an agreement, so as to level the playing field. This is also one of the premises of the possible solutions proposed below.

Besides the theoretical aspects – which have been extensively discussed by authors such as Prof. Catherine Rogers – the fact is that new ethical issues still arise whenever new factors come into play, and that is the case with the internet, and virtual aspects of arbitration proceedings. There are ethical issues being discussed when it comes to online documents, forwarding of procedural documents by e-mail, conference calls between arbitrators and counsel, and a number of other factors that come with the interplay between arbitration and the virtual world.

With the pandemic and the development of virtual legal resources, these issues tend to be highlighted, which is the focus of this article, as will be further discussed below.

III. Potential ethical issues arising from virtual hearings

There are, of course, a number of factors to be taken into consideration when deciding whether or not to hold a virtual hearing. Many of those had already been object of discussion on recent documents and protocols dealing with videoconferencing and the use of technology in domestic and international arbitration. Others became the object of webinars and articles when COVID-19 forced everyone to stay home.

From March onwards, practically every country in the world had to decide how to deal with its legal system in the middle of a pandemic. Many of them provided for similar solutions than those being discussed by the arbitral community and faced coherent problems.

Among all of the initiatives and discussions, one must highlight the recent decision of the Federal Court of Australia in the case *Capic v. Ford Motor Company of Australia Ltd.*, when

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discussing the adjournment of a hearing due to the COVID-19 pandemic. The order, rendered by Judge Perram J. on April 2020, discusses a number of factors relevant to the discussion on virtual and remote hearings.

After considerations on the safety of the people involved, the court concluded that the most coherent solution would be "*a mode of trial conducted over virtual platforms from participants' homes*". This is perfectly and entirely in line with the premises of this article. Then, Judge Perram J. states – and we also agree – that virtual hearings must be considered on a case-by-case basis, so as to consider whether or not they could result in an unfair trial.

The Australian Court analyzed seven different factors that had been raised by the respondent, and this article does not intend to analyze all of them. Some of them, however, discuss issues that may be connected with ethical queries and, as such, are highlighted herein.

When it comes to factors relating to communication between the persons involved, the main issue raised was communication between the members of the same legal team. This, of course, does not propose relevant ethical questions, but the solution found must be highlighted. The judge suggested the communication between attorneys using WhatsApp, or other communication methods.

While we agree that this is not only necessary, but will most certainly happen, the use of different means of communication may make difficult the assessment of whether or not other ethical rules are being complied with. An arbitrator – or, in this case, the judge – would never be able to tell who exactly the counsel is communicating with.

When it comes to hearing of witnesses and technical experts, the Australian Court did discuss an issue which is ethically relevant: that "*it will not be possible to see whether there is somebody in the (upstairs bed) room coaching the witness or suggesting answers out of earshot*".

Judge Perram J. did not provide a solution, but effectively analyzed the case that was being discussed. There, he considered that very little could be done in terms of helping, and that he did not believe that the case was serious enough that someone would be willing to risk his or her own life for it.

This, of course, cannot be transposed to all cases. Especially when it comes to arbitration, most cases have big companies and immense amounts involved, which could lead to an incentive for unethical behavior. Thus, the Australian Court's assessment, on its own, is useful only for identifying a potential issue, but not for solving it.

Besides the Australian Court's decision, there are a number of other assessments and analysis made in several different countries, as mentioned above. This, however, it not the objective of this article and, therefore, we will move forward with the analysis, highlighting two potential ethical issues that can arise in a remote hearing: *first*, the impossibility to know who is communicating with who; and *second*, the possibility of witnesses being assisted or informed during their statements.

Besides case law and domestic regulations, one must also look at protocols and documents published that refer specifically to arbitration. Here, we have chosen to look at the so-called Seoul Protocol, as a potential identifier of issues to be discussed.

The Seoul Protocol on videoconferences in international arbitration was published by the Korean Commercial Arbitration Board ("KCAB") in 2018 and seems to have foreshadowed the importance that videoconferences would have on arbitration. It discusses, mostly, technical aspects of video conferencing. For example, the Protocol discusses potential connection issues, the necessity of having technical experts on-call and a series of Technical Requirements stablished in Article 5.

Thus, not many ethical issues can be derived from the Seoul Protocol, which is why it is not the focus of this article.

Besides the analysis of documents and case law, it is also important to look at day to day practice, and concerns raised by clients, counsel and arbitrators alike. Many attorneys and clients are concerned with practical aspects regarding potential unethical behavior by the counterparty, their lawyers and witnesses.

When everyone is sitting in the same room, everything is clearer when it comes to who is or is not complying with certain norms – spoken or unspoken. For example, an arbitrator may notice that a counsel is wrongfully communicating with a witness during its inquiry, or that arbitrator is talking with a party representative about the case during the coffee break. Of course, in-person hearings are not free of unethical behavior, but they are already charted territory.

The issue is renewed when technology comes into play. With long distance and communications media involved, the means for unethical behavior change, and new aspects must be taken into consideration.

The fact is, however, that the actual issues remain the same. The potential ethical problems arising in virtual hearings are the same as those already well known in in-person events. Ex-parte communications, exchange of undue information, leading and training of witnesses, and so on. What changes are the means, and the possibility of control by the arbitrators.

In order to better understand the problem, a practical example is warranted. In an in-person hearing, arbitrators and arbitral institutes tend to impede different witnesses from discussing the case with each other, by placing them in different rooms before their respective inquiries. And, when the witnesses sits on the stand, they are well placed within the view of the arbitral tribunal and both parties, and cannot be assisted in anyway, or receive any external interference. While this does not impede ethical issues from arising outside of the hearing center, it does eliminate certain potential problems.

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Old eclectic style building in Sao Paulo center, Brazil | Luis Roberto Ferraz De Toledo Costa

When this scene is transported to a virtual scenario, the factors change substantially. The arbitral tribunal and the parties' counsel can only see a part of the room, where the camera is directed, and are not aware of the surroundings. No one can stop witnesses from being in the same building, or counsel from interfering in their statements. There might as well be a lawyer at the other side of the room, raising signs with all of the answers.

While this image may seem like a distant reality, fact is that small ethical problems are present almost everywhere – and create doubts as to the effectiveness of virtual hearings. What if a counsel is texting the witness during the interview or is communicating by e-mail with one of the arbitrators? What if everyone is, in fact, in the same building, without the counter-party's knowledge?

As Catherine Rogers once called arbitration an ethical no-man's land, maybe the virtual setting could effectively transform it into the Great War. Without trust, and with no possibility of effective control, arbitration proceedings could be severely disrupted by something as simple as a virtual hearing.

IV. A practical view: how to avoid ethical problems during virtual hearings?

While the theoretical aspects of the potential ethical issues arising from virtual hearings are easy to discover and come to mind to even the most unexperienced player, the harder aspect is how to resolve them. This, as the focus of the present article, is also its most substantial assessment. How can one, as a player in the field of international arbitration, guarantee that no war ensues?

In order to construe this analysis, we have decided to, *first*, assess the solutions already proposed by arbitral institutions and groups and then, *second*, effectively provide our opinion on the actions and results arising therefrom. Thus, our article will finish with, *third*, our own proposal of practical solutions when it comes to ethical issues in international arbitration.

Regarding the *first* aspect, before delving into the analysis of the notes and statements released by arbitral institutions in the past few months, one must take a step-back to look, once again, to the Seoul Protocol.

As explained by Jiyoon Hong and Jong Ho Hwang when assessing the Seoul Protocol, it's objective was to answer one simple – or not so simple – question: "As the use of videoconferencing in international arbitration grows more common, we must ask ourselves: do we have the right tools to eliminate the risks that arise with this new technology?".

One of the articles that most closely relate to our assessment is Article 3.1 of the Seoul Protocol, which regards the presence of other people in the conference room. Under such protocol, the only people present in the room should be the witness, and the parties counsel. Every person in the room must be identified and accounted for, and the arbitral tribunal must verify their identity.

This, while demonstrating an effort to resolve one of the main ethical issues stated above, is, of course, nothing more than an effort itself: there is no guarantee that this will be effectively followed by the parties and their lawyers.

Among the other provisions of the Protocol, another one that may relate to ethical aspects is Article 8, which regards recording in virtual hearings. It states, as should be, that no one should be allowed to record any part of the hearing without the

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arbitral tribunal's consent. While this, *prima facie*, may seem obvious, it may resolve issues with tampering with recordings, or using certain information unjustly as evidence.

In our opinion, however, recording issues are not a central ethical problem when it comes to virtual hearings, as most hearings are already fully recorded by the arbitral tribunal or the arbitral institution. In fact, most conferencing systems, such as Zoom or Microsoft Teams, already have their own built-in recording systems, making it easy for the tribunal to record the hearing, and control who is also creating a copy.

One factor of the protocol that should be highlighted is that it is directed to *video conferencing* and not to *virtual hearings*. As such, while many of the provisions are applicable, fact is that several important matters are not even addressed. Additionally, there is an important difference there: it is one thing for everyone but one witness to be in the same room, and another entirely different scenario for each person to be present in a different environment.

With this in mind, and in light of the COVID-19 pandemic, many arbitral institutions worldwide have rushed to provide parties and arbitrators with at least some guidance in the conducting of virtual hearings.

One of the first institutions to do so was the International Court of Arbitration of the International Chamber of Commerce ("ICC"), which published the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic in 9 April 2020.

In general, the Note aims at encouraging arbitrators and counsel alike not to delay conflict resolution because of the pandemic. As such, §6 states that "*the adverse consequences of the COVID-19 pandemic make it more critical than ever that parties, counsel and tribunals give due consideration to implementing case management techniques designed to make arbitration fair and efficient*". While the Note provides that "*many of these techniques are not new*", it also highlights several practices and measures that could be taken in these circumstances.

One of the measures suggested by the Note is, precisely, "*using either audioconference or videoconference for conferences and hearings where possible and appropriate*". Virtual hearings were, thus, encouraged from the very start. And not only were they encouraged, but they were also regulated – or, at least, there was an attempt to do so.

In its third item, the Note provides extensive guidance on the organization of virtual hearings, stating that the players in the arbitration must decide whether or not to hold them. Many of the items therefrom are, of course, not related to ethical matters and, as such, are not the object of this article. They discuss, for example, the possibility of holding a virtual hearing against the parties' will, and the fact that Article 25(2) of the Rules does, indeed, allow for hearings to be held virtually.

An interesting aspect of the Note is that it provides for matters regarding a "cyber-protocol", which regards privacy aspects and applicable data privacy regulations. While this is not the focus of this article, it is important to highlight that such issues may come into play when discussing unethical behavior by parties' counsel – and, as such, anyone aiming to hold a virtual hearing under the ICC Rules should look at Annex II to the Guidance.

Lastly, the Note provides for certain procedural issues, and even attaches a Protocol on virtual hearings. For example, measures are implemented to guarantee "*procedures for verifying the presence of and identifying all participants, including any technical administrator*" and "*procedures for the taking of evidence from fact witnesses and experts to ensure that the integrity of the oral testimonial evidence is preserved*". Such issues, as already seen, are closely connected to potential ethical problems.

The measures identified in the Protocol, however, are mostly efforts of regulation. For example, the Protocol suggests "*avoiding use of equipment that interferes with connectivity or allows illicit recording*" – a clear ethical matter – and the discussion on "*the permission/prohibition of synchronous or asynchronous communications between witnesses and parties/counsel in chat rooms or through concealed channels of communications*" – another potential ethical issue.

A final interesting suggestion provided in the Note is to have the parties and their counsel provide statements in certain regards. For example, the participants would sign statements on online etiquette and due process considerations, and the arbitral tribunal would indicate that the parties have to agree on certain issues that could lead to unethical behavior.

The ICC, of course, is not the only arbitral institution that released communications on the matter.

Another interesting document to be analyzed is the Guidance Note on Remote Dispute Resolution Proceedings published by the Chartered Institute of Arbitrators ("CIArb") in 2020. The CIArb Note, which comes precisely from the "new normal" created by the global pandemic of COVID-19, focuses on the use of video and audio conferencing, as provided in its Introduction.

While the CIArb Note is not directly focused on virtual hearings, its Appendix I, titled "Preliminary checklist prior to conducting remote dispute resolution proceedings" shows its concern with potential ethical problems. It states, for example, that "*attendees have chosen physical rooms that are fully enclosed and separated from non-attendees*" and that "*attendees' physical rooms can be made visible to all participants to the extent to show that no individual or recording device is present that was not agreed to*".

While the CIArb Note does not effectively provide solutions, but merely a checklist, this last statement, contained in item 16 thereof, must be paid attention to. That is because the statement contained therein seems to be more of use than that contained in other notes and guides: not only must the party state that there is no one else in the room, but it must be able – and willing – to prove it.

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This, as will be seen below, can be an important difference when it comes to effectively guaranteeing ethical behavior during virtual hearings.

One must also highlight that there is another potential solution to issues concerning foul play during witness statements. While this is not entirely possible *during* the COVID-19 pandemic, this suggestion is based on the fact that we believe remote hearings are here to stay. The proposal, therefore, is that a representative of one party is in the room with the counterparty's witness.[5]

Having analyzed several existing guides and proposals, we now aim to provide our own input on the matter. First, however, it is important to make clear that this article does not intend to provide an exhaustive list on everything that must be done or taken into account by the participants in the virtual hearing, but, rather, to propose general guidelines and measures to be considered.

First, we believe that ethical issues must be considered when choosing whether or not to hold a virtual hearing. While, as stated, we believe that virtual hearings are beneficial – especially when in-person hearings are effectively impossible – the fact is that whether to hold them must be decided on a case-by-case analysis.

For example, in a case where a party or their counsel have been repeatedly warned by the arbitral tribunal in what regards unethical behavior, holding a virtual hearing while guaranteeing that ethical concerns are safeguarded may prove to be an impossible mission.

Second, we believe that, in order to hold the participants accountable if necessary, it is important for ethical issues to be reduced in writing. This is particularly true since, as stated, there are no clear ethical regulations in international arbitration.

In this regard, we praise the initiative of the ICC Guidance Note, to ask parties to agree, beforehand, on certain practical and ethical procedural aspects. It is fundamental for parties to discuss and agree whether or not their counsel may communicate with the witnesses, in order to avoid potential problems in the future.

After a clear agreement of ethical rules is made, the arbitral tribunal may ask all of the participants of the virtual hearings to sign statements that they will be followed. While this does not literally impede practitioners from employed unethical behavior, it does stop future discussions on whether or not that behavior is to be considered prohibited.

It is always best to make the rules of the game crystal clear to all its players, from the very beginning.

Third, there must be an attempt, by the arbitrators and arbitral institutions, to control and confirm whether the agreed to ethical rules are being followed. Here, we highlight statement 16 from the CIArb Note, in the sense that parties must show that there is no one else in the room, for example.

This type of measure was also suggested by Gary Born during the debate held in the SIAC Congress, where he stated that cameras showing the entire room – or a reasonable amount thereof – could ensure that ethical standards are complied with. He also remembered – correctly – that foul play and witness coaching are not exclusive to remote hearings and are also problems to be tackled during in-person hearings.

This, of course, also does not completely halt the possibility of unethical behavior, but it does reduce it. Just like a teacher checking whether or not the students are cheating, the arbitrators and arbitral institutions must confirm whether ethical behavior is being employed.

Fourth, the arbitral tribunal must not refrain from applying sanctions. The discussion on whether or not to sanction party or representatives for unethical behavior is not the object of this assessment and, as such, we will base our assessment on the assumption that certain sanctions are available within the legal framework applicable to the proceedings.

If that is, in fact, the case, we believe that arbitrators must always apply the sanctions when they find it necessary and appropriate. If, for example, it is found that the counsel unduly communicated with the witness, then the testimony must be considered inadmissible evidence, and not be considered by the arbitrators when they reach a decision.

In conclusion, we agree that it may be – physically or virtually – impossible to effectively guarantee ethical behavior. There are, however, measures that can be taken by arbitral institutions and arbitrators alike so as to set up ground rules and attempt to verify whether they have been followed.

The most important thing to be taken here from, however, is that ethical issues must continue to be discussed in international arbitration, and virtual – or remote – hearings are no strangers to such rule. Virtual hearings may be the new normal, but ethics should never become old.

Fernanda Cominato Nemr

1 For an analysis on the SIAC Congress and the contents thereof, *see* Shaun Lee, Low Zhe Ning. *SIAC Congress Recap: This House believes that Virtual Hearings are just as effective as In-Person Hearings* (Kluwer Arbitration Blog 2020) Available at http://arbitrationblog.kluwerarbitration.com/2020/09/04/siac-congress-recap-this-house-believes-that-virtual-hearings-are-just-as-effective-as-in-person-hearings/.
2 In this regard, *see*, for example, the work published by Maxi Scherer on remote hearings.
3 Catherine A. Rogers. *Ethics in International Arbitration* (Oxford University Press 2013) 18; Catherine A. Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' (2002) 23 Michigan Journal of International Law 314.
4 William W. Park. 'A Fair Fight: Professional Guidelines in International Arbitration' (2014) 30 Arbitration International 410.
5 This possibility was also mentoned by Shaun Lee and Low Zhe Ning in their article on the SIAC Congress. See 1 above.

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II.

DOCUMENT PRODUCTION, CONSENT AND PRE-ARBITRAL PROCEDURES

Detail of a building at Porto Alegre - Brazil | Lisandro Trarbach

THIRD-PARTY DOCUMENT PRODUCTION IN BRAZIL: GOING BEYOND THE FOUR CORNERS OF THE ARBITRAL PROCEEDINGS

By Pietro Benedetti Teixeira Webber[1]

Introduction

The Brazilian Arbitration Act empowers the arbitral tribunal to order the production of "necessary evidence".[2] Likewise, arbitration rules of the most renowned national institutions also provide for a broad discretion of arbitrators in regards to document production. Although this context of flexibility is essential and one of the main pros of arbitration, it may also become a con, creating uncertainty in some cases.

The question that we face is the following: if a document is in the possession of a person or entity other than the parties of the arbitral proceedings, could the arbitral tribunal order its production, according to Brazilian Law? That is, could the arbitral tribunal go beyond the four corners of the arbitral proceedings for the production of evidence?

Both the Brazilian Arbitration Act and the most frequently applied arbitration rules do not reach an explicit answer on the matter[3]. From one perspective, it could be sustained that the procedural principle that "no one can exempt itself from collaborating with courts for reaching the truth" [4] should apply to arbitration. From another, the jurisdiction of the arbitral tribunal is limited to the parties that consented to the arbitration agreement.

The purpose of this article is to assess whether an arbitrator can order third-parties to produce evidence, as well as how compelling its order would be. Hence, the interaction between arbitration and state courts in Brazil will be addressed initially, focusing on the development of arbitral letters (section 1). Then, we will analyze two different scenarios of the production of third-party documents (section 2).

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1. The interaction between arbitration and state courts under Brazilian Law

It is well-known that an arbitral tribunal lacks *imperium*. As a result, although the arbitrators have jurisdiction[5], "it is sometimes necessary to apply to the courts to seek enforcement of an arbitral tribunal's order"[6].

In this sense, Brazilian Arbitration Act establishes five groups of situations in which arbitration might interact with state courts: if (i) the arbitration agreement is 'pathologic' (article 7); (ii) there are difficulties in the formation of the arbitral tribunal (article 13, para. 2); (iii) a party has an urgent request before the commencement of the arbitration (article 22-A); (iv) the arbitral tribunal demands the cooperation of a state court to take certain measures (article 22-C); and if (v) a party seeks the annulment of an award (article 33).

The main provision for the purpose of this article is article 22-C, included in the Brazilian Arbitration Act in 2015. This rule allows arbitrators to issue an "arbitral letter" (*carta arbitral*), requesting the collaboration of a state court to enforce its decision. The arbitrator seeking collaboration prepares and issues the arbitral letter, which shall comply with the formal requirements set forth by the Brazilian Code of Civil Procedure. However, the interested party is the one responsible for submitting the arbitral letter to the state court.[8]

Article 22-C frequently applies if the arbitral tribunal orders interim measures, such as preventive seizure (*cautelar de arresto*)[9] or a credit reservation in insolvency proceedings[10]. As it follows the same pattern of the cooperation between different state courts[11], the national court whose cooperation is required shall not assess if the decision is (or not) correct[12].

However, according to the Superior Court of Justice, state courts shall not "mechanically" enforce the arbitral letter, since they have a "small margin of interpretation to enforce the decision legally issued by arbitral tribunals"[13]. Brazilian case law considers that national courts might assess the validity of arbitral letters[14], denying its enforcement if, *e.g.*, there are reasonable suspicions that the decision is false[15].

Regarding the taking of evidence, if a witness does not provide for justifiable reasons to refuse to participate in a hearing[16], the arbitrator might issue an arbitral letter to compel a witness to testify, as the Brazilian Arbitration Law expressly establishes[17]. In a similar way, the arbitral tribunal may request the collaboration of state courts to order the production of a document, as section 2 will address.

2. Third-party documents: how to reach them?

If a party requests the production of third-party documents – or the arbitral tribunal, on its own initiative, orders it –, the arbitral tribunal may send a correspondence to the third-party, requesting its collaboration to produce the evidence. What should the arbitral tribunal do if it the third-party refuses to produce the document, either expressly or by keeping itself silent?

The UNCITRAL Model Law establishes that "the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence [...]"[18]. In a similar sense, the Portuguese Arbitration Act provides that an arbitral tribunal may authorize a party to demand the production of evidence at a state court[19]. It is important to stress that Portuguese Act does not allow (i) the parties to demand directly to state courts[20]; and (ii) the arbitral tribunal to act *motu proprio*[21].

From the other side of the Atlantic, however, there is no express rule on this subject. Under Brazilian Law, there is no such a limitation to the powers of the arbitral tribunal, which can act *ex officio*. However, there are some cases in which the arbitral tribunal does nothing beyond a non-compelling request. Excluded the cases in which this could suffice[22], two scenarios might arise, depending on the effects produced by the arbitration agreement on the so-called "third-party": in the first, the document is in the possession of someone who is bound by the arbitration agreement (section 2.1.); in the second one, the holder of the document is not bound to it (section 2.2.).

2.1. First scenario: the arbitration agreement binds the so-called 'third-party'

A *third-party* can actually be *part* of the arbitration agreement. Although it may sound uncanny, this statement lies on the difference between "party" in procedural and substantive senses. The arbitration agreement, as a legal transaction (*negócio jurídico*), should also be interpreted according to the substantive law[23].

From a procedural perspective, a party is a subject who claims or against whom someone claims[24]. The definition of third-party comes by exclusion: third-parties are the ones who do not take part in the arbitral proceedings[25]. From a substantive perspective, a party is a sphere of interest (*centro de interesse*)[26]. Each sphere of interest encompasses people or entities that are bound to the arbitration agreement, due to their express or implied consent.

Thus, it is not unusual to have a person or entity that is a third-party from a procedural perspective and an effective party[27] from the substantive one. This person or entity was called as *tiers imparfait* by Alexis Mourre[28]. One of these situations would occur, for instance, if only a shareholder 'x' is litigating against the company: the shareholder 'y' is bound by the same arbitration agreement inserted into the company's bylaws, albeit its absence from the proceeding.

In this example, if the so-called third-party (the shareholder 'y') does not voluntarily produce the document requested by the arbitral tribunal, the Brazilian Arbitration Act allows it to issue an arbitral letter, according to article 23-C. Therefore, the state courts could enforce the order that the arbitrators issued applying *imperium*.

Finally, one could reflect on the effects of an arbitral letter issued by an arbitral tribunal outside Brazil's "national

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territory"[29]. Even though the Brazilian Arbitration Act is not explicit in this question, it would be necessary to request *exequatur* to the Superior Court of Justice[30], due to the functional approach with letters rogatory (*cartas rogatórias*).

The situation is much more intricated if the document holder is not bound by the arbitration agreement, as we will now address.

2.2. Second scenario: the 'third-party' actually is a third-party

The jurisdiction of an arbitrator is limited by the boundaries of the arbitration agreement[31]. Hence, if the person or entity that possesses the evidence is a third-party in both procedural and substantive senses, the arbitral tribunal is not allowed to compel it to produce the document, since it would not have jurisdiction over that third-party[32]. As Brazilian scholars recognize, the arbitral letter does not "formalize the jurisdiction that the arbitrator does not have"[33].

There would be two ways to coerce the third-party to produce the evidence before a state court: (i) an injunction prior to the commencement of the arbitration (*produção antecipada de prova*); (ii) an autonomous legal action (*ação autônoma de exibição de documento*).

The first solution is provided by article 381 of the Brazilian Code of Civil Procedure. If the claiming party knows before the commencement of the arbitration that a necessary document is in possession of a third-party, it can ask for an injunction before a state court, provided that (a) there is a risk of the production of evidence getting impossible; (b) the evidence could allow the parties to reach an agreement; or (c) the evidence could legitimate or avoid the filing of a legal action. This is a special procedure, in which the judge would decide if the evidence shall or not be produced. The respondent party is not allowed to file a statement of defense[34].

The second solution was developed by case law. The Superior Court of Justice allows the filing of an autonomous legal action if the claiming party has a substantive right to produce such evidence, either by contract or by law[35]. In this case, there is no need for complying with one of the requirements set forth by article 381 of the Brazilian Code of Civil Procedure, since the ground for producing the evidence is the substantive right itself.

For instance, 'A', who owns 100% of the shares of the company 'B', sells 10% of the shares to 'C'. After paying the price, C suspects that there is some non-compliance regarding tax liabilities. If the buyer C wants to receive the company records (and considering that the arbitration agreement inserted into the contract does not bind B), it might either (i) apply for an injunction against the company B if it does not know the actual liabilities are higher than the amount represented by A in the contract; or (ii) file an autonomous legal action against B, requesting the company to produce the evidence, since B has this duty, according to Brazilian Corporations Law[36].

Therefore, if the owner of the document is not bound by the arbitration agreement, the arbitrator cannot reach the evidence: the interested party would have to claim the production before state courts to compel the third-party to do it.

Closing remarks

The fact that someone is not a party of an arbitral proceeding does not prevent it from being ordered to produce evidence. The document production can exceed the four corners of the arbitral proceeding, provided that the arbitral tribunal remains within the boundaries of the arbitration agreement. Arbitrators can request the cooperation of state courts in order to produce evidence that is in possession of someone who, albeit not being part of the proceeding, is bound by the arbitration agreement.

This proposal is not an 'one-size-fits-all' solution. The arbitral tribunal should decide if it is *efficient* to request the cooperation of state courts, taking into consideration, *e.g.*, (i) the relevance of the evidence; (ii) the stage of the proceedings; and (iii) the possible impacts on the procedural timetable. It is uncontested that this solution can be *bureaucratic* in some cases, especially if it would be necessary to request *exequatur* to the Superior Court of Justice.

By its turn, if the holder of a document is not bound by the arbitration agreement, the arbitral tribunal may request the collaboration of the third-party, but cannot compel it to produce the evidence. In this case, the interested party can either ask for an injunction prior to the commencement of the arbitration or request the production of evidence in an autonomous legal action before Brazilian courts.

One should not forget that when the arbitrators are allowed to extract adverse inferences from a refusal for producing evidence, they might get to the same door as they would get if they followed the long and winding road of requesting a third-party to produce evidence.

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3 According to the Report on the reception of the IBA arbitration soft law products 2016, the IBA Rules on Taking of Evidence were referenced in only 11% of the arbitrations known to respondent in Brazil (p. 12-13).
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17 See Brazilian Arbitration Act, article 22, para. 2: "Art. 22. Poderá o árbitro ou o tribunal arbitral tomar o depoimento das partes, ouvir testemunhas e determinar a realização de perícias ou outras provas que julgar necessárias, mediante requerimento das partes ou de ofício. [...] § 2º Em caso de desatendimento, sem justa causa, da convocação para prestar depoimento pessoal, o árbitro ou o tribunal arbitral levará em consideração o comportamento da parte faltosa, ao proferir sua sentença; se a ausência for de testemunha, nas mesmas circunstâncias, poderá o árbitro ou o presidente do tribunal arbitral requerer à autoridade judiciária que conduza a testemunha renitente, comprovando a existência da convenção de arbitragem".
18 UNCITRAL Model Law, article 27.
19 Portuguese Arbitration Act, article 38: "Solicitação aos tribunais estaduais na obtenção de provas. 1 - Quando a prova a produzir dependa da vontade de uma das partes ou de terceiros e estes recusem a sua colaboração, uma parte, com a prévia autorização do tribunal arbitral, pode solicitar ao tribunal estadual competente que a prova seja produzida perante ele, sendo os seus resultados remetidos ao tribunal arbitral. 2 - O disposto no número anterior é aplicável às solicitações de produção de prova que sejam dirigidas a um tribunal estadual português, no âmbito de arbitragens localizadas no estrangeiro".
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Pinheiros river in Sao Paulo, Brazil, with modern buildings and their reflections in the water. | William Rodrigues Dos Santos

FINDING CONSENT IN CLASS ARBITRATION: A BRAZILIAN PERSPECTIVE

By Riccardo Giuliano Figueira Torre and Marcela Melichar Suassuna

I. Introduction: the search for consent in class arbitration.

1. Class arbitration represents an important tool for the collective protection of rights. Albeit having been successfully used in the United States for decades, there was a significant setback for the institute last year. Although there is no current specific legislation in Brazil providing for the use of class arbitration, recent class disputes have given rise to the discussion of its implementation in specific conflicts.

2. Yet, one of the main inquiries regarding class arbitration in Brazil resides in determining whether a specific consent of the parties is required for a class arbitration proceeding to be valid. In other words, what must be answered is: is there a specific consent threshold for class arbitration and is it any different from individual arbitrations?

3. This paper articles intends to (i) briefly address the use of arbitration in Brazil, comprehending its consolidation, expansion and innovation phases, aiming to provide a better context to the discussion; (ii) illustrate how consent is construed under Brazilian law – by analyzing explicit and implied/tacit expressions of consent; (iii) present a comparative view of class arbitration in the United States and how consent is expressed; (iv) demonstrate how class arbitration currently operates in Brazil and in which norms the institute is grounded; and (v) analyze the possible approaches of consent in Brazilian class arbitration in Brazil.

II. Arbitration in Brazil: consolidation, expansion and innovation.

4. The use of arbitration has increased exponentially over the past decades in Brazil. Currently, Brazil holds its position as one of the most relevant nations in the arbitration setting[1], as the number of domestic and international arbitration proceedings involving Brazilian parties, contracts, Brazil as the place of arbitration, among others, continue to escalate.

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5. Likewise, Brazilian state courts are usually committed to respect domestic and foreign arbitral tribunal's orders and awards, thus reinforcing the country's position as an arbitration-friendly jurisdiction.

6. However, arbitration in Brazil went through a rough path before it was fully accepted. Starting from the enactment of the Brazilian Arbitration Act (hereinafter "BAA") in 1996, followed by the declaration of its constitutionality by Brazil's Federal Supreme Court (hereinafter "STF", as its Brazilian acronym) in 2001 and, further, the ratification of the New York Convention in 2002, arbitration is now undoubtedly in an expansion and innovation phase in Brazil.

7. As a corollary of the development of arbitration in Brazil, the proceedings are largely used to enable the settlement of complex disputes in Brazil, such as construction and infrastructure, energy and corporate and capital markets conflicts.

8. More recently, Brazil has enacted new legislation aimed at consolidating the use of arbitration (including the participation of public entities) and other adequate dispute resolution mechanisms in Brazil, e.g. mediation and conciliation.

9. The Brazilian Code of Civil Procedure of 2015 (Law 13,105/2015) mandates, as a public policy, that the government shall attempt, whenever possible, to promote ADR to solve disputes. To that end, it embraces arbitration as an adequate dispute resolution method and establishes the use of mediation as a preliminary step for all court cases. Further, Law 13,129/2015, changed many provisions of the BAA and Law 13,140/2015 was enacted shortly after, which represents the Brazilian Mediation Act.

10. New and specific laws were also passed to amplify the use of arbitration in the infrastructure sector. Law 12,815/2013 provides the use of arbitration with the Brazilian public administration. Decree 10,025/2019 regulates arbitration with the public administration in ports, road, railway, waterway and air transportation sectors.

11.As part of this trend, the implementation and development of methods to expand access to arbitration in Brazil has the purpose of simplifying and de-bureaucratizing arbitration in order to allow its use by a larger number of people.

12. In this sense, recent disputes involving Brazilian publicly traded companies have led to the rethinking of important concepts with regard to arbitration in Brazil. One of these concepts is the possibility of implementing and developing the institute of *class arbitration* in Brazil, which is largely inspired in common law class actions and arbitrations.

13. However, a preliminary question arises: given that consent to arbitrate is crucial, how to find the necessary consent to arbitrate in class arbitration?

III. How is consent to arbitrate construed under Brazilian law.

14. Consent to arbitrate derives from an agreement made by the parties to submit their disputes to arbitration rather than to state courts. Consent commonly manifests itself through written agreements, such as arbitration clauses in a contract, *before* the conflict has emerged, or an arbitration agreement, prepared *after* a dispute has arisen.

15. As corollary of the principle of party autonomy, consent entails the expression of acceptance of the parties to waive their right to access state courts for the settlement of their disputes and, instead, opt to arbitrate. As a result, the absence of the parties' consent to arbitrate undermines the validity of the arbitration proceeding itself.

16. Under the BAA, an arbitration agreement must be made in writing to be considered valid, effective and binding among the parties, as follows:

"Article 4. An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration any disputes that might arise with respect to that contract.

Paragraph 1. An arbitration clause will be in writing, and it may be inserted into the contract itself or into a separate document to which it refers."

17. Thinking about consent is clearer when parties express their intention to arbitrate through a written arbitration clause or an arbitration agreement. Yet, practice has shown that a party's participation in an arbitration proceeding will not always be based on an *explicit* expression of consent.

18. In such cases, where there is no clear demonstration of a mutual agreement between the parties, *implied* consent plays an important role in allowing the parties to arbitrate their disputes without diminishing the importance to consent to arbitrate.

19. In order to find consent where there is no explicit demonstration, implied/tacit consent will frequently be based on equitable notions, such as good administration of justice, efficiency, and fairness[2], as well as the common intention of the parties and these parties' conduct and performance in the fulfilment of the obligations among each other.

20. This understanding has been recently embraced by the Brazilian Superior Court of Justice (hereinafter "STJ", as its Brazilian acronym). The court analyzed an improper use of corporate status case where a corporation that did not formally sign the arbitration agreement in detriment of other party was bound to the arbitration clause.

21. The STJ further concluded that the parties can resort to arbitration when there is sufficient proof of an implied (or tacit) consent, which considers the common intent of the parties to arbitrate:

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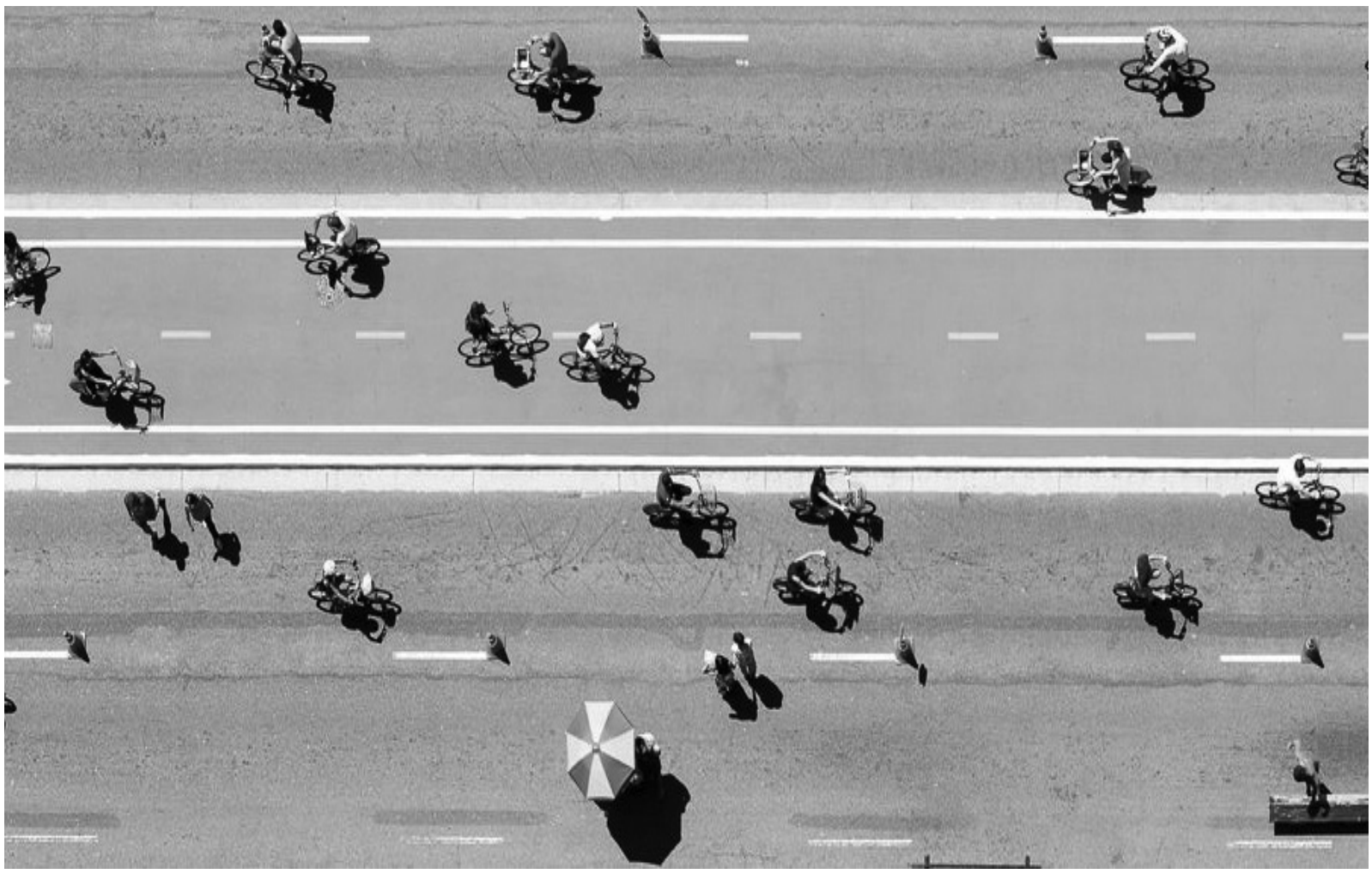

Aerial view of the Paulista Avenue bike lane on a Sunday in Sao Paulo, Brazil. | William Rodrigues Dos Santos

"The subtract of arbitration is party autonomy that, in a conscious and voluntary manner, renounce the state jurisdiction, electing a third party, an arbitrator, to solve eventual conflicts of interests arising out of a contractual relationship. This consent to arbitrate, that must be protected, can present itself not only in an express manner, but also tacitly, which allows, for this purpose, the demonstration, by diverse means, of the participation and adhesion of the parties to the arbitration proceedings, specifically the underlying contractual relationship."[3]

22. By recognizing that presumed, tacit or implied consent is possible under Brazilian law, Brazil's pro-arbitration policy becomes even clearer, which is of utmost importance when analyzing class arbitration under a Brazilian perspective.

23. However, because Brazil does not have any specific legal provisions on class arbitration or indicating how consent shall be construed in this type of proceeding, one must resort to the experience of other jurisdictions, such as the United States, where class arbitration has been an established practice for decades.

IV. A comparative law approach: Class arbitration in the United States.

24. Traditionally, class arbitration consists in a large-scale arbitration, comprehending multiple parties— either claimants or respondents—, which share rights and/or juridical remedies in common. These parties are usually represented by one or more representatives in the arbitration proceeding and this arbitration generally discusses the rights and interests of these persons, inserted in a collective group or *class*.

25. As a common law jurisdiction, the United States holds a few judicial precedents that have dealt with class arbitration and helped to tailor the institute throughout the years.

26. In *Green Tree v. Bazzle* (2003), the U.S. Supreme Court ruled that class arbitration is consistent with the Federal Arbitration Act (hereinafter "FAA") and that it is for the arbitrators to decide whether an arbitration clause enables class arbitration, thus embracing the competence-competence principle.

27. After the *Green Tree* ruling, two of the United States' main arbitration institutions created specific rules for class arbitration proceedings. In this sense, the American Arbitration Association — AAA enacted its 2003 Supplementary Rules for Class Arbitration[5] and JAMS (formerly Judicial Arbitration and Mediation Services, Inc.) created the regulation of its Class Action Procedures in 2009[6].

28. Both rules adopt the competence-competence principle when analyzing the authority to rule on class arbitration, pursuant to the *Green Tree* ruling, as follows:

"3. Construction of the Arbitration Clause, AAA: (…) the arbitrator shall determine (…) whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class".

"Rule 2. Construction of the Arbitration Clause, JAMS: (…) the Arbitrator (…) shall determine as a threshold matter whether the arbitration can proceed on behalf of or against a class".

29. However, although class arbitration is permitted in the United States, more recent decisions demanded the proof of consent for the arbitration to be valid, thereby representing another

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swing of the U.S. Supreme Court, which inhibits the expansion of the class action and class arbitration in the United States.

30. In *Stolt Nielsen* (2010),[7] the U.S. Supreme Court ruled that, because it could not detect an agreement or expression of consent between the parties, class arbitration could not be implied from the mere existence of an arbitration agreement which is silent on the possibility of parties to resort to class arbitration.

31. Further, in *AT&T v. Concepción* (2011)[8], the U.S. Supreme Court decided that a class action waiver in arbitration agreement is enforceable, notwithstanding state law to the contrary, which is preempted by the applicable federal law, the FAA, which allows such waiver.

32. In *Oxford v. Sutter* (2013),[9] the U.S. Supreme Court unanimously ruled that courts have no power of judicial review under the FAA to review the merits of an arbitral decision that permits or denies class action arbitration. Yet, *Oxford*'s *dicta* suggested that the U.S. Supreme Court might in the future broaden a court's authority to determine the validity of arbitration agreements that contain class action waivers.

33. In *American Express v. Italian Colors* (2013)[10] the U.S. Supreme Court embraced the primacy of the intent of the parties as expressed in the arbitration agreement, and concluded that the FAA does not allow courts to invalidate a contractual waiver of class arbitration on the grounds that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

34. Specifically in relation to consent in class arbitration, the U.S. Supreme Court ruled last year, in *Lamps Plus v. Varela* (2019),[11] that arbitration is a matter of *consent*, which is why consent cannot be inferred from an agreement that is ambiguous or silent on the possibility of class arbitration.

35. However, the most worrying excerpt of such ruling is the understanding that class arbitration would be inconsistent with the FAA, thus weakening the institute and disregarding the possibility of presumed consent and consent by conduct, both widely accepted after the ruling in the *Dow Chemical* arbitration.[12]

36. This novel approach seems to embrace some previous notions of arbitration that had been subject to some level of flexibility in U.S. case law. For instance, the U.S. Supreme Court ruled that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," which then embraced the need for an explicit expression of consent.[13]

37. In fact, the FAA apparently demands a more explicit proof of consent, through consent in writing, when it sets forth the need for *"an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"*.[14]

38. This new shift in the U.S. Supreme Court position towards consent in class arbitration disregards common arbitration standards such as the possibility of proving consent by conduct and the existence of implied/tacit consent, which is widely accepted in Brazil, as previously stated.

39. Despite our concern regarding the U.S. case law's latest understanding related to consent in class arbitration, the approach given to class arbitration in Brazil so far has not echoed the limitations imposed by *Green Tree*.

V. Class arbitration in Brazil: a plentiful field for implementation and development.

40. Brazil does not have any specific legislation, regulation or domestic arbitral institution's rules with respect to class arbitration and its procedure. However, our understanding is that there are no obstacles in the Brazilian current legal scenario that could impede the use of class arbitration.

41. Class arbitration would be equivalent, to some extent, to the Brazilian institute of "ação civil pública", similar to civil class actions, which is a proceeding involving numerous parties that bear common rights or share a similar legal standing.

42. These "ações civis públicas" and other related proceedings are widely used in Brazil for the protection of consumers (Law 9,008/95), employees (Consolidation of Labor Laws, Decree Law No. 5452) and even minority shareholders in disputes related to damages caused to these shareholders in the capital market (Law 7,913/89).

43. In this sense, transporting the "ação civil pública" in these cases to an arbitration setting is tenable, as the arbitrability of disputes in all abovementioned fields are accepted in Brazil.

44. With regard to labor and consumer disputes, although there is no possibility of mandatory arbitration for these types of controversies —unlike in the United States, for example —, arbitration is allowed in certain circumstances.

45. For labor disputes, arbitration must be provided only in individual labor agreements, as long as: (i) the proceeding is initiated by the employee; or; (ii) the employee explicitly agrees to arbitration, as per the BAA; and (iii) the employee's wage must be at least two times the maximum amount established for Social Security.

46. With respect to consumer law in Brazil, mandatory consumer arbitration is prohibited under the Brazilian Consumer Code (Law 9,008/95), but arbitration is valid if a dispute arises and the consumer agrees to arbitrate.

47. On the other hand, disputes involving company's shareholders have fewer limitations, as opposed to labor and consumer litigation and arbitration.

48. In corporate and capital markets, with the enactment of Law 9,307/96 and, more specifically with the

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inclusion of the 3rd paragraph in its Section 109, resource to arbitration became expressly allowed in publicly traded companies' articles of incorporation to solve conflicts between the company and its shareholders and/or between controlling and minority shareholders.

49. In any case, the arbitrability of these corporate disputes is not limited to publicly traded companies or to the stakeholders expressly mentioned in Section 109 of Law 9,307/96.

50. Arbitration is also an adequate means for the settlement of disputes in other types of corporations and involving other stakeholders in the corporate and capital market sectors. That falls within the broad scope of Section 1 of the BAA, which provides that "[t]hose who are capable of entering into contracts may make use of arbitration to resolve conflicts regarding freely transferable property rights".

51. Therefore, controversies among shareholders, controlling and controlled companies, administrators and the company itself can be settled through arbitration if there is a provision in the company's articles of incorporation, shareholders' agreements or any existing applicable instrument.

52. It is safe to assume that Brazil provides a plentiful field for the implementation and development of class arbitration, especially in corporate and capital markets disputes, as well as labor and consumer controversies, although the two latter can entail a few public policy restrictions, such as in relation to the proof to consent.

53. By accepting this premise, the path to find consent to arbitrate disputes through class arbitration becomes clearer, which is why there are already a few class arbitration cases in Brazil in spite of the lack of specific legal provisions.

VI. Finding consent in class arbitration: approaches to prove consent.

54. Given that Brazil is an arbitration-friendly jurisdiction, it tends to adopt the *favor arbitrandum* principle to interpret ambiguous arbitration agreements. In addition, explicit consent is not the only means for a party to be able to resort to arbitration; implied consent and consent by conduct are expressly admitted in Brazilian case law.

55. Moreover, one must bear in mind that the BAA encompasses a large scope in terms of the arbitrability of disputes, allowing arbitration over conflicts regarding all freely transferable property rights.

56. It becomes clear that there are proper grounds to enable class arbitration even when there is no explicit expression of its use in arbitration agreements or other applicable instruments.

57. In our opinion, class arbitration must be interpreted as a mere *type* of arbitration procedure. Consequently, an explicit provision allowing class arbitration is not needed, as a broad arbitration agreement that comprises all disputes and controversies among the parties is sufficient proof of the parties' consent to arbitration, regardless of whether individual or class.

58. Allowing class arbitration in this scenario also benefits all stakeholders involved in the arbitration. For companies, it represents a more cost-effective approach, as they will save time and money instead of having multiple individual arbitrations; for individuals, it broadens their access to arbitration; and for arbitration itself, it avoids the risk of conflicting decisions in similar cases from different arbitral tribunals.

59. Consent to class arbitration can be detected, therefore, either (i) through an explicit agreement; (ii) by performance or conduct of the parties, which shall be verified in a case-by-case analysis, and (iii) through implied, tacit or presumed consent.

60. The latter can be inferred from the BAA's own broad wording as regards the arbitrability of disputes, but also in arbitration clauses that reflect the standard models used by most Brazilian arbitration institutions and in a company's bylaws or articles of incorporation, when providing a large scope of disputes to be submitted to arbitration.

V.I.1. Broad provisions in standard arbitration clauses.

61. Many Brazilian arbitration centers — which usually provide standard arbitration clauses to be incorporated in arbitration agreements — give a very broad wording with respect to the types of disputes to be submitted to arbitration, generally referring to 'all disputes arising out of a contract' or 'all disputes existing among the parties'. There are many examples in this regard:

Standard CAM-CCBC Arbitration Clause: "Any dispute arising out of the present contract, including its interpretation or performance, shall be finally settled by arbitration, administered by the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM/CCBC"), under its Rules and the Arbitral Tribunal shall consist of [one(1)/three(3)] arbitrators appointed in accordance with the said Rules".

Standard ICC Arbitration Clause: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules".

62. In addition, the Novo Mercado Listing Regulation, which governs the activities of the B3 – Bolsa, Brasil e Balcão, as the entity that manages the stock market in Brazil, also provides for arbitration in broader terms — which is crucial when analyzing consent —than the ones provided for in Law 9,307/96:

Article 39. *"The bylaws must include an arbitration clause stating that the company, its shareholders and executive officers, as*

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well as the members of its fiscal council and their alternates, if any, undertake to seek arbitration by the Market Arbitration Chamber and to abide by its rules in order to resolve any disputes that may arise relating to their status as issuer, shareholders, management and fiscal council members, especially in light of the provisions of Law 6.385/76, Law 6.404/76, the company's bylaws, the rules issued by the National Monetary Council (CMN), the Central Bank of Brazil (BCB) and CVM, as well as other rules applicable to the securities market in general, the rules herein, other rules and regulations established by B3, and the Novo Mercado participation agreement."

63. Likewise, a similar wording is provided in the Standard CAM Arbitration Clause, applicable to all companies enrolled in the Novo Mercado, which demands the use of arbitration in "all and every dispute or controversy that could arise" from the company, shareholders, administrators and members of the board of directors.

64. Given that it is our opinion that class arbitration must be interpreted as a form or type of arbitration proceeding, whenever arbitration clauses and agreements mention that "all disputes" must be subject to arbitration, the consent to resort to class arbitration is therefore *implied*.

65. Because of the broad wording of such arbitration clauses, a trend towards the expansion of the use of class arbitration in Brazil can be observed, which is corroborated by the fact that there are already ongoing class arbitration proceedings in Brazil in spite of the lack of specific legal provisions.

VI.2. Ongoing class arbitrations in Brazil.

66. There are currently two main class arbitration cases in Brazil: the class arbitration filed by minority shareholders against Petrobras, the Brazilian state-owned oil company, and the class arbitration also filed by minority shareholders against Vale, the Brazilian state-owned mining company. Both cases are administered by the Market Arbitration Chamber (hereinafter "CAM', as its Brazilian acronym).

67. In the Petrobras class arbitration, an association representing several minority shareholders is suing the company. The associations claims the shareholders are entitled to damages arising out of misinformation carried out by Petrobras related to the corruption scandals in the context of the Car Wash Operation. Petrobras was already facing other individual and multiparty arbitrations when the class arbitration commenced.

68. In the Vale class arbitration, an association representing minority shareholders that sued Vale initiated the proceedings seeking compensation for losses and damages caused by the "Brumadinho" dam collapse in the state of Minas Gerais, Brazil, and for the misinformation related to the company's safety protocols.

69. In these cases, there were objections to the arbitrability of the disputes, including the question whether class arbitration was viable, since there is no explicit permission for class arbitration in the BAA.

70. However, both statutory arbitration clauses inserted in Petrobras' and Vale's bylaws provide a broad scope for the use of arbitration, as follows:

Article 58, Petrobras' bylaws. *"Disputes or controversies involving the Company, its shareholders, managers and members of the Audit Council must be resolved through arbitration, according to the rules of the Market Arbitration Chamber, in order to apply the provisions contained in Law 6,404 of 1976, these Bylaws, and the rules issued by the National Monetary Council, Central Bank of Brazil and Brazilian Securities and Exchange Commission, as well as all other rules applicable to the operation of the capital markets in general, in addition to those contained in the contracts Petrobras may enter into with a stock exchange or over-the-counter market entity registered with the Brazilian Securities and Exchange Commission, to adopt corporate governance standards established by these entities and respective rules on differentiated corporate governance practices, if applicable".*

Article 50, Vale's bylaws. *"The company, its shareholders, administrators and members of the Fiscal Council and of the Committees undertake to resolve by arbitration before the Market Arbitration Chamber (Câmara de Arbitragem do Mercado), under its regulations, any and all disputes or controversies that may arise between or among them, related to or resulting from their condition as issuer, shareholders, administrators and members of the Fiscal Council, in particular, arising from the application, validity, effectiveness, interpretation, breach and its effects of the provisions of Law No. 6,385/76, Law No. 6,404/76, these By-Laws and the rules issued by the National Monetary Council, the Central Bank of Brazil and the CVM, as well as other rules applicable to the operation of capital markets in general, in addition to those in the Novo Mercado Listing Rules, other regulations of B3 and Participation Agreement Rules of the Novo Mercado".*

71. Even though there is no express authorization for class arbitration, such statutory clauses do not prohibit it, and both Petrobras and Vale agreed to a broad definition of disputes to be submitted (e.g. "all disputes"), which entails the consent to submit all controversies and disputes to arbitration — including through class arbitration, as it is simply one category of arbitration.

72. This seems to be the position adopted in the Petrobras class arbitration, in which the Federal Government claimed the non-arbitrability of the dispute and inefficiency of the statutory arbitration clause. The arbitrability of the dispute was accepted by the arbitral tribunal due to the express provision in the company's bylaws to solve all disputes involving the company, its shareholders, administrators and advisors through arbitration.[15]

73.However, the subject is still disputed among scholars and courts, as there is a contrary ruling held by the STJ in this regard.[16] A definitive resolution to this matter is yet to be decided.

VII. Conclusion: class arbitration as an adequate means to settle disputes in Brazil.

74. Class arbitration represents a more adequate, cost-effective and specialized procedure in dealing with complex

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claims involving numerous parties, which is specifically beneficial in labor, consumer, corporate and capital market claims.

75. Requiring specific consent to allow for class arbitration in these areas shall not be used as a scapegoat so that arbitration deviates from its true purpose, that is, to be accessed by a larger number of persons, thus, de-bureaucratizing the legal institute. That is why *presumed consent* in these cases is a tenable approach to prove that consent has been given in the first place.

76. In fact, current trade usages and commercial relations demand new interpretations in order to settle disputes more efficiently, which includes the use of arbitration in its collective setting, as a means to promote the collective protection of rights.

77. In any case, although there are sufficient legal grounds to sustain consent to class arbitration in Brazil, some measures may give more certainty with respect to the adequacy of class arbitration. Some of these measures include: (i) expressly providing for class arbitration in the arbitration agreements; (ii) writing broad arbitration clauses and agreements with respect to the arbitrability of disputes; and (iii) the enactment of specific rules in Brazilian arbitration institutions providing for class arbitration, to which a party will adhere when opting for the set of rules of such institution — using the AAA and JAMS specific rules as an example.

78. Nevertheless, we believe class arbitration may develop under Brazilian law as it is, as it does not conflict with any issues related to the proof of consent to arbitrate. Therefore, it can be concluded that class arbitration has a proper space to be largely implemented and developed in Brazil, which is why we are optimistic with the further developments in the ongoing class arbitration cases in Brazil — which we expect to have an important impact in consolidating the institute in Brazil.

Riccardo Giuliano Figueira Torre
and Marcela Melichar Suassuna

1 According to the ICC Dispute Resolution 2019 Statistics, Brazil is the most represented nationality among parties from Latin America and the Caribbean and maintains third place in the worldwide nationality ranking with 133 parties, following the USA (196 parties) and India (147 parties). Brazil also hold the sixth position in terms of nationalities of arbitrators acting in ICC Arbitrations, as well as it ranked sixth overall and remained the preferred seat within Latin America and the Caribbean with 24 cases.
2 Bernard Hanotiau. Consent to Arbitration: Do We Share a Common Vision. In: Arbitration International, Vol. 27, No. 4 (LCIA, 2011). pp. 541, 543 and 545.
3 STJ, Recurso Especial No. 1.698.730-SP, 3rd Panel, Justice Marco Aurélio Bellizze, published on May 21, 2019.
4 Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003).
5 Supplementary Rules for Class Arbitrations, available at <https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf>
6 JAMS Class Action Procedures, available at <https://www.jamsadr.com/rules-class-action-procedures/>
7 Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010).
8 AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).
9 Oxford Health Plans v. Sutter, 133 S. Ct. 2064, 2066 (2013).
10 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).
11 Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).
12 ICC Case No. 4131, Y.C.A. Vol. IX (1984), 131.
13 Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).
14 9 U.S. Code § 2. Validity, irrevocability, and enforcement of agreements to arbitrate.
15 Information available in Ementário da B3: <http://www.b3.com.br/pt_br/b3/qualificacao-e-governanca/camara-de-arbitragem-do-mercado-cam/ementario/>
16 STJ, Conflito de Competência No. 151.130/SP, 2nd Section of Justices, Justice Nancy Andrighi, decided on November 27, 2019.

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Panoramic view of Lima main square and cathedral church. | Aliaksei Skreidzeleu

DISPUTE BOARD AND APPLICATION OF THE EMERGENCY ARBITRATOR PROVISIONS UNDER THE ICC RULES

By Alvaro Cuba Horna[1]

I. INTRODUCTION

Are the Emergency Arbitrator ("EA") provisions and the Dispute Board ("DB") provisions of ICC rules, as pre-arbitral procedures, incompatible? Should the DB's power to grant precautionary measures, under the ICC DB rules, prevent a party from requesting these measures to the EA?

Some scholars, including the own Secretariat of the ICC, state that the sole power of the DB to grant precautionary measures is enough not to apply the EA's provisions. As I will explain, for not applying the EA's provisions of the ICC rules, it is essential to prove the existence of a pre-arbitral procedure empowered to grant precautionary measures, of the same enforceability effects to those granted by an EA. This is not complied by the powers of the DB under the ICC DB rules.

The Article proceeds as follows. In section II, I will explain the prerequisites for applying the EA's provisions of the ICC rules and, specifically, the prerequisites related to the existence of a pre-arbitral procedure agreed. Then, I will conclude why the DB, as a pre-arbitral procedure agreed, is not an implied opt-out of the EA's provisions, under the ICC rules.

II. PREREQUISITES TO APPLY THE EA'S PROVISIONS UNDER THE ICC RULES

According to article 29.6 of the ICC rules, among others, the EA's provisions shall not apply if *"the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures"*.

As Christopher Boog indicates, the purpose of this provision is:

"29. Article 29(6)(c) of the ICC Rules derives from concerns raised by representatives of users of the FIDIC contract forms – which contain an ICC arbitration clause – that the emergency arbitrator could potentially undermine the powers vested particularly in dispute boards under FIDIC standard contracts to grant interim and conservatory measures in certain cases."[2]

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In addition, Nathalia Voser says that this provision was included "*to assuage the concerns of the construction industry and users of the FIDIC contracts which provide for other forms of pre-arbitral procedures for emergency relief*"[3].

Under the ICC rules, it is considered that if the parties agree on a DB as a pre-arbitral procedure, empowered to grant precautionary measures, the parties cannot request a precautionary measure to an EA.

The DB procedure in construction contracts is recognized, for example, in clause 20.4 of the 1999 FIDIC Red Book.[4] Once the DB issues its decision, the interested party may review its decision in the arbitration proceeding, as established in clause 20.6 of the FIDIC Red Book of 1999:

"The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and also any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute."[5]

Various arbitration rules recognize the power of the DB to grant precautionary measures. In the specific case, article 15.1 of the ICC DB rules establishes that the DB shall have the power to "*[d]ecide upon any provisional relief such as interim or conservatory measures*".

Consequently, if the arbitration clause or the DB rules agreed by the parties grant the DB a similar power, according to a textual interpretation of article 29.6 of the ICC rules, the EA's provisions shall not apply. The ICC Secretariat's Guide to Arbitration recognized this criterion:

"3-1102. Implied opt-out. Agreeing to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures amounts to an implied opt-out and therefore also excludes the application of the Emergency Arbitrator Provisions (Article 29(6), subparagraph (c)). For example, this will occur where the parties have agreed to the ICC pre-arbitral referee procedure or to use a dispute board that may issue interim measures."[6]

The ICC case law ratifies this criterion. In one case decided under the ICC rules, one party challenged the jurisdiction of the EA on the grounds that the parties had agreed to the DB as a pre-arbitral procedure, which had the power to grant precautionary measures. The EA decided that it lacked jurisdiction and concluded as follows:

"*The EA concluded that it lacked jurisdiction on the basis of Article 29(6)(c), and accepted that the parties effectively had agreed to "another pre-arbitral procedure", which is empowered to provide for "the granting of conservatory, interim or similar measures". The EA supported the decision by referring to the Secretariat's Guide to ICC Arbitration which mentions the "use of a dispute board that may issue interim measures" as one of the examples of an "implied opt-out". The EA carefully set out, however, that it is not the simple fact that the contract provided for a DAB procedure, but that this particular DAB was i) already in place when the EA Application was sought, and ii) that it was empowered to grant similar provisional interim relief. It duly noted that parties to FIDIC agreements are free to amend the clauses and opt out of the DAB or to exclude its power to order interim relief."*[7]

Subject to certain conditions, the EA declined his jurisdiction. Consequently, under the ICC rules, if the parties agree the DB as a pre-arbitral procedure, empowered to grant precautionary measures, the EA has not the authority to grant precautionary measures.

In the next section, I will analyze if these textual interpretation of the article 29.6 of the ICC rules is legally reasonable or not, under the practice of international arbitration.

III. IS DB AN IMPLIED OPT-OUT OF THE EA'S PROVISIONS?

A. *Compatibility of DB and EA's provisions*

In any of the types of DB, the DB decision has not legal effects, but rather contractual effects between the parties, according to the ICC DB rules.[8] According to article 1.2 of the ICC DB rules:

"Dispute Boards are not arbitral tribunals and their Conclusions are not enforceable like arbitral awards. Rather, the Parties contractually agree to be bound by the Conclusions under certain specific conditions set forth herein."

In addition, Petkute-Guriene states that:

"DBs are entirely contractual in nature and although their characteristics provide somewhat of a mixture between expert-determination and arbitration, 'Dispute Boards are not arbitral tribunals, and their Conclusions are not enforceable like arbitral awards"[9]

In other words, unless otherwise agreed, the precautionary measure of the DB is not enforceable, as an arbitral award is.[10] Instead, the legal effects and enforceability of the precautionary measure granted by an EA cannot be stopped by one of the parties, unless the arbitral tribunal decides to modify or annul the precautionary measure[11] or the compliance of the elements described in article 6.6 of Appendix V of the ICC Rules.[12] Article 29.2 of the ICC rules recognizes that the parties "*undertake to comply with any order made by the emergency arbitrator*".

In that sense, if a party decides to breach the precautionary measure ordered by an EA, there are various legal sanctions to discourage such breach and to enforce the decision of the EA.

First, according to the ICC Commission Report on EA Proceedings, the interested party can seek support from local courts to enforce the EA's decision.[13] Second, according to article 29.4 of the ICC Rules, the interested party can seek support from the arbitral tribunal to sanction the breach of the counterparty.[14]

But what are the consequences of the lack of enforceability of the precautionary measure granted by the DB? A serious

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danger to the parties or to the effectiveness of the award, which are the objectives of protection of the precautionary measure. If a party breaches a DB decision, the interested party cannot enforce immediately the DB decision.

Although it is possible to request a court or an arbitral tribunal to qualify as enforceable the DB decision, until its occurs[15], the DB decision cannot enforce the parties to not execute acts which could cause serious risk the *status quo* of the parties, the assets of the parties or, in general, the arbitration proceeding.

The limitation of article 29.6 of the ICC rules leads to this scenario. Excluding the EA's provisions, and granting the DB the exclusively power to grant precautionary measures (in addition to national courts), greatly does not protect the *status quo* of the parties during the arbitration proceeding. In fact, it places the parties and the effectiveness of the final award at serious risk.

Regardless of the fact that parties still have the chance to request a precautionary measure to the national courts, whose decisions are enforceable, there is no reasonable argument to restrict the application of the EA's provisions in this context. To exclude the EA's provisions represents a breach of the preferences of the parties to resolve their disputes in arbitration.

Consequently, in my view, it is not correct to restrict the application of the ICC EA's provisions in those cases in which the DB procedure was agreed has the power to grant precautionary measures. To be clear, the DB is not a suitable substitute of the EA to grant precautionary measures, since its decisions are not enforceable. This restriction could cause serious damages to those parties that require urgent measures to preserve their status quo or any other measure.

As Petkute-Guriene says:

"In the author's view, the exclusion in Article 29(6)(c) of the ICC Arbitration Rules obviously assumed that the other pre-arbitral procedures agreed between the parties offer the effective 'granting of conservatory or interim measures'. If that condition is not met, there is no reason to deny access to an emergency arbitrator. It is to be remembered that the prevailing purpose of emergency arbitration is 'urgency' of the requested measure which has to be demonstrated by the applicant and that the emergency arbitrator's decision is limited in time as it can be amended by the regular Arbitral Tribunal, once constituted. Thus, the 'effectiveness' test could arguably be one of the solutions to deal with the interaction of the emergency arbitration and DBs that do have powers to order interim measures."[16]

Also, Nathalie Voser states that:

"Also, it is open whether Article 29(6)(c) applies when the measures ordered, which are based on the other agreed pre-arbitral procedure are of contractual nature and thus cannot be recognized and enforced as a judicial decision rendered by an arbitral tribunal."[17]

Notwithstanding the above, other factors prove that the DB is not a suitable substitute of the EA to grant precautionary measures:

• First, engineers usually compose the DB. If a party requires an urgent precautionary measure, but which requires a legal analysis, the engineers have not the legal expertise to analyze such a measure. These criteria has been recognized in the ICC Commission Report on EA Proceedings:

"For example, the EA could still conclude that […] when it is disputed whether a DB was constituted or where the DB consists of engineers but the emergency measure is of a legal nature, then the parties' adoption of the DB procedure is not a choice providing for an effective granting of conservatory or interim measures."[18]

• Second, the time limit for the DB to issue its decision is generally longer (approximately three months[18]), compared to the time limit of the EA (less than one month). There may even exist problems during the constitution of the DB. According to an ICC case, an EA declined her jurisdiction, but subject its decision to the fact that the DB was already in place when the EA application was sought:

"The EA carefully set out, however, that it is not the simple fact that the contract provided for a DAB procedure, but that this particular DAB was i) already in place when the EA Application was sought, and ii) that it was empowered to grant similar provisional interim relief. It duly noted that parties to FIDIC agreements are free to amend the clauses and opt out of the DAB or to exclude its power to order interim relief."[20]

For all of the above, it is valid for an EA to confirm its jurisdiction over an application, even when the parties have agreed to a DB as a pre-arbitral procedure, empowered to order a precautionary measure, but which is not enforceable and does not have the similar effectiveness as a precautionary measure ordered by an EA.

B. *Commencement of the arbitration without the exhaustion of the DB pre-arbitral procedure agreed*

It has been widely discussed the consequences of the commencement of the arbitration, without the exhaustion of the pre-arbitral procedures agreed in the arbitration clause.

The rule is to review the text of the arbitration clause and confirm the common intention of the parties to first, exhaust the pre-arbitral procedures, and then initiate the arbitration proceeding. If the agreement demonstrates its binding nature, it would be reasonable for the arbitral tribunal to reject the claims and declare the termination of the arbitration, since the dispute was not previously submitted to the DB.[21]

This criterion is recognized, for example, in ICC case No. 6535. In the absence of submission of the dispute before an engineer (previous step to the DB), the tribunal stated that "*… disputes which have arisen, in accordance with the first sentence of article 67, should have been submitted for decision to the Engineer as a precondition to any arbitration*."[22] Consequently, the tribunal concluded that "*no 'dispute' had previously been submitted to the engineer (the predecessor of the DB) and, consequently, the tribunal had no jurisdiction and dismissed the case*"[23]. In the ICC case No. 16262, other arbitrators issued a similar decision.[24]

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Palpa Lines and Geoglyphs, Peru | Konstantin Kalishko

However, another trend of international arbitrators is that failure's exhaustion of the pre-arbitral procedures agreed does not lead to the rejection of the claims, but there is discretion to suspend the arbitration proceeding, until the exhaustion of the pre-arbitral procedure. As Born and Scekic state, *"…even where a contractual provision is interpreted as a mandatory condition precedent, it should be capable of being satisfied even after an arbitration is commenced…."*[25]

Also, Kaufman-Kohler and Rigozzi take the view that:

"…the solution best reconciling the non-binding character of mediation or conciliation with the principle of party autonomy consists in staying the arbitration and fixing a time limit for the parties to attempt to resolve the dispute by way of the agreed pre-arbitral method."[26]

Applying to the context of the DB, in ICC case No. 14431, an arbitral tribunal decided as follows: "*stays proceedings and sets Claimant a deadline to formally refer the* dispute […] *for an Adjudication Procedure to the Engineer referred to in para. 10 hereinabove acting as DAB* […] *this Interim Award shall indicate that in the event Claimant fails to comply with this deadline, the Arbitral Tribunal will dismiss Claimant's claims as inadmissible*"[27].

In case No. 4A-628/2015, a party triggered an annulment proceeding to challenge the decision on the jurisdiction of the arbitral tribunal, who confirmed its jurisdiction despite the fact that the parties had not complied with the conciliation pre-arbitral procedure agreed. The interested party decided to challenge the jurisdiction decision. The Swiss Federal Supreme Court decided to annul the award and, instead of restart the arbitration, decided to suspend "*the arbitral procedure for a limited period of time, so that the conciliation procedure could take place*"[28].

Consequently, the tendency seems to be (i) to reject the claims or (ii) to declare the suspension of the arbitration proceeding, until the pre-arbitral procedure is fulfilled.

If a party starts an arbitration procedure to prevent the termination of the EA proceedings, considering the short time limit established in ICC rules, even though the DB procedure is still ongoing to decide the dispute, there is a serious risk that an arbitral tribunal decides that it lacks jurisdiction.

According to the article 1.6 of the Appendix V of ICC rules:

"The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary."

In my view, there are two possibilities to prevent this risk:

• Firstly, request the EA for an extension of the time limit to initiate the arbitration, which is a possibility recognized in article 1.6 of Appendix V of ICC rules[29], until the DB issues its decision.[30]

• Secondly, only if the EA rejects the extension of the time limit, the interested party must initiate the arbitration within the time limit established on the ICC rules, but immediately request the Secretariat the suspension of the arbitration until the DB issues its decision. The ICC Commission Report on EA Proceedings recognize this option:

"Commentators have noted that the requirement that the Request for Arbitration be filed within 10 days of the Application could conflict with the parties' obligations under a multi-tiered dispute resolution clause. This issue can be addressed by the parties in a number of ways, for example by filing a Request for Arbitration and then seeking a stay pending compliance with the escalation clause, or by obtaining an extension of the filing requirement from the EA."[31]

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Any of the previous options, in my view, will prevent the interested party from an eventual termination of the emergency arbitration by the President of the ICC Court.

IV. CONCLUSIONS

Considering all the above, I understand that the EA's provisions under the ICC rules and the DB, as agreed pre-arbitral procedures, are indeed compatible. Regardless of the fact that the DB is empowered to grant precautionary measures, I consider that any party has the legal right to obtain a precautionary measure from an EA.

The lack of enforceability and effectiveness of the DB decisions, in addition to factors related to expertise and the delay of the proceeding, confirm the necessity of the application of the EA's provisions under the ICC rules to protect the *status quo* of the parties.

Moreover, if a party requests a precautionary measure to an EA, in order to prevent the termination of the emergency arbitration by the President of the ICC Court for not initiating the arbitration procedure within the time limit agreed, there are two options: (i) request the EA to order an extension of the time limit, until the finish of the DB procedure; or (ii) initiate the arbitration, but immediately request the Secretariat the suspension of the arbitration proceedings to allow the conclusion of the DB procedure.

Alvaro Cuba Horna

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7 See ICC, Commission Report on Emergency Arbitrator Proceedings [2019] 87, 14.
8 See ICC DB rules, art. 1.2 ("Dispute Boards are not arbitral tribunals and their Conclusions are not enforceable like arbitral awards.").
9 Jurgita Petkute-Guriene, 'Chapter 1: Access to Arbitral Justice in Construction Disputes (Dispute Board-Related Issues, Time Bar and Emergency Arbitration)', in Crina Baltag and Cosmin Vasile (eds), Construction Arbitration in Central and Eastern Europe: Contemporary Issues, (Kluwer Law International 2019) 2-3.
10 See ICC DB rules, art. 1.2.
11 See ICC rules, art. 29.4 ("The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.").
12 Appendix V of ICC Rules, article 6.6. ("The Order shall cease to be binding on the parties upon: a) the President's termination of the emergency arbitrator proceedings pursuant to Article 1(6) of this Appendix; b) the acceptance by the Court of a challenge against the emergency arbitrator pursuant to Article 3 of this Appendix; c) the arbitral tribunal's final award, unless the arbitral tribunal expressly decides otherwise; or d) the withdrawal of all claims or the termination of the arbitration before the rendering of a final award.").
13 Id at 33 ("204. In the event of non-compliance, the successful applicant can attempt to seek support from local courts either in an enforcement action, particularly in UNCITRAL Model Law inspired countries, or in a breach of contract claim.").
14 See ICC rules, art. 29.4. Id at 33 ("4) The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.").
15 Id. at 5.
16 Jurgita Petkute-Guriene, 'Chapter 1: Access to Arbitral Justice in Construction Disputes (Dispute Board-Related Issues, Time Bar and Emergency Arbitration)', in Crina Baltag and Cosmin Vasile (eds), Construction Arbitration in Central and Eastern Europe: Contemporary Issues. Id.
17 Nathalie Voser, 'Overview of the Most Important Changes in the Revised ICC Arbitration Rules' (29 ASA Bull. 783, 817, 2011). Id. at 815.
18 Id. at 12.
19 See ICC DB rules, art. 22.1 ("1. The DB shall issue its Conclusion promptly and, in any event, within 90 days of the Date of Commencement as defined in Article 19(2). However, the DB may extend the time limit with the agreement of the Parties. In the absence of such agreement, the DB may, after consulting the Parties, extend the time limit by the shortest time it considers necessary, provided, however, that the total duration of any such extensions shall not exceed 20 days. In deciding whether to extend the time limit, the DB and the Parties shall take into account the nature and complexity of the Dispute and other relevant circumstances.").
20 Id. at 14.
21 See case DFT 4A_46/2011 [2011] SFT, ¶¶3.4, 3.5, 4.
22 ICC Case No. 6535, Award [1992]. Jean-Jacques Arnaldez, Yves Derains and Dominique Hascher. 'Collection of ICC Arbitral Awards. 1991-1995', (Kluwer Law International, 1997), 496.
23 Christopher R. Seppälä. 'Chapter 12: Recent Case Law on Dispute Boards', in Filip J.M. De Ly and Paul-A. Gélinas (eds). Dispute Prevention and Settlement through Expert Determination and Dispute Boards. (Kluwer Law International, International Chamber of Commerce, 2017), 116.
24 Christopher R. Seppälä. 'Chapter 12: Recent Case Law on Dispute Boards', in Filip J.M. De Ly and Paul-A. Gélinas (eds). Dispute Prevention and Settlement through Expert Determination and Dispute Boards. Id.
25 Born and Scekic. 'Pre-Arbitration Procedural Requirements', in David Caron et al. (eds.). A Dismal Swamp in Practicing Virtue: Inside International Arbitration, (Oxford, 2015) 227.
26 Gabrielle kaufman-Kohler and Antonio Rigozzi. 'International Arbitrations: Law and Practice in Switzerland' (Oxford, 2015) 5.23.
27 ICC Case No. 14431, Award [2008], ICC Dispute Resolution Bulletin, 2015.
28 Christopher R. Seppälä. 'Chapter 12: Recent Case Law on Dispute Boards', in Filip J.M. De Ly and Paul-A. Gélinas (eds). Dispute Prevention and Settlement through Expert Determination and Dispute Boards. Id at 116.
29 See Appendix V of ICC Rules, art. 1.6 ("The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.").
30 Jurgita Petkute-Guriene, 'Chapter 1: Access to Arbitral Justice in Construction Disputes (Dispute Board-Related Issues, Time Bar and Emergency Arbitration)', in Crina Baltag and Cosmin Vasile (eds), Construction Arbitration in Central and Eastern Europe: Contemporary Issues. Id. at 2.
31 Id. at 40.

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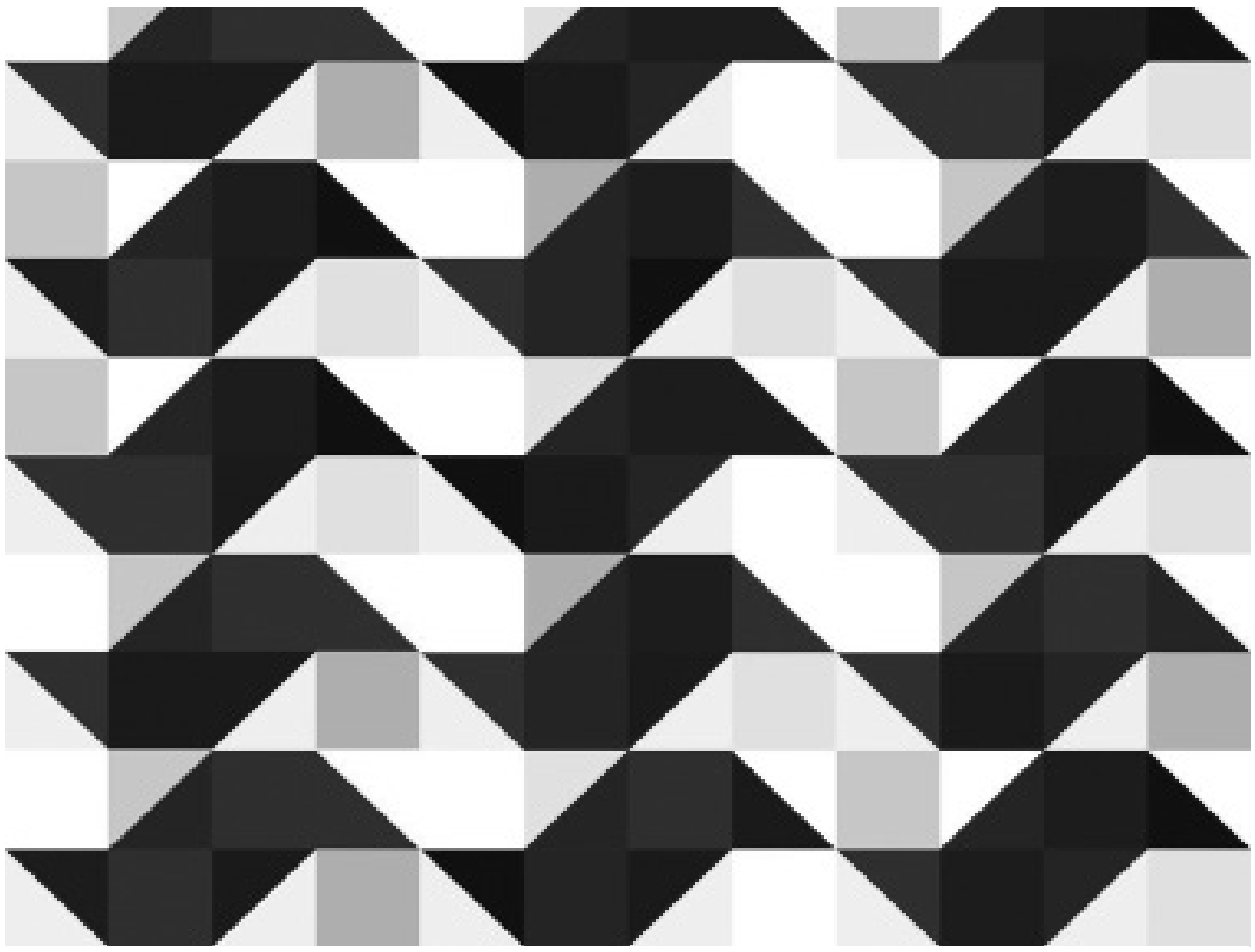
III.

LET´S TALK ABOUT BIAS



Sao Paulo seamless pattern | Carlanichiata

COMMENTS ON THE ROLE OF COGNITIVE BIAS IN ARBITRATION

By Isabela Albini Maté and Vitoria Suman Campos

1. Introduction

There is a joke that says that every answer to a legal question is "it depends". As law is not usually black or white, you may find several scholars who defend a specific view on a certain matter and a whole other group who defends just the opposite. When it comes to the decision-making process, an important invisible element could possibly play a role when deciding for this or that position: cognitive bias.

This article aims to study the process of decision-making and an attorney-point-of-view on the topic: what may attorneys do to prevent their arbitrators' cognitive bias?

Many studies are dedicated to the decision-making process and the influence of cognitive bias upon it. From the psychological point of view, the best-seller 'Thinking Fast and Slow', by Daniel Kahneman[1], examines two different thought systems and their implication on decision making. According to Kahneman, there are two systems according to which our brain works: System 1 (the fast, automatic and cognitive system) and System 2 (the slow, effortful and conscious system). Cognitive bias falls under System 1 and influences one's behavior and decision-making.

In the 1950's, Prof. Soia Mentschikoff and Prof. Ernest A. Haggard studied the factors that may affect the decision-making in arbitration[2]. The findings of such study are very illustrative of the issue we intend to develop in this article.

The experiment was conducted at the American Arbitration Association ("AAA") in New York with 180 arbitrators selected from four different groups – lawyers, brokers, manufacturers, and bankers. The arbitrators were given a hypothetical case regarding contract interpretation and waiver of performance, in which claimant, the buyer, claimed that both parties waived certain contractual obligations, while respondent, a broker, alleged that the parties did not waive any obligations and the claimant breached the contract[3].

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Each group of arbitrators was chosen considering their knowledge of the specificities of the case, and each group was expected to be inclined to a certain position because of their own professional experience, which was later confirmed. For instance, panels consisting purely of brokers decided 100% pro-respondent; panels consisting purely of lawyers, manufacturers or bankers were usually pro-claimant (on a 60% - 40% ratio); and different results were showed on panels consisting of different groups of arbitrators, showing that one group may influence on the decision of the other. It is also worth mentioning that panels consisting of manufacturers and brokers were half the time pro-claimant and half the time pro-respondent[4].

Another study by Guthrie, Wistrich and Rachlinski gave the judges a hypothetical case in which certain information was inadmissible as evidence. Only half of the judges were given access to the document, which would ruin claimant's case. In the group that did not see the document, 55% ruled in favor of the claimant, while in the group of judges who saw the document only 29% found in favor of the claimant – even though they ruled that the document was inadmissible as evidence[5].

These are a few empirical examples that show how non-rational factors affect the decision-making process. As this article is not a psychological study but rather an introduction to the topic of decision-making in arbitration, we will (i) present some of the most common biases and (ii) give some practical suggestions of what to do to prevent cognitive bias improperly affecting arbitral decision making.

2. The different types of cognitive bias

This topic will analyze a little deeper the cognitive biases that play the most relevant roles in decision-making when it comes to dispute resolution situations. From the moment the responsible legal team formulates the claims to present to the arbitral tribunal, to the moment this said arbitral tribunal examines such requests and the proofs produced during the arbitral procedure, the cognitive biases are there and can be decisive for the final result of the legal discussion.

2.1. Coherence and possible misleading conclusions

The human brain's natural tendency to seek coherence in its decisions[6] creates a series of cognitive biases used as interpretative tools to ensure that the first impression we had of, the first opinion we ever formed about, and the first information we received on any subject or situation is the correct one[7]. Therefore, it is essential that the following common cognitive biases be considered when presenting statements for judgment of any claim, to paint a truthful and positive first impression about the facts and the rights to be evaluated.

2.1.1. The confirmation bias, the halo effect and the framing effect.

The confirmation bias is the major condition the human brain has of interpreting any new fact to fit with its previous opinion about the situation in hand. It is psychologically proven that individuals interpret new evidence to confirm their existing beliefs[8]. The decision-making process often begins with so-called "intuition", guided by the first impression about the subject, and then moves on to search the proof that supports such intuition.

Such process is affect by the expectation the decision-maker has on him/herself. It is expected from us to maintain a certain amount of "loyalty" to our previous experiences and consistency with our previous opinions. Such expectation falls especially upon the most experienced professionals, who are expected to use their years of learning and development to reach the best decision possible[9].

A particular form of the intuition conditioned by the existing impressions in one's mind is the halo effect. The halo effect confirms the power of the first impression, and its ability to influence all further impressions of the subject matter. Human beings, when evaluating a proposition or situation, tend to like or dislike a subject if it is presented by someone they already like or dislike,[10] or if it is associated with an idea or scenario that they already like or dislike. A person who, or situation which, already gives rise to positive or negative emotions for the individual therefore influences the decision-maker's perception of the point being made. This mechanism is used by the intuitive decision-making system to match our impressions and create a whole and cohesive overall picture, based on the natural chemical activity of the human brain when triggered by certain events, images, or persons.[11]

Finally, the framing effect is the influence that the disposition of information has on its process and judgment. It is responsible for the difference of emotions that a certain situation provokes if presented different ways – for instance, saying that someone has 90% chance of winning a case sounds more positive than saying that there is a 10% chance of losing it, although it is exactly the same information.

Thus, in order to evoke the right emotions in the decision-maker responsible for the dispute, the attorney must understand the facts of his/her case deeply, acknowledging its strengths and weaknesses to better present its claims, pulling the right trigger, creating the right first impression and activating a more favorable confirmation bias.

2.1.2. Attitudinal bias

Another cognitive bias is one that leads individuals to approach, surround themselves and agree with others they perceive as like-minded. The attitudinal bias, which can be seen in the brokers experiment presented in the introduction, is responsible for the weight one's background and previous experiences have in the decision-making process[12].

Such relevance of these aspects arises from the fact that the cultural background, the life experiences, and the influences one carries are constitutional factors of one's way of interpretation of certain situations[13]. Therefore, we tend to approach those individuals who will most probably adopt the

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same way of seeing things because his/her point of view was molded in the same shapes as ours.

This unconscious bias is not, by itself, harmful for the arbitral procedure. Indeed, lawyers tend to nominate arbitrators who have written in favor of a certain position, or who have a similar experience as the party. It does not guarantee a certain decision, but it helps – as the arbitrator may already be inclined to see the case in a specific way. There is no ethical impediment nor is unacceptable for a party to choose an arbitrator based on criteria such as a cultural background in common with the party. However, it can be prejudicial to the final award if the arbitrators are not aware of the role their cognitive bias can play when analyzing the case.

2.2. The use and interpretation of data

The following cognitive bias are more related to the way the decision-maker deals with the data available to form his/her opinion. They deal with more concrete aspects of the evaluation of the dispute, such as quantum of damages and weighting of value of the claims presented to the arbitral tribunal.

2.2.1 The anchoring effect

The most discussed cognitive bias in international arbitration is the anchoring effect. Used just as much in procedures prior to the institution of an arbitral procedure, such as negotiation and mediation, the anchoring method consists in the consideration of a given value to measure an unknown quantity before estimating that quantity[14]. When a figure for such unknown quantity is initially set, subsequent estimates tend to reach a value close to the one initially provided (irrespective of how accurate that initial figure might have been), creating a limit to the increase or decrease of that evaluation from the "anchor" figure.

The anchoring effect is observed in a series of behavior studies. As noted by Lucy Reed in her lecture "Arbitral Decision-Making: Art, Science or Sport?"[15], a study conducted by Professor Chris Guthrie, Professor Jeffery Rachlinski and US Federal Magistrate Andrew Wistrich demonstrated the anchoring effect in judges' interpretations and decisions. The study consisted in presenting for a group of judges a fact pattern about a personal injury claim. The plaintiff in said hypothetical case did not request any specific amount of damages. One group of the judges in the study, however, was informed that the defendant's motion to dismiss was grounded on the fact that the damages requested by the plaintiff would fall below the USD 75,000 minimum to access US Federal court jurisdiction. The sole mention of the value USD 75,000, even though it has no relation with the actual damages suffered by the plaintiff or with the actual claim, made those judges to whom such information was disclosed reduce the award to nearly one-third less than the awards made by the judges who did not have access to such information.

The anchoring effect can function as a tool for adjustment of a hunch – a conscious and deliberate activity – and as a mechanism to achieve coherence triggered by suggestion[16]. The second function is the one connected to the intuitive decision-making system. For such system, even the most random numbers, that rationally have nothing to do with the dispute in hand, when presented can serve as an anchor that influences determination of a final value[17]. The way one handles the hypothetical value informed to adjust and settle a final evaluation is key for avoiding such misleading cognitive bias.

2.2.2. The extremeness aversion and 'fixed pie' bias

If we consider the arbitral procedure as a dynamic formed by the parties, on one side of the table, and the arbitrators, on the other, two different types of cognitive biases can be observed, in accordance with the part each of the subjects is playing in the scenario of a dispute resolution.

When it comes to the parties and its claims, the fixed-pie bias performs an important role in the conduct of discussions. The fixed-pie bias is the assumption that the totality of the counterparty interests are absolutely opposed to my own, in a way that, if there is a window for the counterparty to win in any level, it means that I will, necessarily, lose. Such assumption prevents parties reaching creative and balanced solutions that could translate in the best scenario possible for all the subjects involved. By being affected by 'fixed pie' bias effects, lawyers engaged in negotiation frequently diminish the value of a business topic if such topic is conceded by the other party in the negotiation – it is assumed that, if it was conceded, it was not important or valuable[18].

Such tendency to polarize interests in commercial disputes may lead professionals to presenting inflexible and extreme claims. And that is the exact opposite of what arbitrators are comfortable dealing with. The reason for such discomfort is yet another cognitive bias, this one present in the decision-making process of arbitrator: the extremeness aversion.

The extremeness aversion is the tendency to avoid extreme results when facing a decision[19]. Therefore, when presented with three or more choices, the human brain tends to choose the one in the middle. Presenting multiple options can therefore be of extreme importance in the decision-making process[20]. When it comes to the exercise of jurisdiction by arbitrator, such aversion often results in a behavior known as the "split-the-baby behavior", whereby decision-makers, rather than choosing between two extremes presented by the parties, decide instead upon a middle-ground solution that was not the preferred outcome of either party.

There is a clear clash between the two unconscious patterns of behavior of the arbitral tribunal and the parties: while the latter wish to make their requests extreme and absolute to achieve victory in the dispute and so obtain a positive arbitral award, the former is looking for a more balanced, concessive decision in the middle-ground of those extreme claims. Thus, it is in the lawyer's interests to formulate a reasonable claim that opens room to a more creative solution to the case in hand.

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Buildings on the Paulista Avenue seen from inside the Ibirapuera Park. Sao Paulo city, Brazil. | Cifotart

3. **A few ideas for improvement**

The problems indicated as cognitive bias will not be fully neutralized as they are part of human nature and the way we process information. Nevertheless, law professionals, used to dealing with the proper use of language and with strategic sets of arguments, can and should reflect upon addressing and possibly using unconscious biases in their favor. The interdisciplinary studies of psychology and law can provide a set of tools for the lawyers better present their cases and achieve the best results possible.

The biases connected to the need of coherence specified above – the confirmation bias and the attitudinal bias– highlight ways to influence the perception of information. In order to paint the most favorable picture possible of their case, a party may include in its speech information that is not related directly to the case in hand, but which could influence the arbitral tribunal and start a train of thought tending to one conclusion. It is essential to ask to oneself, when drafting a case, why one specific piece of information is being shared, how specifically this shared information contributes to the resolution of the dispute and whether this information persuades or only misleads the arbitral tribunal from the main discussion. When it comes to the framing effect and the halo effect in the mind of the arbitral tribunals, it is in the abilities of the lawyer to display the right and necessary information in its most convincing form.

A tool lawyers can use to try to avoid conditioned thinking is to have a colleague to question every point made in the construction of the legal strategy. By forcing him or herself to consider the key focus of the argument at every moment of the legal discussion, a lawyer can avoid engaging in arguments and ideas motivated only by loyalty to past opinions, and will be encouraged to develop a more creative and innovative course of action, addressing the true core of the claims.

As for the biases related to the interpretation of data, such as the anchoring effect and the extremeness aversion, it is common to see claims and counterclaims in arbitrations even when one of the parties does not have any real claims. It is an attempt to have arbitral tribunals "split the baby", and have both claims influence the decision. Lawyers can however avoid extremeness in the claims and give the arbitrators a reasonable choice, overcoming the extremeness aversion.

Prof. Lucy Reed also proposes two general practices for counsel to avoid arbitrators' reliance on intuition and heuristics: the "Reed Retreat" and the "Strategic Path ".

According to Prof. Reed, when more time is invested in preparation and deliberation, cognitive biases in decision-making are better avoided. She suggests scheduling in the procedural timetable some time for the tribunal to meet in person and study the case when the arbitrators could concentrate on the case and brainstorm. The arbitrators then have the opportunity to test their intuition on the facts, witnesses and law.[21]

With respect to the "Strategic Path", Prof. Reed suggests that counsel should avoid presenting too much material to the tribunal, when possible. Giving a mountain of arguments and documents to the tribunal may not make the case clearer –

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instead, the arbitrators may rely on heuristics and short cuts. Prof. Reed recommends that counsel always present a clear roadmap emphasizing the important pieces of information, even for a large case record. Demonstrative exhibits that make the case more visual are also welcome: timelines, dramatis personae, flow charts. Making it easy for the tribunal to identify the relevant issues will help prevent it from taking shortcuts – at the expense of a proper decision – or from taking significant additional time to analyze all of the record – at the parties' expense[22].

As seen above, studies on cognitive bias show that unconscious factors in the process of decision-making are more than natural to the human being and affect even the most experienced professionals. Knowledge of such biases is the first step to make the process the most conscious possible.

Isabela Albini Maté
and Vitoria Suman Campos

1 KAHNEMAN, Daniel – Thinking Fast and Slow, Farrar Straus and Giroux, First Edition, 2011.
2 Part of the findings was published in 1977 by Prof. Mentschikoff and Prof. Haggard (*Responsible Decision Making in Dispute Settlement*, in Law, Justice and the Individual in Society, ed. J.L. Tapp, F.J. Levine; Holt, Rinehart & Winston, 1977; and *Decision Making and Decision Consensus in Commercial Arbitration*, in Law, Justice and the Individual in Society, ed. J.L. Tapp, F.J. Levine; Holt, Rinehart & Winston, 1977). In 2014, Kristina Klykova published some of the until then unpublished results and findings of such experiment (*Bias in Arbitral Decision-Making: Rescuing the Mentschikoff Archives from a Half Century of Oblivion*, in Young Scholar in International Arbitration, University of Miami School of Law, 2014, pp. 7-35).
3 KLYKOVA, Kristina. *Bias in Arbitral Decision-Making: Rescuing the Mentschikoff Archives from a Half Century of Oblivion*, in Young Scholar in International Arbitration, University of Miami School of Law, 2014, p. 10.
4 Ibid, p. 18.
5 SUSSMAN, Edna. *Arbitrator Decision-Making: Unconscious Psychological Influences and What you can do About Them*, in The American Review of International Arbitration, vol. 24, n. 3, 2013, p. 492.
6 As explained by William W. Park, "Once the state of coherence is reached, certainty, a state the mind strives for, takes hold. Jurists have long commented on the human inclination to reach a state of certainty which leads to conviction as to the accuracy of conclusions reached." (PARK, William W. - *Chapter 1: Rules and Reliability: How Arbitrators Decide*, in The Roles of Psychology in International Arbitration, Kluwer Law International, COLE, Tony, 2017. p. 58).
7 As explained by Daniel Kahneman: "Contrary to the rules of philosophers of science, who advise testing hypotheses by trying to refute them, people (and scientists, quite often) seek data that are likely to be compatible with the beliefs they currently hold."(KAHNEMAN, Daniel – Think Fast and Slow, Farrar Straus and Giroux, First Edition, 2011, p. 89)
8 As stated by Bruno Guandalini: "Psychology confirms that people normally interpret evidence to confirm their initial beliefs. As the hypothesis Informed, individuals will seek information and overestimate the relevance of information that suggests their initial beliefs were correct." (GUANDALINI, Bruno - *Economic Analysis of the Arbitrator's Function*, Kluwer Law International, 2020, p. 337)
9 "Professionals are not immune from this tendency. Indeed, the expectations that arise from their experience are part of their expertise. Nonetheless, expectations can also distort what the professional sees, introducing a confirmatory bias." (DIAMOND, Sharei Seidman - *Psychological aspects of dispute resolution: issues for international arbitration*, in International commercial arbitration: important contemporary questions, Albert Jan Van Den Berg with International Bureau of the Permanente Court of Arbitration The Hague, 2003, p. 357)
10 In this regard, Eleonora Coelho states that: "O ser humano possui uma tendência a gostar (ou a desgostar) de tudo relacionado a certa pessoa que ele goste (ou desgoste), ainda que diga respeito a algum aspecto absolutamente desconhecido." (COELHO, Eleonora. *A tomada de decisão dos árbitros: a ignorada e relevante influência dos vieses inconscientes*, in Estudos de Direito: Uma Homenagem ao Prof. José Carlos de Magalhães, Org. BAPTISTA, Luiz Olavo; VISCONTE, Debora; ALVES, Mariana Cattel Gomes, Ed. Atelier Jurídico, 2018. p. 806.
11 "[…] even though emotions flourish inside one's mind, body, and soul, they are triggered by an external source. Emotions are actually unleashed after a mental evaluation process; actors have external signs or perceptions (i.e., images or sounds) that trigger and activate emotions from memory." (GUANDALINI, Bruno - *Economic Analysis of the Arbitrator's Function*, Kluwer Law International, 2020, p. 356).
12 COELHO, Eleonora. *A tomada de decisão dos árbitros: a ignorada e relevante influência dos vieses inconscientes*, in Estudos de Direito: Uma Homenagem ao Prof. José Carlos de Magalhães, Org. BAPTISTA, Luiz Olavo; VISCONTE, Debora; ALVES, Mariana Cattel Gomes, Ed. Atelier Jurídico, 2018. p. 807.
13 According to William Park, "Arbitrators are people and like all people have their own frames of reference, experiences and societal inputs that guide their thinking and their decision-making processes. Each arbitrator is uniquely influenced by his or her lifetime experiences and cultural influences and like a judge is influenced by that background. The legal culture in which an arbitrator is schooled and practices can have a significant impact not only on the procedures the arbitrator adopts to conduct the arbitration but perhaps even more significantly, on how he or she interprets the legal principles applicable regardless of the party's choice of law." (*Chapter 1: Rules and Reliability: How Arbitrators Decide*, in COLE, Tony. The Roles of Psychology in International Arbitration, Kluwer Law International, 2017. p. 64).
14 "[…] it is an anchoring effect. It occurs when people consider a particular value for an unknown quantity before estimating that quantity. What happens is one of the most reliable and robust results of experimental psychology: the estimates stay close to the number that people considered—hence the image of an anchor" (KAHNEMAN, Daniel – *Thinking Fast and Slow*, Farrar Straus and Giroux, First Edition, 2011, p. 118)
15 REED, Lucy Ferguson - *Chapter 6: Arbitral Decision-Making: Art, Science or Sport? (Sixth Kaplan Lecture, December 3, 2012)*, in Hong Kong International Arbitration Issue, Perspectives and Practice: Liber Amicorum Neil Kaplan, Kluwer Law International, 2018. p. 165.
16 KAHNEMAN, Daniel – Thinking Fast and Slow, Farrar Straus and Giroux, First Edition, 2011, p. 119 to 122.
17 "Numbers, including completely irrelevant numbers, or numbers which cannot be rationally justified, unconsciously move the decision maker's thinking in the direction of that number" (*Chapter 1: Rules and Reliability: How Arbitrators Decide*, in The Roles of Psychology in International Arbitration, Kluwer Law International, COLE, Tony, 2017. p. 55).
18 "[..] when the other party concedes on an issue, a negotiator may devalue the issue's worth: "If she's willing to make that concession, this issue must not be important." Or, when the other party seems happy, a negotiator may assume he got a bad deal: "If she is happy, we must have lost." These tendencies are all rooted in the fixed-pie bias, which mistakenly leads us to believe that "whatever is good for them is bad for us." (BAZERMAN, Max; MALHOTRA, Deepak – *Negotiation Genius, hot to overcome obstacles and achieve brilliant results at the bargaining table and beyond*, Bantam, 2008, p. 103)
19 "When making a decision, we tend to avoid extreme results. Studies show how adding a third option to a list of two makes the central one more desirable than it was before, even when the third option is clearly absurd and ineligible."(FIGAREDO, Jose Maria - *Cognitive Biases: What Are They, Do They Affect Arbitrators, And if So, Can That Influence Be Avoided?*, in GONZÁLEZ-BUENO, Carlos - 40 under 40 International Arbitration, Carlos González-Bueno Catalán de Ocón; Dykinson, S.L., 2018, p. 82).
20 GUANDALINI, Bruno - *Economic Analysis of the Arbitrator's Function,* Kluwer Law International, 2020. p. 343.
21 REED, Lucy Ferguson - *Chapter 6: Arbitral Decision-Making: Art, Science or Sport? (Sixth Kaplan Lecture, December 3, 2012)*, in Hong Kong International Arbitration Issue, Perspectives and Practice: Liber Amicorum Neil Kaplan, Kluwer Law International, 2018. p. 170.
22 Ibid, pp. 171-174.

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Top view of Juquehy Beach, Sao Paulo, Brazil | Gustavo Frazao

INDEPENDENCE AND IMPARTIALITY OF EXPERTS AND THE ROLE OF ARBITRAL INSTITUTIONS: A BRAZILIAN AND AN INTERNATIONAL VIEW

By Cristina M. Wagner Mastrobuono

1. Introduction[1]

The taking of evidence in arbitration has been the subject of discussion in the most varied forums across the global arbitration community. This is a process of high importance in the course of arbitration proceedings both national and international, especially in complex cases which require analysis and expertise that often times go beyond the technical domain of arbitrators.

In these cases, the participation of a technical professional acting as an expert in the collection and processing of information to support decision making by the arbitral tribunal acquires fundamental importance.

Logic dictates that the more a case relies on production of evidence, the more responsibility and power to impact decision making befalls the experts involved, and there is a greater incentive – in the behavioral economics sense - for the arbitrators to rely on the conclusions presented in the technical reports, ensuring a better outcome of the dispute.

This same logic does not apply to the parties to an arbitration proceeding, which have an incentive for using a taking of evidence model that is under their control, enabling them to expose and prove their case. In this aspect of the arbitration process parties' and arbitrators' interests are not always aligned.

Independence and impartiality of the arbitrators are fundamental requirements to the arbitral process, "*which is an adjudicatory procedure requiring a neutral and objective tribunal*"[2]. In order to assure that requirements are met, arbitral institutions invariably regulate the applicable standards for neutrality and objectivity and the challenge possibilities involving this matter. However, despite the potential power of experts in decisively influencing the final outcome of arbitral disputes, institutional rules do not give the same attention to the duty of technical professionals acting as experts.

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This is a complex and controversial issue, influenced by various aspects, such as the legal regime (common law or civil law), cultural background of the parties, and the procedural legislation applicable to the dispute.

However, despite all the differences that may impact arbitration proceedings, it seems to us that ethical standards and the principles of impartiality and independence are relatively univocal in the international legal community. There may be differences in opinion as to the optimal criteria of independence that should be adopted, but there are certain conducts and professional and personal relationships between technical professionals and parties to the dispute that certainly fall within the universal common sense and should be avoided to rule out any inquiries about the ethical standards involved in the case.

The subject is also of interest in Brazil, thus motivating an investigation on the existing rules and practices established by arbitral tribunals in the country. We conducted an in-depth analysis based on a survey carried out among professionals of the Brazilian arbitral community regarding existing rules and practices on impartiality and independence for experts. The main purpose of our study was to gather information about the practice of producing evidence in arbitral proceedings, and to collect participants' insights about the independence and impartiality standards expected - or which should be expected - from technical professionals acting as experts[3].

In this article we focus on one of the questions of the survey, mainly that of the role held by arbitral institutions in regulating impartiality and independence criteria for experts in arbitral proceedings.

In order to provide information in the international level and allow a global view of the theme we extended our research to the most prestigious arbitral institutions around the world.

In section 2 we explore the data obtained through the survey conducted in Brazil. In section 3, we summarize the results of the research on existing rules of the most reputable international arbitral institutions, and how the matter is regulated. The trends in the matter are offered in section 4 and our conclusions follow in section 5.

Before analyzing the data collected, we want to point out a lack of uniformity in the English language terminology used by the various arbitral institutions on the topic, often leading to confusion. For instance, some institutions use the terms *party-appointed expert* and *expert witness* interchangeably, and do not differentiate between them[4]. This lack of rigor in terminology may indicate deficient comprehension about the particular roles of the various professionals involved in the taking of evidence.

Due to the importance of the role of experts, it is recommended to standardize terminology in order to avoid any doubts about the role and ethical parameters expected from these professionals.

IBA Rules on the Taking of Evidence[5] defines "*Party-Appointed Expert*" as *"an expert witness presented by a Party"*. It does not define "Expert" or "Tribunal-Appointed Expert", but while defining "*Expert Report*" is suggests the acknowledgement of these terms: "[expert report] *means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert submitted pursuant to the IBA Rules of Evidence*".

In this article, we consider the *expert*, both tribunal or party-appointed, as being the professional responsible for elaborating a report considering the issues raised by the parties and the tribunal. The expert performs an active role in the analysis, research and studies that are necessary to elaborate this report. When appointed by a party, he or she may assume the role of a party-appointed expert and may be subject to independence and impartiality rules. The *expert witness*, on the other hand, is considered in the present article as the professional appointed by the parties to analyze the statement elaborated by the experts. He or she is not subject to the same independence and impartiality rules as the experts, and thus may have a professional relation with the appointing party.

There is still insufficient clarity about the matter as we found through our research and in the analysis of the arbitral institutions' regulations, notwithstanding the importance, for the arbitrators, of being able to rely on evidence conducted under parameters of strict independence and impartiality.

Finally, it is important to notice that a formal requirement of independence and impartiality of experts is not the only solution to avoid bias in the taking of evidence, nor is it fail-proof. According to Prof. Doug Jones AO[6], "*Despite the amendments and reforms in the institutional rules, it is unclear whether the regulation of evidence procedure itself, through codes of conduct and protocols actually reduces partiality and bias of many party-appointed experts*." However, it is our view that the existence of clear rules of ethics, and the requirement of a formal commitment by the experts to acting unbiased and disclosing conflicts of interest, may be an important step in addressing the issue.

2. Overview of the Rules of Brazilian arbitral institutions

Our survey conducted amongst the Brazilian arbitral community in February/2020 was divided into two parts: the first one (Part A) consisted of sending a questionnaire (via "Google Forms") to arbitrators, professionals acting as experts, and lawyers in arbitral proceedings[7]. We developed 18 questions on the most used practices in the taking of evidence, focusing on how experts are appointed (whether by the arbitral tribunal or parties), or whether the evidence was produced by expert witnesses[8] only – and the (explicit) use of independence and impartiality rules. We also asked for participants' opinions about the role of arbitral tribunals and institutions in establishing standards for independence and impartiality of experts. A total of 116 subjects participated in the survey, which may be considered a representative sample of the targeted community.

The second part of the research (Part B) was directed to arbitral institutions, and consisted in a questionnaire to

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collect quantitative data about (i) how the expert evidence was adduced – with the participation of tribunal appointed expert, by party-appointed expert or by expert witnesses -, and (ii) the existence of expert independence and impartiality rules.

In this article we focus on the topic of question 17 of the survey (Part A), and the question 4 submitted to the arbitral institutions (Part B):

> Part A – arbitrators, experts and lawyers:
> 17. In your opinion, should the arbitral institutions address in their regulation rules about independence and impartiality of experts – tribunal and party-appointed?

The majority of opinion expressed in Part A was positive. For 80% of the participants, the arbitral institutions should have rules about independence and impartiality of the experts. Another 10.3% of respondents have doubts about it, and only 9.7% are against it. It is possible to conclude, therefore, that in Brazil the arbitral community has a positive view about an active role of arbitral institutions in being more straightforward on the topic.

It is worth to point out that the Federal Arbitration Act in Brazil (Lei n. 9.307/1996) has no provision about the matter, and the model adopted in the Procedural Civil Code does not apply to arbitration. Hence, there is no legislation about it in the country, which heightens the importance of rules issues by arbitral institutions.

> Part B – arbitral institutions:
> 4. Does this arbitral institution have rules about the expected independence and impartiality of the professionals that act as tribunal appointed experts? And for the party-appointed experts?

Concerning Part B of the research, it is important to explain first that the regulations of the main Brazilian arbitral institutions do not address the procedure to select or appoint expert(s), whether he/she must be a party-appointed one, or a professional chosen by the arbitral tribunal. Flexibility, therefore, is the rule, in accordance to one of the most valued principles of arbitration.

The vast majority of the institutions do not address rules about the expected independence and impartiality of the experts, whether they are appointed by the tribunal or by the parties. Out of 8 researched institutions, only one has an explicit rule about the necessary independence and impartiality of tribunal appointed experts[9]. However, 4 of the institutions explained that tribunal appointed experts are always required to sign a declaration of independence and impartiality when are appointed. The same is not requested from party-appointed experts.

According to our survey, the majority of the adduced expert evidence in Brazil involves a tribunal appointed expert (90% of the proceedings). From these, 44% counted with the participation of parties' expert-witnesses, not subject to independence, although impartiality is desired.

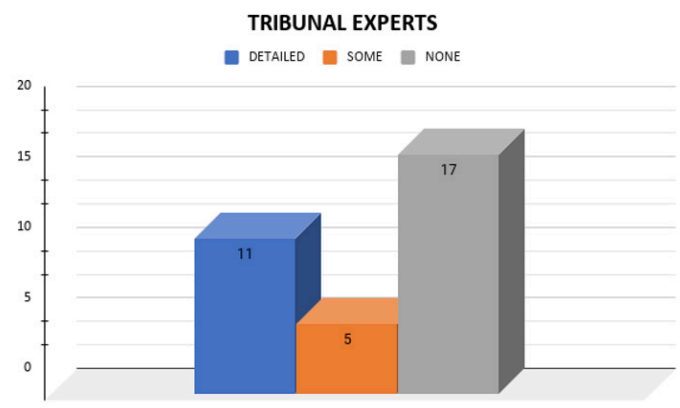
The lack of express rules, however, does not imply in an authorization for the experts to act in a biased or partial manner. These are proficient experts of different areas and linked, first of all, to professional institutions that regulate and define ethical and technical standards for their activity.

Nevertheless, the absence of specific rules applied to arbitral proceedings gives rise to uncertainties and may impact the reliability of the evidence. It may also impact the length and costs of the proceedings, since a tribunal may opt to indicate an expert that will adhere to impartiality and independence standards after noticing that the evidence produced by the expert witnesses or party-appointed experts were divergent. In deciding the dispute, arbitrators evaluate the presented evidence, including experts' reports. In our opinion, the less certainty about the experts' independence and impartiality, the less the arbitrators will value the evidence and consider it for decision making.

3. Overview of the Rules of International arbitral institutions

We extended our research to the 33 of prestigious international arbitral institutions[10] and reviewed their rules while focusing on three aspects: do the rules address impartiality and independence standards for (i) tribunal appointed experts?; (ii) party-appointed experts?; and (iii) expert-witnesses? Based on the gathered information, the institutions were divided into three categories descriptive of the rule status for each of the analyzed aspect: "detailed", "some" and "none".

The majority of the arbitral institutions do not address any of the aspects and were classified under the "none" category for the three questions. On the question regarding rules for tribunal appointed experts, out of 33 institutions, 33% have "detailed" guidance, 15% "some" orientation and 52% "none".



Although the majority of institutions do not have clear rules in place, one can notice a movement in most recent regulations towards setting of rules for independence and impartiality of tribunal appointed experts.

For instance, Swiss Chambers' Arbitration Institution (SCAI Rules 2012) has a very well-defined rule and matches tribunal appointed experts to arbitrators, in regard of the independence standards, duty to disclose and challenge

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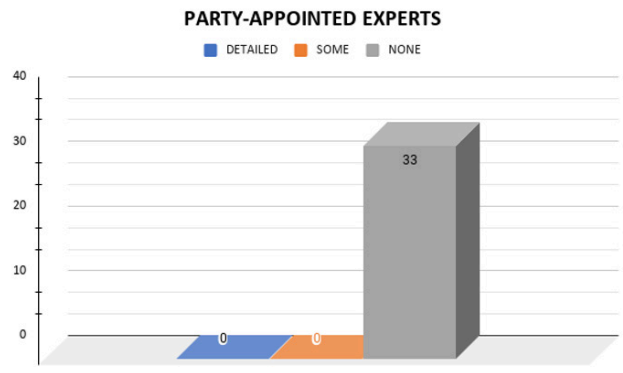
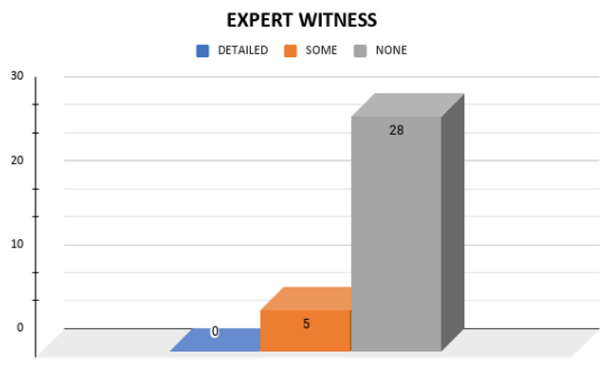
possibilities. The German Arbitration Institute (DIS Rules 2018) adopts the same model, as does the 2018 version of the Hong Kong International Arbitration Centre (HKIAC Rules 2018), and the Vienna International Arbitration Centre (VIAC Rules 2018).

Under the "some" guidance we considered the Cairo Regional Centre for International Commercial Arbitration (CRCICA Rules 2011), the Australia Centre for International Commercial Arbitration (ACICA Rules 2016), the Permanent Court of Arbitration (PCA Rules 2012), the Milan Arbitration Center (Rules 2020) and the London Court of International Arbitration (LCIS Rules 2020) among others. These institutions also have rules demanding impartiality and independence of tribunal appointed experts, but do not impose a clear duty for disclosure or regulate challenge proceedings.

None of the analyzed rules referred expressly to independence and impartiality requirements applicable to party-appointed experts. The term was used for an expert that offers comments on or an own report in behalf of the parties and is mostly designated in conjunction with expert witnesses.



Only five rules refer to expert witnesses and only in an indirect way, by not opposing the expert witness being, for instance, an employee or officer of the party, or by admitting the administration of an oath, as is the case of the London Court of International Arbitration (LCIA Rules 2020).



4. Trends

Although the majority of the arbitral institutions still do not address the issue through existing rules, it is possible to identify an international trend in the creation of guidelines and best practices on standards of independence and impartiality of the experts.

There is also an intensive discussion about mechanism for appointing experts that aim to prevent a biased choice of professionals, and case management tools bringing more efficiency to the proceedings. We briefly comment on them bellow.

Uncitral Arbitration Rules:

Regarding the duties of experts, the Uncitral Arbitration Rules (version 2010)[11], which provides guidance on practical aspects of the arbitration proceedings, refers to the term "independent expert" to be appointed by the arbitral tribunal. This professional must declare independence and impartiality, with the parties being given the opportunity to object the appointed name. The expert may be cross-referenced during the hearings, and the parties are entitled to bring the testimony of an expert witness to the case.

The IBA Rules:

The IBA Rules on the Taking of Evidence[12] were issued in 1999 and adopted by the IBA Council in 2010. It addresses the necessary independence and impartiality of experts in charge of producing evidence, appointed by tribunal as well as by the parties.

CIArb Protocol:

The Chartered Institute of Arbitrators issued in 2007 the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (CIArb Protocol)[13], structured in similar lines to the IBA Rules, but giving "*more detailed guidance as to what should (and should not) be in an expert's written opinion and it deals with independence and privilege*"[14]. The CIArb Protocol mentions that the method in which each of the parties chooses their own experts is the most frequently used in practice, since "*it is an integral part of their right to submit evidence and to be heard*". Thus, the need for enacting guidelines addressing issues "*that arbitrators should take into account when considering how to deal with expert evidence*". The Protocol promotes the impartiality of the experts, even party-appointed ones, by defining that "*experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them*"[15].

Prague Rules:

More recently, in 2018, the Prague Rules[16] focused on the Efficient conduct of Proceedings in International Arbitration. The Rules provide a framework with many options for the arbitral tribunal to choose and appoint an expert, and we want to point out the possibility under Art. 6 (6.2.a.iii) *to seek a proposal for a suitable expert from a neutral organization, such as a chamber of commerce or a professional association*. Thus, although the Prague Rules do not use the terms independence and impartiality as features required of the experts, one may notice the concern about the qualification of the professionals that will work on the evidence.

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View of Santos from the pier destroyed by a hangover in Ponta da Praia, Brazil. | William Rodrigues Dos Santos

ICC:

The ICC International Centre for ADR published in 2015 the ICC Rules for the Proposal of Experts and Neutrals[17], offering three distinct services: (i) proposal of experts and neutrals; (ii) appointment of experts and neutrals[18]; and (iii) administration of experts' proceedings. The expected independence and impartiality of the professional is clearly addressed in all the services: "*Before a proposal is made, a prospective expert or neutral shall sign a statement of acceptance, availability, impartiality and independence. The prospective expert or neutral shall disclose in writing to the Centre any facts or circumstances which might be of such nature as to call into question the expert's or neutral's independence in the eyes of the Person filing the Request for Proposal, as well as any circumstances that could give rise to reasonable doubts as to the expert's or neutral's impartiality"* (art. 3 (3)).

Sachs protocol:

Presented in 2010 in Rio de Janeiro at the International Council for Commercial Arbitration – ICCA, Karl Sachs'[19] study on the topic became a paradigm on the matter of appointing experts. Considering that international practice has a clear preference for the use of party-appointed expert, and in order to optimize the expert work, Sachs suggests an innovative way of composing a team that will carry out the taking of evidence. With the participation of the parties an expert team is formed, which, although chosen by the parties, shall act with independence and impartiality. Also, it will respond to the arbitral tribunal, this being, according to Sachs, an important advantage in comparison to the model of individual and parallel acting of the party-appointed experts.

Other mechanisms:

As mentioned above, a statement of independence is not *per se* the solution for the investigated problem, especially in relation to the commitment of the party-appointed experts. Some authors advocate for a set of procedural mechanisms that try to give the right incentives for an expeditious – and therefore less expensive – evidentiary proceeding. Prof. Doug Jones AO[20], in a recent article suggests "*a practical framework of the taking of part-appointed evidence that goes beyond a statement of independence*" and gives a valuable contribution in analyzing the existing methods and proposing a new approach to the matter.

Challenges:

Challenging of expert's appointment - tribunal and party-appointed - due to the lack of independence is becoming more often. Smiley[21] addresses the theme and points out the importance of arbitral institutions providing guidance "*in relation to the grounds of exclusion"* of party-appointed experts, especially "*At a time when it is feared that the benefits of confidentiality in international arbitration are slowly eroding…*)".

However, in relation to the party-appointed experts, after analyzing cases dealing with it, Burianski and Lang conclude that "*tribunals tend to consider the independence/impartiality to a party-appointed expert as relevant to the tribunal's weighing of the probative value of the expert evidence, and not as a matter of admissibility*".[22]

5. Conclusion:

We aimed to offer an objective perspective of how arbitral institutions are handling the theme, on the basis that production of evidence in arbitral proceeding is a relevant issue since, the more technical the dispute, the greater the possibility the arbitral tribunal will rely on experts' findings. Therefore, in order to provide the necessary confidence for arbitrators, it is important that the evidence presented is as impartial and unbiased as possible.

It is an exercise of reconciling the parties' autonomy principle with the interest of the arbitral tribunal. These

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interests are not always aligned. Borrowing a concept of behavioral economy, parties have an *incentive* to use the taking of evidence model that is under their control, while arbitrators want a model that offers certainty and reliability to the decision-making process.

There is an increasing number of rules and protocols issued by institutions dedicated to enhancing the good practices in arbitration and setting up independence and impartiality standards, such as IBA and CIArb. But, as soft laws, these are only applied by express decision of the parties.

The use of these rules when not established in the arbitration agreement will be discussed between parties and the arbitral tribunal in the beginning of the proceedings (Terms of Reference). Since parties' incentives and arbitrators' needs are not necessarily aligned, the decision on using these rules may be a topic of debate at an early stage of arbitral proceedings, with inherent and undesired transaction costs.

Besides, the fast development and growing adoption of arbitration as a dispute resolution mechanism increases the participation of new players in such proceedings, which may not yet be familiar with the use of these international rules and protocols. This further encumbers the adoption of such rules.

Therefore, it seems to us that addressing the subject in a direct manner through regulations issued by arbitral institutions would reduce transaction costs inherent to a process that seeks consensus between different parties, increasing the efficiency of arbitration procedures.

Our suggestion is that regulations (i) address the theme, defining the level of independence and impartiality applicable to experts (tribunal appointed and party-appointed); or (ii) adopt a rule that parties must decide on the level of independence and impartiality for experts (tribunal appointed and party-appointed) in the early stage of the proceedings (Terms of Reference, e.g.).

It is our intention to provoke debate by questioning that, if the most renowned international institutions dedicated to regulating best practices in arbitration such as IBA, CIArb, and ICC are concerned in issuing guidance about the expected independence and impartiality of experts, why not internalize these in the arbitral institutions' rules?

Cristina M. Wagner Mastrobuono

1 I want to thank Maria Luiza Negreiros D'Assunção for her efficient help with the research and Victoria Wagner Mastrobuono for her helpful insights and for reviewing the text.
2 Born, Gary. International Arbitration. 2016 Kluver Law International BV, The Netherlands, p.138.
3 Full results of the survey will be published in Revista Brasileira de Arbitragem ed. 67 (RBA 67).
4 This is the case, for instance, of the Camera Arbitrale di Milano – Rules 2020. Article 29 refers to "expert witness", but a closer look to the Italian version and the duties imposed demonstrates that it refers to a tribunal appointed expert. See <htpp://www.camera-arbitrale.it> accessed 08 September 2020.
5 See <www.ibanet.org> accessed 05 September 2020.
6 Professor Doug Jones AO, 'Party Appointed Experts in International Arbitration—Asset or Liability?', (2020), 86, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Issue 1, pp. 2-21, https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/86.1/AMDM2020002
7 Publicity was given to it through e-mails lists from professional institutions (Cbar, CIArb-Brazil Branch, Bar Association) and posting in social medias (LinkedIn, Instagram).
8 Meaning here professional that are related to the parties, with no declaration of independence and impartiality.
9 Câmara de Mediação e Arbitragem Empresarial – CAMARB Rules 2019. See <https://www.camarb.com.br> access 09 September 2020.
10 American Arbitration Association (3 versions), Australian Centre for International Arbitration, Arbitration Center of Ohada, ADR Institute of Canada, Arbitration Institute of The Stockholm Chamber of Commerce, Arbitration Centre for Industrial Property, Domain Names, Trade Names and Corporate Names (Arbitrare), British Columbia International Commercial Arbitration Centre, Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, Corte de Arbitraje de Madrid, Geneva Chamber of Commerce, Industry and Services, Chinese International Economic and Trade Arbitration Centre, Concórdia, Cairo Regional Centre for International Commercial Arbitration, The Danish Institute of Arbitration, German Arbitration Institute – DIS, Hong Kong International Arbitration Centre, Instituto de Arbitragem Comercial, International Chamber of Commerce, International Centre for Dispute Resolution, Japan Commercial Arbitration Association, London Court of International Arbitration, Milan Chamber of Arbitration, Netherlands Arbitration Institute, Oslo Chamber of Commerce, Permanent Court of Arbitration, Arbitration Centre of the Portuguese Chamber of Commerce and Industry, Swiss Chambers' Arbitration Institution, Singapore International Arbitration Centre, Vienna International Arbitration Centre, World Intellectual Property Organization Arbitration and Mediation Center, Zurich Chamber of Commerce.
11 See <https://uncitral.org/pdf/nglish/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> accessed 05 September 2020.
12 See <www.ibanet.org> accessed 05 September 2020.
13 See <https://www.ciarb.org/media/4200/guideline-7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf.> accessed 05 September 2020.
14 See <www.ciarb.org> accessed 05 September 2020.
15 See <https://www.ciarb.org> accessed 06 September 2020.
16 See <https://praguerules.com/> accessed 05 September 2020.
17 See <https://iccwbo.org/dispute-resolution-services/experts/proposal-experts-neutrals/rules-for-the-proposal-of-experts-and-neutrals/> accessed 06 September 2020.
18 Some arbitral institutions are following this model. For instance, the Milan Chamber of Arbitration issued new Rules, in force as from 01.07.2020. Among the tasks of the institution, it offers a service for providing neutrals and experts in proceedings not applying the Rule. In the same way, Danish Institute of Arbitration (DIA – Rules 2013) offers a Secretariat service in producing experts to be appointed, at request of the tribunal or the parties.
19 SACHS, Karl with the assistance of SCHMIDT-AHRENDTS, Nils. *Protocol on Expert Teaming: A New Approach to Expert Evidence*. VAN DEN BERG, Albert Jan (General Editor), Arbitration Advocacy in Changing Times – ICCA Congress Series No. 15, 2011 Kluwer Law International BV, The Netherlands. p. 135-148.
20 Professor Doug Jones AO, 'Party Appointed Experts in International Arbitration—Asset or Liability?', (2020), 86, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Issue 1, pp. 2-21, https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/86.1/AMDM2020002.
21 Antoine K F Smiley, 'An Unwanted Intrusion: Challenging the Appointment of Experts in International Arbitration', International Journal of Arbitration (2019) 85 Arbitration, Issue 4 © 2019 Chartered Institute of Arbitrators.
22 Markus Burianski and Alexander C. Lang, '"Challenges" to Party-Appointed Experts"', in Jörg Risse, Guenter Pickrahn, et al (eds), SchiedsVZ / German Arbitration Journal, (© Kluver Law International; Verlag C.H. Beck oHG 2017, Volume 15 Issue 6) pp. 269 -277.

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IV.

INVESTMENT ARBITRATION

Assumption (Uspenskyi) Cathedral of Bila Krynytsia Old Believer, Ukraine. | Irynal

RES INVESTORS AGAINST UKRAINE: UNPRECEDENTED AGREEMENT TO AVOID FUTURE CLAIMS?

By Krystyna Khripkova and Mykola Krys

Introduction

In 2008, Ukraine introduced a renewables support scheme with the purpose of reducing gas dependence from the Russian Federation and to favour renewable resources over fossil fuels. The Ukrainian Government offered relatively generous green tariffs to foreign and local investors to encourage a rapid growth of production of renewable energy electricity. In the recent several years, this was accompanied by a great success, as foreign investors and many Ukrainian entrepreneurs have since invested USD 4.5 billion in the construction of wind and solar power plants throughout the country. The renewable energy production in Ukraine got a boom, and generous incentive schemes for renewable energy prompted investors to take advantage. Ukraine's installed production capacity grew from 981 MW in 2016 to 6328 MW at the end of 2019.[1]

However, as explained further, economic difficulties, and the inability to comply with specific obligations regarding full offtake and compensation arose in Ukraine.[2] Ukraine could have become another State along with Spain, Italy and the Czech Republic facing a wave of investor's treaty claims, but in late 2019 the Ukrainian Government initiated public discussions with its local and foreign investors aiming to reach a compromise as regards reduction of the green tariff (and various other aspects of the support scheme).

On 10 June 2020, the Ukrainian Government[3] and the associations amalgamating the interests of investors/producers of electric power from renewable energy sources ("**RES**") reached a compromise and signed a "Memorandum of Understanding for the Resolution of Problematic Issues in the Renewable Energy Industry of Ukraine" ("**Memorandum**") to bring stability to the

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renewable energy market in Ukraine.[4] This step was a result of tough negotiations between the participants who experienced the complicated state of affairs. In a few weeks after that, the Ukrainian Legislative Power passed a new law reducing renewables sector incentives.[5] Nonetheless, could this be the end of the story?

This article aims at describing the introduction of the renewable support scheme and the crisis that hit the energy market of Ukraine. The authors consider the Memorandum and the new legislative changes passed after its signing as a way to solve the entanglement in this regard. Last section addresses Ukraine's promises of legislative stability and predicts possible changes in the Ukrainian tax regime affecting RES investors. It further analyses prospects of bringing treaty claims against Ukraine if an excise tax is imposed on RES producers.

1. Background

a. History of establishing the FiT in Ukraine

In order to support the development of renewable energy, in 2008, Ukraine introduced the feed-in tariff ("**FiT**") along with other incentives by amending the 1997 Law of Ukraine "On the Electric Power Industry".[6] The amendments envisaged the mandatory purchase of green energy by the State Enterprise "Energorynok" (which was later replaced by the State Company "Guaranteed Buyer" (the "**GB**")) at the highest price in Europe using the FiT[7]. The FiT was available for producers of green energy for 10 years from the moment of power plants installation.[8]

In September 2010, Ukraine signed the Protocol concerning the Accession of Ukraine to the Treaty Establishing the Energy Community[9]. Shortly after that, Ukraine acceded to the specified Treaty as a Contracting Party. This specifically meant that Ukraine could participate in the integration into the energy sector of the EU. It also entailed setting binding goals at the state level, notably to guarantee investment protection and to encourage the development of modern technologies and innovation.[10]

Ukraine also became a party to the Paris Climate Agreement and set a goal to reach 11% of energy consumption from renewable energy sources by 2020.[11]

b. Other amendments prior to crisis

As a part of the renewables support scheme, RES producers were exempt from income tax for the period of 10 years, starting from 1 January 2011.[12] The income tax exemption was later abolished in 2014 by the Law of Ukraine No. 1621-VII.[13] Developing legislation in this area, in 2015, the Parliament adopted the Law of Ukraine No. 514-VIII[14] that established that RES producers could receive a premium for use of materials and equipment produced in Ukraine.

On 1 July 2019, a new electricity market in Ukraine with a new procedure for purchasing electricity at the FiT started working.[15] The Ukrainian regulator approved a new scheme for budgeting the GB and adopted the procedure to enter into power purchase agreements ("**PPAs**") at the FiT between the GB and RES producers.[16] The Government also implemented the new system of state support of RES producers allowing them to participate in support quota distribution auctions. These auctions were developed to replace the FiT, but both procedures will co-exist until 2030.

c. Crisis in RES sector

After the new electricity market started to operate, it turned out that the system did not work the way it should. Amongst the main reasons that became a threat to the further stable development of RES sector were:

- significant excess of the green tariff over market prices and lack of funds for its compensation;
- a large number of previously signed pre-PPAs that could be implemented at still high FiT;
- lack of liability of RES producers for imbalances;
- ineffective implementation of the new energy market (auctions);[17] and
- reduced consumption of electricity due to the warm winter and Covid-19 pandemic.

This problem became acute in November 2019, when the energy transmission system operator NPC "Ukrenergo" for the first-time limited RES generation due to the surplus of electricity in the Unified Energy System of Ukraine. The GB's budget deficit led to suspension of the FiT payments. This put both the State and RES producers in a precarious position that triggered lengthy negotiations through mediation aiming to reach a mutually beneficial agreement.

2. Memorandum with the Government

a. Start of negotiations

Under these circumstances, the Government proposed a retroactive cut of FiT for RES producers, while the GB had already been in deficit for hundreds of millions of debts.[18] In December 2019, two renewables associations – the European-Ukrainian Energy Agency ("**EUEA**") and the Ukrainian Wind Energy Association ("**UWEA**") – started to negotiate with the Government over the proposed reform. However, the negotiations were not successful and came to a standstill. If negotiations had failed, RES producers could have commenced commercial arbitrations against the GB under the ICC arbitration clause contained in their PPAs. But it was unclear whether it would be possible to enforce such awards and collect the debts from the GB, because the GB itself was essentially a clearing house and had no significant assets.[19] As alternative, RES investors started looking *"at instigating arbitration proceedings against the government"* under applicable BITs and the ECT.[20] As investment arbitration is a costly and time-consuming process,[21] RES investors continued expressing their willingness to find an amicable solution with the Government.

After the President of Ukraine formed the new Government, the negotiations between the participants resumed.[22] Three leading

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Railway bridge on the Dnieper River in Kiev Ukraine | Yurii Malashchenko

RES industry associations addressed a letter to the President of Ukraine expressing their readiness in voluntary restructuring of the size of FiT and in voluntary refusal to put into operation new RES facilities (which would reduce the financial burden on the GB by more than 80 billion UAH) in return for a promise for a greater stability from the State.[23]

b. Memorandum

In the wake of the success of the talks on 10 June 2020, the Ukrainian Government[24] signed the Memorandum with the key associations amalgamating the interests of investors/producers of electric power from renewable energy sources (EUEA and UWEA), however, not all of the RES producers (including members of the aforementioned associations) accepted the terms of the Memorandum.[25] The primary task of the Memorandum was to make the position of the GB solid and cut the FiT for RES producers.

The Memorandum sets forth, *inter alia*, the following amendments to the renewable energy regulatory framework[26]:

• for facilities put into operation before 1 July 2015 the FiT is reduced by 15%;

• for facilities put into operation from 1 July 2015 until 31 December 2019: for ***solar*** facilities with installed capacity above 1MW the FiT is reduced by 15%; for ***solar*** facilities with installed capacity equal to or less than 1MW the FiT is reduced by 10%; for ***wind*** facilities with wind turbine capacity equal to or exceeding 2MW the FiT is reduced by 7,5%;

• for ***wind*** and ***solar*** facilities put into operation after 1 January 2020 the FiT is reduced by 2,5%.

The Memorandum also envisages the accelerated responsibility for imbalances (i.e. errors in forecasting the electricity production at RES facilities). RES producers shall bear financial liability for imbalances at the rate of 50% starting from 1 January 2021 and at the rate of 100% after 1 January 2022. Until 31 December 2029, the tolerance margin for imbalances is 5% for ***solar*** projects and 10% for ***wind*** projects.[27]

In turn, the Government undertakes to ensure timely payment by GB for green electricity, and repayment of existing debt to RES producers that has accrued since 1 January 2020. In particular, GB will repay 40% of the debt in the fourth quarter of 2020, then 15% of the debt – each quarter in 2021.[28]

Furthermore, the Government undertakes to determine and approve the annual quotas in support of green energy and to ensure the holding of auctions for the allocation of such quotas.[29]

Finally, by signing the Memorandum, RES producers do not waive their right to resort to arbitration in order to protect their rights.

c. The New Law reducing the FiT

In as little as 10 days after the Memorandum was signed, the President of Ukraine s igned the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving Terms for Supporting Electricity Production from Alternative Energy Sources" No. 810-IX, dated 21 July 2020, that entered into force on 1 August 2020 (the "**New Law**").[30] The New Law reflects the key arrangements contained in the Memorandum, albeit with a number of changes and additions.

As regards the cut of the FiT, the arrangements set out in the Memorandum have been partially amended, including: for ***solar*** facilities with installed capacity equal to or less than 1MW put into operation from 1 July 2015 until 31 December 2019 the FiT is now reduced by **7.5%** (it is 10% in the Memorandum).

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The New Law additionally envisages that the FiT for ***solar*** plants commissioned after 31 October 2020[31] will be reduced by 60% (for solar plants with installed capacity exceeding 75 MW), and by 30% (for solar plants with installed capacity less than 75 MW)[32].

The New Law introduces several changes into the regulation on support quota distribution auctions and curtailment, as well as sets out the sources to finance the GB.[33] The Memorandum contains express undertakings to repay the indebtedness of the GB, whereas the New Law does not specifically address this point. Instead, the New Law says that a specific law dealing with the repayment of debts must be drafted by the Government within three months.[34]

Last but not least, several state guarantees are included in the New Law as explained in more detail in the next section.

3. Potential investment claims

Admittedly, the 2020 legislative changes leading to the reduction of the FiT and shift of the cut-off dates for the commissioning of new facilities entitled to benefit from the FiT could lead to deterioration of RES investors' financial position and significant losses. The renewables reform itself, as well as failure of the GB to fulfil its obligation to offtake green electricity may be seen as the State's measures in breach of the legitimate expectations of investors. In turn, foreign investors may bring treaty claims against Ukraine under applicable BIT and / or the ECT contending, *inter alia*, the latter's failure to accord fair and equitable treatment (FET) to their investments and to protect investments from expropriation without compensation.

This article does not address potential claims that may arise out of the current legislation. Instead, the authors are interested in exploring a hypothetical scenario if, to the extent possible, Ukraine goes further and imposes new taxes on RES producers. This section discusses the likelihood of tax changes in the foreseeable future and evaluates prospects of bringing treaty claims against Ukraine if the legislator decides to lift RES producers' exemption from the excise tax that is now in place.

a. Stabilization clause and taxes

Previously, Ukraine guaranteed the stability of the FiT for the period from 2009 to 2030.[35] Namely, under the 1997 Law of Ukraine "On the Electric Power Industry" (as amended in 2009) RES producers were promised that the same incentives for the production of renewable electricity that were in place on the date of commissioning of their facilities would apply. Importantly, in case of change of the incentives, RES producers were free to choose the new incentive package set out in a new law.[36]

In 2015, the legislator introduced the excise tax on electricity that was relatively modest and constituted 3.5%. Yet, RES producers have always been exempted from this tax for obvious reasons. Imposing excise tax on RES producers, who sell electric energy for the regulated price (the FiT) and cannot 'transfer' the excise tax to the consumer by increasing the selling price accordingly, would effectively mean reduction of the FiT by the rate of the excise tax. In other words, imposition of the excise tax would reduce the financial burden on the State related to the renewables support scheme.

Not surprisingly, when the crisis hit the electricity market in fall 2019, there had been discussions that the excise tax might be imposed on RES producers at the rate that is applicable to other producers. Nevertheless, in late November 2019, a draft law leaked to the public that provided for excise taxes for RES producers at the rate of 30-40%. Although the said draft law has never been formally submitted to the Parliament, it has raised concerns that excise tax is already on the table as one of the possible solutions to the budget deficit. Considering these developments, during negotiations between renewable energy producers and the State in relation to potential changes in the renewables regime it was agreed to include the following stabilization clauses in the Memorandum:

"2. The State Authorities of Ukraine guarantee that the laws of Ukraine effective on the date of entry into force of the Law on the Agreements (as amended to give effect to this Memorandum) will apply to the rights and obligations of the Parties under the PPAs […]

22. After the Parties fulfil all obligations provided for in this Memorandum, the State Authorities of Ukraine undertake within their competence to take all necessary measures to prevent the adoption by the relevant state bodies of Ukraine of laws and other statutory instruments worsening conditions of economic activities of RES Producers, in particular, through introduction of additional taxes, fees, fines, FiT reduction, etc."

Put differently, the Government guarantees the stability of the new regulation and promises to abstain from introducing new legislative changes, including imposition of new taxes, that might negatively affect RES producers.

By virtue of the New Law that came into force on 1 August 2020 the legislator amended the existing stabilization clause by adopting changes in two laws. The first one is the 1996 Law of Ukraine "On the Regime of Foreign Investments" (the "**RFI Law**") that now envisages that the rights and obligations under the power purchase agreements at the FiT will be regulated by the legislation in force at the moment of adoption of the New Law, though with the exceptions that the guarantees "*do not apply to changes in defense, national security,* ***tax legislation****, public order, and environmental protection*".[37] It is fairly obvious that this clause may be used by the legislator as a back door for imposing the excise tax.

The second law is the 2013 Law of Ukraine "On Alternative Energy Sources" (the "**AES Law**") that now states the following in Article 9-4:

"The state guarantees that for business entities for which the "green" tariff is set or will be set in accordance with part three of this article, the legislation of Ukraine will be applied during the whole term of the "green" tariff, which is valid on the day of entry into force of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving Terms for Supporting Electricity Production from Alternative Energy Sources". This law does not cover the legislation which reduces the amount of taxes or fees or abolishes them, weakens the regulation of economic activity … which shall apply from the date of entry into force of such legislation."

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Moreover, the next paragraph of Articles 9-4 is spelled out as follows:

"Guarantees of the stability of legislation do not apply to changes in legislation relating to defense, national security, public order and environmental protection."

In plain words, the legislator guarantees that the FiT will not be changed or cancelled and RES producers can continue enjoying their exemption from any new taxes and, if existing income tax is reduced, RES producers would be entitled to pay such tax at the lower rate.

The discrepancy between the RFI Law and the AES Law makes the authors wonder on how, in practice, these two colliding stabilization clauses will correlate. In our view, the AES Law is *lex specialis* for RES sector as compared to the RFI Law. Thus, the stabilization clause in the former would likely prevail over the one in the latter when the question of interpretation of the two laws arises. Therefore, at least for now, we may conclude that there is a statutory commitment from the State to keep the RES producers exempt from new taxes, including the excise tax, during the lifetime of the FiT.

Yet, it is hard to rule out the possibility that the AES Law will be amended to include a taxation carve-out. We are indeed living in the era of uncertainty and downturn in economic activity due to the COVID-19 pandemic. That said and in view of the previous excise tax discussions last year, we cannot exclude that the excise tax for RES producers would be levied.

b. Tax measures breaching treaty standards of protection

Hypothetically, if the legislator levies an excise tax over RES producers, it would likely mean further reduction of the FiT by the rate of the excise tax or even lead (if the excise tax is 30-40%) to deprivation of the investor in significant part of the use of its investment or reasonably expected revenues. It is common practice that the power of taxation is an inherent attribute of sovereignty. Thus, some, but not all, investment treaties exclude tax matters from the scope of their protection subject to certain exceptions. In practice, tribunals often examine whether taxation measures by a host State are confiscatory, discriminatory, and/or tantamount to expropriation in the light of standards of protection under applicable investment treaties.

As a general observation it must be stressed that each investor's case would be assessed individually against the factual background. In this hypothetical scenario, it seems sensible to assume that such taxation measures could lead to claims from RES producers on the ground of violation of the legitimate expectations. The investor would need to show that at the time of investments the host State by means of the stabilization clauses in the Law of Ukraine "On Electric Power Industry" and the AES Law made a *specific* commitment that the renewables incentives would not be changed or cancelled, thus, imposition of any additional financial burden, like the excise tax, would be a breach of FET.

An interesting question remains unanswered: how to interpret the Government's commitments under the Memorandum that were effectively given only to those RES investors who signed it? Could such commitments be extended to other investors who refused to sign the Memorandum? Given a number of reservations in the Memorandum that most of the rights and obligations of the parties thereto only come into force when the New Law comes into force, it could be argued that such commitments were given in the course of mediation and could not create legitimate expectations. In response, those investors who signed the Memorandum may contend that the arrangements therein indicate *specific* intentions of the parties at a certain point in time that became binding upon them.

Moreover, if as a result of a series of state's measures (for instance, the cut of FiT, the shift of deadlines for commissioning renewables facilities, liabilities for imbalances and the imposition of the excise tax), which do not individually amount to an expropriation, a RES investor was radically deprived of the economic use and enjoyment of its investments, this could be an example of creeping expropriation. If introduction of the excise tax lead to a sufficiently severe economic impact on investment,[38] a tribunal may consider such measure to be expropriatory if it was in conflict with prior representations or commitments of the host State on which the investor relied on when making its investment.[39]

c. Jurisdictional hurdles: lesson learnt

The ECT drafters decided to preserve the sovereign and legitimate taxation powers of a host State and included the taxation carve-out in Article 21. However, in exceptional circumstances a taxation measure could not benefit from the taxation exclusion if a claimant is able to demonstrate a lack of good faith on the part of the host State. A great illustration of application of a complex mechanism contained in Article 21 of the ECT may be seen in the Spanish international investment arbitration case law.

Spain enacted the renewable energy scheme to boost production of renewable energy at the expense of long-term investments. As part of the scheme, Spain offered, *inter alia*, a FiT which permitted RES producers to sell electricity at a higher rate for the first 25 years, and granted tax incentives.[40] However, due to financial difficulties the government largely eliminated the incentives[41] and imposed a 7% tax on the value of the production of electric energy, that was introduced by Law 15/2012.[42] In response, Spain faced dozens of investment arbitration claims under the ECT.

In *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*[43], the claimant argued that Law 15/2012, which introduced a 7% tax, constituted a breach of Spain's obligations under the ECT[44]. In response, Spain raised jurisdictional objections contending that Article 21(1) of the ECT was a "carve-out" provision, which exempted tax measures from the scope of the ECT. Therefore, in Spain's view, the Tribunal lacked jurisdiction to hear any claims based on alleged breaches of Article 10(1) of the ECT by virtue of implementation of Law 15/2012[45].

Claimant argued that Spain's argument should fail because Article 21 of the ECT only applied to taxes adopted *bona fide*, whereas

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this was not the case. Although it was evident for the Tribunal that Law 15/2012 was indeed a taxation measure that was subject to the carve-out from the protection of the ECT,[46] the question remained whether Law 15/2012 was a taxation measure enacted *bona fide*.[47] The starting point of the analysis should always be that the taxation measure was in fact adopted in good faith. This means that the claimant bore the burden of proving that "Law 15/2012 was not enacted for the purpose of raising general revenue for the state, but for a different purpose, i.e. that the measure therefore was enacted *mala fide*."[48] In the Claimant's view "a tax is adopted *bona fide* only if the state's intention was to raise revenues in accordance with the stated purpose of that tax. According to the Claimant, the stated purpose of Law 15/2012 had nothing to do with its real objective, which was to function as a backdoor tariff aimed at further reducing the income the Respondent had guaranteed to PV investors. The Tax was, therefore, adopted *mala fide*."[49]

However, the Tribunal was not convinced and held that it was not easy to overthrow the presumption that a tax measure introduced by a state was enacted *bona fide*. The Tribunal went on explaining that "the actions relied upon by the Claimant in this respect fall short of the extreme actions that according to other arbitral tribunals constitute viable *mala fide* grounds."[50]

Similarly in *Antin Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain*[51], the Tribunal held that the adopted tax "is not merely a measure labelled as a taxation measure, but rather plainly it is a tax of general application to all companies in the RE and conventional energy sector, in the pursuit of a public purpose identified and pursued by the Respondent."[52] In both cases, the tribunals accepted Spain's jurisdictional objection based on the taxation carve-out[53].

The *Novenergia II* and *Antin* lesson allow us to understand how the "carve-out" provision under the ECT operates, emphasising the importance of proving that a tax measure was not *bona fide.*

That said, it is important for investors in renewables sector in Ukraine to check whether they have access to other BITs or MITs in addition to the ECT. Investment restructuring to achieve investment treaty protection before a dispute arose may be an effective invocation of available legal rights. The carefully thought-through restructuring allows coupling the protections under the ECT with those of the applicable BITs or MITs. Thus, even the measures that are excluded from the ECT can be covered.

4. Conclusion

The prolonged negotiations between the Government and many RES producers bore fruit: a mutually agreeable path was found and further partially embodied in the New Law. Engagement of Ukraine in the productive dialogue with investors may be seen as the State's attempt to balance between its commitments to keep the FiT stable and sovereign power to regulate.

Despite that, it appears that the Government is struggling to meet its financial commitments (i.e. timely payment by GB for green electricity) envisaged in the Memorandum. Notwithstanding that the New Law identified the sources to fund the GB, the established scheme has not been fully implemented yet. As a result, in August 2020, the GB was able to pay for only 65% of green energy produced. If, due to new economic reality in the Covid-19 era, Ukraine decides to change the tax regime for RES investors despite the stabilization clauses in the Memorandum and the legislation, it could face investment arbitration claims. It remains to be seen how tribunals would construe the Government's promises of legislative stability in the context of possible alleged breaches of treaty standards of protection. In any case, it is important for foreign investors to be aware of jurisdictional hurdles under the ECT that may be overcome due to timely investment restructuring.

Krystyna Khripkova and Mykola Krys

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Electric wires hanging on the buildings in Mumbai, India. | Mikhail Davidovich

INDIA'S PROTECTIONIST APPROACH TOWARDS BILATERAL INVESTMENT TREATIES: PROVIDENTIAL MOVE FOR THE POST-COVID ORDER?

By Rajarshi Singh and Anamika Singh*

I. Introduction

India has a peculiar history with investor-state disputes, for they have directly influenced the growth of the Indian regime of investment protection.[1] Following a series of arbitral awards that were rendered against India, the government, in an effort to overhaul its framework of investment protection, introduced its new Model Bilateral Investment Treaty ('Model BIT') in 2015.[2] Consequently, it unilaterally terminated 58 of its then existing BITs[3] in an attempt to renegotiate investment treaties with its partner states on the basis of the Model BIT.[4] This new BIT exhibits a departure from the 'pro-investor' stance of earlier Indian BITs and is more favourable towards the host state.[5]

The model BIT, reflective of India's protectionist approach, places more emphasis on the state's right to regulate, bestowing it with expansive regulatory powers.[6] In the midst of a global pandemic, where the threat of investor-state arbitrations arising out of health and regulatory measures undertaken by states is imminent, this shift could potentially play a crucial role in safeguarding India's interests before arbitral tribunals.[7] It is in this light that the authors intend to analyse the new Model BIT to discern the defences that it offers to the host state and their possible implications in investment arbitrations arising out of India's strict regulatory measures undertaken to combat the spread of COVID-19. To this end, Part II of this paper traces the shift in India's approach towards a protectionist investment regime. Part III analyses the relevant changes introduced by the model BIT to interdict investment claims. Consequently, Part IV focusses on the defences available to India under the Model BIT to preclude its liability in COVID-19-infused investment arbitrations.

II. Changing wave of India's stance on protection of international investment

With the advent of globalization, it is increasingly observed that Foreign Direct Investment ('FDI') plays a major role in boosting a country's economy. A Bilateral Investment treaty ('BIT') serves as the primary instrument to protect, promote, and regulate FDI. It includes mutually agreed

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principles creating a balance between investor's rights and sovereign's obligations which are enforced by exclusive Investor State Dispute Settlement (ISDS). The evolution of ISDS in India can be traced through three distinct periods, each marking a significant approach and development of its own. In the earlier period, there was a pro-investor approach to the BITs which witnessed a drastic change at a later stage, giving rise to a protectionist character to the investor-state dispute mechanism embodied in the structure of the Model BIT.

The Starting Point: Pro-Investor Approach

In 1991, India started paving its way towards economic liberalization for attracting foreign investments.[8] The BIT signed with the UK in 1994[9] was the first international investment treaty signed by India, thereby constituting the basic template for future negotiation of BITs.[10] The shadow of this Treaty can be seen in India's Model BIT of 2003[11] which focussed on precedence to investment protection over the right of the host state to regulate such investment. Despite the onset of BIT regime in India, it did not gain much critical attention because of lack of involvement with ISDS.[12] The infrequent discussion of BITs by the Indian Parliament[13] and a lack of literature[14] on the same is also a feature of this period, which led to lack of critical attention the BIT essentially deserved.

However, this changed drastically after the institution of *Dabhol Power Project case*[15], pursuant to which nine ISDS cases were filed against India[16]. Dabhol Power Company ('DPC') was to generate electrical power in Maharashtra, pursuant to which an agreement was entered between the company and the Maharashtra State Electricity Board ('MSEB'). Due to certain irregularities, political friction and high cost charges, the contract was cancelled by MSEB, which affected DPC's investment.[17] As a result, arbitration proceedings were initiated by DPC. These did not result in an international investment arbitration award and all these cases were later settled. However, this case raised the profile of ISDS in India and ultimately captured the attention of lawyers and academicians.

The Tipping Point: Emphasis on the case of White Industries

Since 2011, India became increasingly involved with ISDS which reflects a striking contrast to the period before the 21st century. The first widely-known BIT arbitral award against India was issued in the case of *White Industries v. India,*[18] where India was found to be in violation of its obligations under the India-Australia BIT[19]. The Tribunal concluded that India had breached its responsibility to provide *'effective means of enforcing rights and asserting claims'*[20] and compensation of USD 4.08 million[21] was awarded against India. This caused a *domino effect* resulting in several ISDS claims against India challenging a myriad of its regulatory measures. This was a turning point in the investor-state dispute resolution regime in India. The country was caught off-guard and the much-needed deliberation which had thus-far been denied to India's BIT finally began to take place.

Wheels of change: Post White Industries arbitration

The decision of the *White Industries* case caused India to revisit the BITs, following demands from different players ranging from academia, politicians, media and civil society organizations.[22] As against the preceding period, there were comprehensive and frequent discussions on the BITs in the Parliament, which attested that the White Industries award was "*an attack on the sovereignty of the Indian Judiciary.*"[23] The Ministry of Commerce concluded a discussion paper on this issue in 2011, which recognized a need for a balance between investors' rights and domestic policy of the host state.[24] It led to the attestation by the government that Indian BITs needed some revision to remove vagueness, ambiguity and to strike an appropriate balance between investor protection and state obligations.

Need for the wave of Protectionism

The second decade of 21st century saw investors misusing ISDS mechanism contained in BITs to challenge sovereign policy decisions taken by host states.[25] A majority of BITs have a substantial, if not paramount, impact on the sovereignty of host state, as the investor has the remedy to invoke the ISDS claims instead of moving the national court of the host state.[26] Resultantly, hefty compensation could be, and in case of India[27], were taken from the host state as arbitral awards by invoking ISDS claims under the BIT. Disputes referred to ISDS were decided by international arbitral tribunals with the power to impose heavy amounts as compensation, along with other sanctions.[28] This was perceived as a pro-investor bias to the ISDS mechanism instituted in the BITs, as the participation of the investor would be warranted only if it was in their interest[29] and a BIT, drafted ambiguously, could allow the Tribunal to interpret the terms across a vast spectrum, creating uncertainty to its result. As a reaction to the drastic increase in the number of claims against India, it was considered crucial that the revised BIT be more state-centric. Revisions to this effect, resolving the problems surrounding the erstwhile BITs can be seen in the embodiment of the new Model BIT.

Birth of Model BIT of 2015

There was a swift increase in the number of ISDS claims between 1990 and 2016,[30] of which some of the cases were decided against India[31]. As of the date of this paper, there are various investor-state cases pending[32] against India which are spread over various sectors including telecom[33], energy[34], construction[35], and manufacturing[36]. This led to a backlash[37] against the regime of foreign investment, with the current regime of investment treaties found to be considerably restrictive of the rights of a state to implement sovereign regulations.[38] This backlash could be resolved by one of two kinds of state practice: one, to completely denounce[39] the ISDS mechanism, thereby terminating[40] India's BITs; or to review[41] the BITs and change them in a way to strike a different balance between the state's sovereign right to regulate and investor protection.

India took the latter approach, which led to the birth of Model BIT.[42] The new approach towards the design of the BIT,

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unlike its equivalent predecessor tilts the balance slightly in favour of the host state, so that the sovereign right of the state to regulate is no longer compromised.[43] This is a significantly favourable position for India, especially under the current COVID-19 circumstances where the situation demands free exercise of regulatory powers by states in wide array of sectors to control the spread of the virus, and at the same time to ensure that damage inflicted to the economy is minimised.

III. Constricted Framework for Bringing Investment Claims: Changes and Implications for the Post-COVID world order

The Indian government implemented several strict measures to combat the virus. One of the most important steps in this regard was implementing a complete nationwide 'lockdown' under the Disaster Management Act, 2005.[44] A research conducted by Oxford University concluded that India's measures to tackle the spread of the virus were the most severe in the world, which have directly impacted several Indian and international investments in its territory by bringing economic activities to a grinding halt.[45]

Looking at the crystal ball, this creates the possibility that as soon as the dust settles, India may face investment claims from foreign investors alleging a breach of BITs. However, to do so, there are certain conditions precedent that investors must satisfy. That is, to be able to invoke arbitration under a BIT in the form of the new Model BIT, the claimant must demonstrate that its investment qualifies under the definition of "investment" in the BIT, and also that there is a "dispute" as per the definition provided in the BIT.[46] In this Part, we shall analyse these conditions to assess the latitude that they provide to a claimant to invoke investment arbitration under the new Model BIT.

Narrow definition of investment

The definition of investment plays a critical role in any BIT, since it is the foundation on which the jurisdiction of the arbitral tribunal is determined.[47] Most of the previous BITs entered into by India contained an asset-based definition of investment, which meant any kind of asset having economic value, either established or acquired by the foreign investor in India, qualified as an investment. This definition was very broad in terms of rights accorded to the investor to bring a claim against India.

In the Model BIT, however, India has refashioned what qualifies as 'investment.' The relevant provision in the Model BIT reads:

1.4 *"investment" means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made.*

In the Model BIT, investment means an enterprise that has been constituted, organised, and operated in good faith by an investor in accordance with the domestic laws of the country.[48] This means that only an investor into an entity that is legally constituted under the laws of India is entitled to enforce the ISDS provisions of the Treaty to raise a claim. Hence, from an asset-based definition, India has now moved to an enterprise-based definition which in effect narrows the scope of investments to be protected and thus seeks to reduce the number of BIT claims that can be brought against India.[49]

Another important qualifier in this definition of "investment" is the condition that it should be of *significance for the development* of the Party in whose territory the investment is made, which in this case, is India. The Model BIT is silent regarding what constitutes as significant development for this purpose. The determination of this question then rests with the arbitral tribunal, but as recognized in *LESI SpA v. Algeria*,[50] the answer may be difficult for the tribunal to ascertain. The dissonance in interpretation of this qualifier by different arbitral tribunals reinforces this contention. For example, the tribunal in *Patrick Mitchell v. Congo*[51], interpreting a similar provision, found that the contribution of the investor need not always be 'sizable or successful.'[52] It further held that "tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in *one way or another* to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case."[53] On the other hand however, in *Malaysian Historical Salvors v. Malaysia*[54] the tribunal held that to constitute an "investment", it must have made a *significant* contribution to the economic development of the Respondent[55] and small contributions do not qualify to get treaty protection.[56] While leaving room open for interpretation, the introduction of this qualifier does, however, impose an additional hurdle that the investor must mount to bring a claim, and so tilts the balance in favour of the host state[57]

Stringent characterization of dispute

Governmental measures may result in disturbing the 'normative environment' of the investment, as envisaged under respective BITs, resulting in limitations on property rights of foreign investors, interference in contractual relations and unpredicted disruption in business. However, for a foreign investor to seek protection under the Model BIT, the investor must demonstrate that the repercussions suffered are caused by a matter that qualifies as "dispute" under the BIT.

The Model BIT, in addition to restricting the scope of investment under the treaty, has also narrowed down what will qualify as a "dispute" under it. In a significant derogation from the earlier BIT vis-à-vis "dispute", the Model BIT has removed the "umbrella clause". Umbrella clauses are generally found in BITs, and obligate the host State to abide by not just the Treaty but also "any other obligation" that it may owe to foreign investors, bearing a nexus with the protected investment under the Treaty.[58]

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The water-tight nature of the Model BIT is evident from the fact that no such umbrella clause has been included in the text of the Treaty. Instead a clearly worded, limited definition is preferred which has the effect of narrowing down the scope of 'dispute' under it. Article 13.2 under Chapter IV of the Model BIT, titled 'Settlement of Disputes between an Investor and a Party', enunciates:

13.2 *This Chapter shall only apply to a dispute between a Party and an investor of the other Party with respect to its investment, arising out of an alleged breach of an obligation of a Party under Chapter II of this Treaty, other than the obligation under Articles 9 and 10 of this Treaty.*

This provision in the Treaty restricts the ambit of 'dispute' to cover only those disputes which arise from an alleged breach of an obligation of the host State under Chapter II of the BIT[59] with Article 9 (Entry and Sojourn of Personnel) and Article 10 (Transparency) excluded. What this means essentially, is that ISDS claims can be brought against India only on the grounds of alleged violation with regards to "treatment of investments"[60] which comprises of National Treatment, Expropriation, Subrogation and Compensation for losses.

This implies that breaches of contractual obligations, that state-bodies may have entered into with investors, will not automatically be elevated to that of a treaty breach. Hence, investors will not be able to rely on the dispute settlement provision of the BIT to seek compensation for contractual breaches by state and its bodies, the probability of which happening is high owing to the COVID-19 measures. Hence, the cumulative effect of these provisions is that they provide investors a narrow corridor to invoke arbitration under the BIT.

IV. Provisions of the Model BIT That Can Preclude Host State Responsibility

Since arbitration jurisprudence is guided largely by contractual origins, ISDS provisions of BITs typically set out procedural preconditions for submitting a claim, the substantive obligations owed by the contracting states to a foreign investor, and remedies available in the event of a breach.[61] These BITs provide the legal basis for investor-state claims by defining the contours of a State's obligation to foreign investors.

The Model BIT prioritises public health over investment protection

Under the Model BIT, Article 5.5 limits the States' obligation vis-à-vis expropriation of an investment that has its foundational basis in protection of public health. It reads:

5.5 Non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article.

Hence, if India can prove that its regulatory measures have a direct nexus with protection of public health, which under the COVID-19 circumstances should not be an onerous task, this provision can shield it from claims of expropriation.

However, with regards to measures undertaken to protect public health, a valid question that arises is what should be the margin of appreciation given to host States while judging such measures. On this issue, the tribunal's ruling in *Philip Morris v. Uruguay* provides some guidance. It held that the responsibility for public health measures rests with the government, and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health.[62]

Further, Article 32.1(ii), as reproduced below, creates an exception for measures applied which are necessary for safeguarding of public health. However, such measures must be non-discriminatory in nature.

32.1 *Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a non-discriminatory basis that are necessary to:*

….. (ii) protect human, animal or plant life or health;

Article 32.1 qualifies the measures taken under this provision by a condition of 'necessity.' Hence, it is imperative to understand the threshold of this qualification. The assessment of what constitutes a 'necessary' measure lies with the Arbitral Tribunal. As provided for in the Treaty, in considering whether a measure is "necessary", the Tribunal shall take into account whether there was a no less restrictive alternative measure reasonably available to the government.[63]

The WHO declared Covid-19 a Public Health Emergency of International Concern. The connotation carried with such a declaration is that it is 'serious, unusual or unexpected' and can potentially result in trans-national implications requiring immediate international action. Hence, expeditious interference to restrict the outbreak was imperative. Practices such as 'isolation' and 'social distancing' have attained global recognition as essential methods to combat Covid-19.

Moreover, the necessity of a complete lockdown can be ascertained by considering that globally, several countries have adopted this method: including India, the list consists of the UK, China, France, Italy, South Africa, New Zealand and several others. Additionally, owing to the fact that countries which declared lockdown are currently in a better position against the impact of this virus, it should not be a hard task to evidence that the lockdown was a 'necessary' measure. Examining the coronavirus pandemic in this light, it should, in principle, be able to meet this qualification of necessity as envisaged under the Model BIT.

Measures by local governments are exempted from protection

Measures implemented by local government are exempted under the Model BIT from constituting a breach. As provided under Article 2.4 (i):

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2.4 *This Treaty shall not apply to:*

(i) any measure by a local government;

India is a quasi-federal democracy, wherein provincial governments enjoy substantial autonomy. The notion to differentiate between obligations, owing to federal political structure, is inspired by the U.S. Model BIT of 2012.[64] Explicit exclusion of local government from the scope of the Treaty allows them autonomy to pursue their policy, and also provides immunity from fulfilling the obligations under the BIT which was undertaken by the government at the federal level.

Thus, individual states under the Union of India may enact or amend the existing law, and even if such enactment or amendment expropriates an investment, as long as it has been done in good faith, it will not qualify as a dispute under the Treaty.

In India, the regulations pertaining to lockdown were separately pursued by different states and union territories for implementation within their territory.[65] Such legislative enactments in exercise of state government's regulatory function might classify as "measures by local government." This would pre-empt the liability of the state under the BIT, since as per Article 2.4(i), BIT protection is not extended to cover regulatory acts of local governments.[66] Therefore, a claim cannot be brought on the basis of treaty breach and the investor would be limited to pursue domestic remedies.

For ascertaining the nature and extent of Article 2.4(i), guidance may be sought from Article 14(1)(iii) of the U.S. Model BIT, on which this provision is based. Article 14(1)(iii) creates immunity for local action.[67] That is, it flatly excuses the actions undertaken by local US authorities from having to comply with provisions barring them from favouring domestic investors or from imposing performance requirements.[68]

The full import of the exception under Article 2.4(i), however, remains to be seen in practice, especially in cases of expropriation. This is because in addition to treaty provisions, investors may also claim a right against expropriation arising under customary international law.[69]

Reliance can be placed on the doctrine of police power

Investors may raise claims assailing state's regulatory actions as being expropriatory in nature. In such a case of indirect expropriation, the doctrine of police power serves as a frontier defence. Police powers, in the context of public health, is construed to mean powers vested with the states which enables them to undertake bona fide, non-discriminatory measures for the protection of public health and public welfare in general.[70] There is no specific provision regarding this in the new Model BIT, but since it is a principle of customary international law, its applicability is not conditional upon a specific provision to that effect.[71]

This doctrine extends to cover state measures undertaken for maintenance of public health and order. This was explicitly recognized by the tribunal in *Philip Morris v Uruguay* which held that "State's reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that measures taken for that purpose should not be considered expropriatory."[72] (emphasis added)

Another significant ruling on this point is the *Bischoff Case*, wherein the Claims Commission held that "*during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police power.*"[73] Hence, on an assessment of the factual matrix around coronavirus pandemic, and the ease of its transmission amongst humans, State measures in exercise of its police powers, which may result in economic damage, bearing a direct nexus with the objective, will not constitute as expropriation of investment from the vantage of international investment law.

Customary Law Defence of Force Majeure

Another defence which could be invoked against ISDS claims is that of *force majeure*. It must be noted that the new Model BIT does not contain a specific *force majeure* clause and it will have to be invoked as a principle of international law. However, since the term *force majeure* has been used and accepted by international tribunals on a regular basis, it can be said to constitute a rule of customary international law hence reinforcing its validity in such claims.[74]

Force majeure precludes liability for the acts of a State in non-conformity with an international obligation if such acts are due to the occurrence of an *irresistible force*[75] or of an *unforeseen event*[76] that is beyond the control of the State, making it 'materially impossible in the circumstances to perform the obligation'.[77] *Force majeure* is said to be scantly argued in investment treaty arbitration, but in fact it has been successfully invoked at several instances.[78] Moreover, there is a precedent in this regard since a deadly virus outbreak in West Africa was considered to be a *force majeure* event.[79]

From a national policy perspective, it is evident that Indian government is willing to rely on *force majeure,* since a recent direction issued by the Ministry of Finance, Government of India stated that unwarranted disruption in supply chains, as a result of spread of coronavirus, should be considered as a '*natural calamity*' and hence the defence of *force majeure* can be invoked.[80] A similar reading of the situation was furthered by the Ministry of New & Renewable Energy with respect to 'solar project developers.'[81] This interpretation of the situation is not merely a domestic practice, as similar approach is taken in other jurisdictions: for example, on February 17, 2020, the China Council for Promotion of International Trade (CCPIT) issued over 1600 *force majeure* certificates to firms in 30 sectors.[82]

Having said that, it must be noted that the threshold of invocation of a *force majeure* defence is particularly high. Moreover, on account of there being no definition under the new Model BIT of "*force majeure*", there is no specific enumeration of public health events as constituting *force majeure*, and so there is room for argument. The determination of it being a *force majeure* event will depend on a case-to-case basis bestowing attention to the obligations arising out of the instrument as well as the

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surrounding circumstances applicable such as the nature of obligation, extent of impact, expediency of the disputed measure and the underlying factual situation.

Conclusion

The measures undertaken by the Indian government to curb the coronavirus pandemic will significantly impact the flow of foreign direct investment and severely effect current investments. As a result, there is a strong apprehension that several ISDS claims will be brought against the state, once the coast is clear. However, the design of the Model BIT provides solace for executive state actions aimed at protection of public health. Though it is difficult to ascertain with certainty how the tribunals will be moved, it seems there is sufficient basis to preclude responsibility under the new Model BIT.

From the vantage of international investment law, the contours of the tussle between private economic interest and sovereign powers are well accounted for in the new Model BIT. And under the regime of this Model BIT, it is difficult to attribute State responsibility for measures put into place by the Indian government to tackle the spread of COVID-19 virus, regardless of whether one views *lex lata* through the lens of investment protection, sovereignty or development. It is the onset of a protectionist approach towards the investor-state claims, one which can be assessed theoretically, yet a practical assessment can only be done at a later stage.

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V.

FOOD FOR THOUGHT

Barra lighthouse | Brazil

ARBITRATOR'S DUTY TO DECLARE LAWS UNCONSTITUTIONAL: SOME INITIAL THOUGHTS REGARDING BRAZILIAN LAW

By Gustavo Favero Vaughn

1. Introduction

According to the Brazilian law, the Federal Constitution of 1988 -- the latest of seven since 1824, and currently in force -- widely known as "Citizen's Constitution" as it provides for several social rights and guarantees, is the supreme law of the country and, as such, its purpose is to be the parameter for the validity of all other laws and normative rulings enacted by the Federation Powers.

Therefore, in Brazil, the *constitutional supremacy principle* prevails, which, in other words, requires that laws and normative rulings in violation of the Constitution, whether due to formal or substantive defects, be rejected by the legal system. In essence, the unconstitutionality is the most serious defect that may be attributed to a law or normative ruling, as it means a violation of constitutional rules, which comprise both principles and rules.

The supremacy of the Federal Constitution derives from its *normative power,* advocated by the renowned jurist Konrad Hesse, which has gained strength in the contemporary constitutionalism after World War II. Compliance with the Constitution, since it is a grundnorm, is mandatory and inexcusable, it is provided with normative nature that legitimates the form and content of laws below the Constitution.

Despite the clear importance of the Federal Constitution, the study of constitutional law, especially the analysis of judicial review – which, in our standpoint, is the clearest way

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to exercise constitutional jurisdiction –, usually focus the attention only to the court judge's role as a member of the Judicial Branch, while under the constitutional standpoint there is no, or little, examination of arbitrators as *de facto* and *de jure* judges of the arbitral process.

Although the Federal Supreme Court in Brazil, composed of eleven justices selected by the President of the Republic, is the judicial body responsible for the ultimate decision on the meaning of constitutional rules, the importance of arbitrators in interpreting and applying the Federal Constitution should not be disregarded. To the extent that the Brazilian law allows any judges to perform the incidental judicial review, could not (or should not) this be also extended to arbitrators, by allowing them to review constitutionality issues during arbitrations?

Based on the Brazilian law as the only one applicable to a certain arbitration, the scope of this article is to discuss the subject of *commercial arbitration and judicial review* in order to foster discussions on this thought-provoking subject, to finally conclude that arbitrators are entitled to review the constitutionality of legal rules applicable to the arbitral process.

It should be noted that the following lines will examine the subject under study exclusively under the perspective of Brazilian law. This is an important remark because, depending on the constitutional model adopted, it is quite probable that judicial review in a given case is not an event to be considered in arbitration. In Italy, for example, judicial review is concentrated in the hands of judges of the *Corte Costituzionale*, and lower court judges are not qualified for such duty; therefore, in Italy, it is less likely that arbitrators will be allowed to perform the judicial review. In Brazil, on the other hand, lower courts, to which arbitrators are held equivalent by law, may incidentally exert judicial review, with *inter partes* effects.

2. Arbitration and jurisdiction

In addition to the caveat regarding the constitutional model, it should be noted that the present study adopts the *jurisdictional nature* of arbitration, which will be more thoroughly discussed below. It is worth stressing that jurisdiction is an indispensable condition for arbitrators to be able to carry out the judicial review.

It may be said that arbitration, deemed *private justice*, was the out-of-court method for dispute resolution most impacted by the dogma of jurisdiction being the monopoly of the State in its judicial capacity. Although there has been resistance to recognize the jurisdictional nature of the arbitrators' actions, there is no denying that the overwhelming majority opinion of today's jurists argues that arbitration is provided with jurisdiction. In fact, arbitrators have jurisdictional power, and this assertion is confirmed especially by the will of the Brazilian lawmaker, which is well represented in the Arbitration Law.

One evidence of the harmony between jurisdiction and arbitration is in Article 18 of the Brazilian Arbitration Law, which provides that the arbitrator is a *de facto* and *de jure* judge, and at the same time waives the ratification of the arbitral award by the Judicial Branch and prevents the filing of an appeal to the arbitral tribunal (unless, of course, there is an agreement of the parties in this regard).

In addition to the unnecessary ratification of the arbitral award - which was a hindrance to the development of arbitration in Brazil before the entry of that law into force - Article 31 of the Arbitration Law holds the effects of the arbitral award to the litigant parties and their successors equivalent to the effects of decisions rendered by the Judicial Branch, and deems it an instrument enforceable in court, which was included in Article 515, item VII, of the Code of Civil Procedure. It should also be noted that arbitrators are given the right to decide on their own jurisdiction (and not competence), with priority and precedence over the State judge (*Kompetenz-kompetenz* principle).

The reading of the provisions of the Arbitration Law shows that the lawmaker attributed to arbitration the nature of the jurisdictional activity, even if carried out by third parties freely chosen by the parties, in a private and more flexible scope than the Judicial Branch.

Objectively, arbitrators have jurisdictional power because their awards on the controversy presented to them through the concrete action of the positive law are binding and definitive upon the litigants, in accordance with the scopes of the process and subject to the constitutional guarantees. The arbitrators' award achieves the same purpose as the judgment by the courts: it is a matter adjudged, an instrument enforceable in court, and issued by a third party alien to the interests at stake in the case. The difference lays in the fact that the court judge is a government employee, who passed the civil service examination, has a permanent jurisdictional duty, while arbitrators selected by the parties in view of an arbitration agreement have jurisdiction only to rule on a given case, and, after the arbitral award is issued, their jurisdiction no longer subsists.

The analysis made herein on the legal nature of arbitration does not sideline the theories developed by jurists on this subject. The argument is that, based on the *functional point of view* - thus examining the judge's role - the arbitrator exercises jurisdiction when settling conflicts by applying the law elected by the parties to the case. It cannot be denied that arbitration has a contractual origin, precisely because it is agreed upon by capable parties through an agreement (arbitration clause or commitment), which seems to us to be a procedural legal transaction. As it happens, the contractual nature has a relationship with the contracting of this out-of-court resolution method and the investiture of the arbitrator, not influencing the arbitrator's performance.

In other words, the evident contractual nature of arbitration is presented in a preliminary stage, prior to commencement of the arbitration, which takes place upon acceptance of the appointment by the arbitrator (or arbitrators). The parties opt for the arbitration by means of a contract, and, consequently, grant the arbitral tribunal the

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necessary jurisdiction to settle a dispute in a definitive and binding manner. The identification of the jurisdictional nature of arbitration arises, so to speak, after the commencement of the arbitration, when the arbitral process starts.

Neither should it be said that the unfeasibility to enforce the arbitral award within the arbitration is an impediment to recognize the jurisdictional feature of the arbitral process. Coercion, which originates by virtue of unilateral power, is not the requisite that defines arbitration, and the possibility of arbitrators to use coercive means to ensure compliance with the arbitral award is irrelevant to define its legal nature. The main factor connecting jurisdiction to arbitration is the arbitrators' power to make legal decisions.

In view of the above and the holding to the principles of supremacy and normative power of the Constitution, it seems correct to state that *arbitration jurisdiction*, reflecting the combination between jurisdiction and arbitration, is subject to the constitutional jurisdiction, and, as a logical consequence, any arbitration that takes place under the aegis of the Brazilian law must respect the current constitutional order.

3. Arbitral process

As in state jurisdiction, the existence of a *process* is also identified in arbitration. State and arbitral proceedings are equivalent, especially after verification that the legal nature of arbitration is jurisdictional. Arbitrators exercise jurisdiction exactly through the procedural method, ensuring the parties with access to justice and the desired relief.

As said, arbitrators are *de facto* and *de jure* judges with powers to apply the legal system and settle the property law conflict submitted to the arbitral tribunal by fully capable parties, to achieve the legal, social, and political scopes of the process.

The arbitral process has phases similar to those of the judicial proceeding, with a significant difference regarding the typical procedural flexibility of arbitration that results from one of its pillars, the autonomy of will, which, in a short summary, allows the parties to modulate the rules of the game according to the peculiarities of the dispute.

The pleading stage in the arbitration is usually developed through submission of the statement of claims, statement of defense, and counter-claim (rebuttal), and, as the case may be, reply and reply in rebuttal. The fact-finding stage comprises the production of all means of evidence allowed in law, especially technical expert evidence and testimony of witnesses at the hearing. The decision stage will rule on the dispute at the arbitral level, ending the role of the arbitrators in the concrete case. Such stages must comply with the principles of adversary process, fair hearing, and due legal process, without which the arbitration may be disputed in state jurisdiction, which has the authority to review arbitral awards in strict cases of error in the process (*error in procedendo*).

In arbitration, the legal-procedural relationship also involves three procedural subjects, as in judicial proceedings: the unbiased third party who will rule on the case (one or more arbitrators, depending on the choice of the parties); the petitioner, who requested the commencement of the arbitration; and the respondent, against whom the claim was addressed. The arbitral process, as an instrument of the arbitrators' jurisdiction, consists of a complex and dynamic legal relationship, whose several coordinated acts are performed by the procedural subjects throughout the arbitration aimed at reaching the arbitral award, which is final and binding on the litigants. There are rights, options, duties, powers, burdens, and obligations that surround the subjects to the arbitral process. In arbitration, the adversary process also takes place through the dialectical contrast between these three subjects to the process, materializing the dynamics of the arbitral process.

As it is a jurisdictional process, there is no doubt that arbitration is subject to the rules of *constitutional procedural law*. Although it is a different system from the State process, arbitration is fully subject to the constitutional order; thus, the provisions contained in the Federal Constitution must always be complied with in the arbitral process, even if not wished by the parties.

The *constitutional model of the process* applicable to arbitration imposes compliance by the subjects to the arbitral process with the constitutional rules, and the arbitrators must resort to the constitutional provisions to form a conclusion and decide, as well as the parties must comply with the constitutional provisions to enter into agreements and set forth the procedural rules of the arbitration. Albeit belonging to a private justice system, detached from the structure of the Judicial Branch, the arbitral tribunal must follow the constitutional rules.

4. Arbitrator's duty to seek a ruling on the constitutionality of laws

Based on previously established assumptions, i.e., as the arbitrators' activity has a jurisdictional nature and arbitration is a process subject to the constitutional rules, there is no doubt that arbitrators not only can but *must* carry out the diffuse control of constitutionality in commercial arbitration.

However, arbitrators are only responsible for the judicial review, by incidental means, being strictly forbidden to exercise abstract judicial review, which, according to the Brazilian legal system, is under the exclusive and sovereign jurisdiction of the Federal Supreme Court, under the circumstances established by the Brazilian Federal Constitution.

The holding of arbitrators equivalent to *de facto* and *de jure* judges endorses this assertion, as similarly to court judges, arbitrators must declare the unconstitutionality of law when they see applicable and pertinent. The arbitrators' powers-duties to settle a certain dispute by applying the law to the case are inexorably linked to constitutional parameters so that there is no loophole for arbitrators to excuse themselves from overlapping constitutional rules on any other when judging a controversy.

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Palm tree sunset,Porto de Galinhas beach Pernambuco | Brazil

The normative power and supremacy of the Federal Constitution are requirements that cannot be removed from the arbitral process and are not at the service of the parties nor the arbitrators, even if arbitration is a private mechanism for settling conflicts. The arbitrators' duty to attune the applicable law with the Constitution comes from a systematic logic of the Brazilian law, which is inescapable to the arbitration players, even if the arbitral process has its idiosyncrasies and an operational system different from the state process.

Recognizing and accepting the arbitrators' authority to review, by incidental means, the constitutionality of laws applicable to arbitration is the interpretation most consistent - and one risks saying that it is the only one, on pain of belittling arbitration - with the constitutional order that prevails in the Brazilian law. If the Federal Constitution is the highest law of the country, and all other laws must obey it unconditionally, otherwise they will be deemed invalid, and even the three Branches in Brazil are subject to the Constitution, there is no credible justification for removing the diffuse control of constitutionality from the arbitrators.

Arbitrators must apply the law elected by the parties and that being the Brazilian law, the Federal Constitution is the ultimate parameter of validity, the major guideline for interpreters, and laws are inevitably interpreted in light of the Constitution. In fact, arbitrators have an obligation to rule out laws that are incompatible with the constitutional rules.

Based on this logic, and to maintain the argument coherent, the arbitrators also have the duty to reject a request for declaration of unconstitutionality when they understand that the law claimed to be unconstitutional is not. In the same way that arbitrators must rule out an unconstitutional law, they must also apply the law that they understand to be constitutional. The diffuse control works for both sides, but there is a greater weight for the declaration of unconstitutionality, mainly because the laws have a presumption of constitutionality, at least under the Brazilian law.

To agree that arbitrators are required to verify constitutionality by incidental means - whether to rule out an unconstitutional law or to apply a constitutional law, by dismissing the allegation of unconstitutionality -, as it is done now, is part of the concept of *plurality of interpreters of the Constitution*, which is imposed in the current stage of Brazilian constitutionalism.

This concept, as known, was conceived by Peter Häberle, for whom the constitutional judge no longer interprets the constitutional process alone, as there are many participants in the process. In this context, the arbitrator is yet another interpreter of the Constitution, with the duty of ensuring and giving concreteness to the normative power and constitutional supremacy.

The arbitral decision that declares the constitutionality or unconstitutionality of law - especially in this second case, taking into account the presumption of constitutionality of the rules referred to above - must be duly grounded, explaining what led the arbitrators to conclude in one way or another. The grounds represent the substance of the rulings comprised in the relief, as José Rogério Cruz e Tucci would say, and, arbitration being a jurisdictional mechanism to settle disputes, the arbitrators cannot leave the grounds of the constitutional issue aside. Otherwise, the judicial ruling would be an activity that would most resemble an unacceptable authoritarian pronouncement.

The duty to provide grounds mentioned herein is set forth in Article 93, item IX, of the 1988 Federal Constitution, as amended by Constitutional Amendment 45/2004, and in Article 26, item II, of the Brazilian Arbitration Law.

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The diffuse control of constitutionality will be exercised by the arbitrators at any time in the course of the arbitration, which could be no different, as unconstitutionality may be alleged at any time in the arbitration. The interpretation of the conformity of laws with the Federal Constitution, precisely because its primary scope is to ensure the predominance and normative power of constitutional rules, is an imperative activity, mandatory for arbitrators, not limited to a specific phase of the arbitral process and not susceptible to preclusion, in addition to being identifiable by their own initiative.

For the sake of effectiveness and efficiency of the arbitral process, it is recommended that the judicial review be carried out, as the case may be, at the time of the award (partial or final), where the priority issue will be settled in the grounds of the decision jointly with all other matters submitted to the arbitrators' examination. In this sense, the decision of unconstitutionality in procedural orders, for example, would be avoided. However, it is accepted that unconstitutionality be declared in emergency arbitrations and in the trial of provisional, precautionary, or urgent reliefs, by the arbitral tribunal or sole arbitrator, depending on the choice of the parties.

It should be made clear that it is not considered possible for the parties to limit, by agreement, the exercise of constitutional jurisdiction by arbitrators. This power-duty is not at the service of the parties for them to agree, even if the autonomy of will is undeniably important for the arbitration doctrine, as it in fact is.

The will of the parties faces insurmountable hindrances in the normative power and supremacy of the Constitution, being unfeasible for the parties, since it is unconstitutional, to establish in the arbitration clause, for example, that the arbitrators will not be able to verify the constitutionality of laws.

The constitutional jurisdiction, from which the power-duty of the arbitrators to interpret and apply the Federal Constitution arises, acts as a legitimate source of limitation of the will of the parties. In this aspect, naturally, the autonomy of the will of the parties yields to the importance of consistency between the laws and the Constitution, avoiding undesirable conflicts between rules of different hierarchy.

5. The duty, *iura novit arbiter* and due process

Another matter of interest to be faced, although not intending to exhaust examination of the matter, which is not our objective, is the unconstitutionality in the arbitral process, which can also be alleged by the arbitrators to the extent that it concerns, as already anticipated, a matter identifiable by their own initiative, waiving the action of the parties in this regard. It is the arbitrators' prerogative to declare unconstitutionality incidentally, without the parties having made such a request.

The cognizance of unconstitutionality by the arbitrators' own initiative does not waive the analysis of the aphorism *iura novit curia*, which advocates, in general terms, that the judge is not bound to the legal grounds attributed to the facts by the parties, to the rule claimed as applicable to the specific case, nor to the *nomen iuris* attributed to the claim, which is irrelevant in practice. The judge is bound by the facts alleged and the requests made by the litigants but is free to give them the legal and judicial features deemed appropriate.

The *iura novit curia* appears in a peculiar way in arbitration, as arbitrators are not bound to their own law, as in the case of judges, but to the law elected by the parties to settle the conflict; not for any other reason that they must issue awards according to what was defined in the arbitration agreement. If the parties establish that the arbitration will be settled according to the rules of the Brazilian legal system, then the *iura novit curia* (*iura novit arbiter,* in the expression created by Gabrielle Kaufmann-Kohler) will apply to the arbitral process.

The *iura novit curia* is followed by arbitrators due to its link to the legal system elected in the arbitration agreement so that knowing and applying the law chosen by the parties is a real burden. It translates into the obligation assumed by the arbitrators towards the parties to issue an award based on the Brazilian legal system, given the parties' legitimate expectation that the arbitral tribunal will render a formal and correct award in the material sense.

Arbitrators shall apply the Brazilian law unreservedly to the specific case when the parties so establish, unless there has been a caveat in this sense in the arbitration agreement, such as the trial by equity. The unrestricted application of the law addressed herein encompasses the diffuse judicial review by the arbitrators.

One of the caveats mentioned above may be the option of the parties to rule out the *iura novit curia*. It is possible, although not recommendable, as it restricts the decision-making power, to prevent arbitrators, in the arbitration agreement, from resorting to *iura novit curia* to issue awards (including partial and final awards) in the course of the arbitral process. If the parties expressly forbid the *iura novit curia*, the arbitrators shall judge the controversy based on the legal and juridical qualification of the facts made by them, respecting the autonomy of the will - even if they understand that the argumentation is wrong - on pain of deciding outside the scope of the arbitration agreement, resulting in a defect subject to nullity.

Even if the parties agree that *iura novit curia* cannot be claimed by the arbitrators as the grounds of the decision, this agreement has no effect on the incidental declaration of unconstitutionality in the arbitration. A mere expression of will cannot rule out the arbitrators' power-duty to interpret and apply the Federal Constitution to the concrete case as this is a corollary to the principles of normative power and supremacy of constitutional rules, which are unwaivable and not subject to settlement in the private sphere.

From another perspective, the parties may set forth that the arbitrators will have the option to resort to *iura novit curia* when applying the law, provided there is room therefore, taking into account the details of each case. If the parties attribute to the facts the legal and/or juridical qualifications

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that the arbitrators deem correct and necessary to settle the conflict, including the allegation of unconstitutionality, to be recognized via diffuse control, there will be no need to discuss *iura novit curia*, so that, in such case, the non-application of this aphorism by the arbitrators cannot be of use as a basis to dispute the arbitral award in the Judicial Branch.

The *iura novit curia* is applicable to arbitration and, in principle, the arbitrators are not restricted to the juridical qualification of the facts attributed by the parties, to the rules they have raised (legal qualification), or even to the name given to the procedural claim. Arbitrators have full freedom to apply the rules of law chosen by the parties, and, without changing the presented facts, say which legal and juridical grounds best fit in a given conflict and even correct flaws in the arguments.

The incidental declaration of unconstitutionality in the arbitration is, on lack of an allegation in this regard, no more than a legal reclassification of the facts brought by the litigants, envisaging the defect of contradiction to the Federal Constitution in a context not foreseen by the parties. For instance, the respondent may say that a certain provision of law mentioned by the claimant to support his arguments should not be applied to the case because the facts are not subsumed in it. Although he did not say that the provision would be inapplicable because it is unconstitutional, nothing prevents arbitrators from reaching this conclusion on their own initiative, legally reclassifying the arguments of the parties.

However, this action by the arbitrators' initiative has limits, and a declaration of unconstitutionality being a surprise to the parties is out of the question. The principle of due process (right to be heard) is a barrier to the arbitrators' decision on their own initiative, even where facing blatant unconstitutionality. This means that the *iura novit curia* does not allow arbitrators to exercise the judicial review on their own initiative, without the parties having the opportunity to make a statement on this argument.

It is essential that arbitration also comply with the principle of prohibition of surprise decision; not because of the automatic incorporation of Articles 9 and 10 of the Brazilian Civil Procedure Code into the arbitral process, but because the principle of the prohibition of a surprise decision is inserted in the very context of arbitration in view of a current and systematic reading thereof with the constitutional text of Article 21, Paragraph 2 of Law n. 9.307/1996, as it is nothing more than an inescapable consequence of the guarantee of adversary process and constitutional model of process.

6. One conclusion

By way of conclusion, the initial idea of this text is reinforced in the sense that it brings elements giving rise to further considerations on *commercial arbitration and judicial review*, which is little explored by the Brazilian jurists' opinion, but undoubtedly of great relevance for the full development of arbitration in Brazil, whose constitutional model allows us to say, without doubt, that arbitrators must exert judicial review when applying the Brazilian law to the arbitration.

Gustavo Favero Vaughn

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View of old lantern and old architecture as background, Bratislava, Slovakia | Gelia

ARBITRATION IN SLOVAKIA – THE ONGOING DRAMA

By Pavol Kuspan

Resolving disputes arising from international trade is usually entrusted to the hands of arbitrators. To write about pros and cons of this system,in comparisonto resolving disputes before national courts, would be an useless waste of digital ink. Except for *ad hoc* arbitrations, conducted mainly under the UNCITRAL Rules, the parties in their arbitration clauses usually opt for one of the arbitralinstitutions to administer the resolution of their dispute.

It is true that in some cases the final agreement about the seat of arbitration and the arbitralinstitution and its rules is made in the proverbial 'midnight clause', but in the majority of cases the agreement is made after closely examining the advantages and disadvantages of particular options. Among the important factors to consider are issues as different as the arbitrability of particular kinds of disputes in the given jurisdiction, the attitude of courts towards arbitration in its seat, or practical issues such as travelling and visa requirements. The parties will also consider issues regarding the arbitral institution, such as its fees, its location– for instance the the *Arbitration* Institute of the Stockholm Chamber of Commerce (*SCC*) is,for historical reasons, still popular with parties from the former communist countries– the intensity of administration of the proceedings, but also particular procedural questions, and so on.

Besides traditional arbitral institutions such as the ICC International Court of Arbitration, the London Court of International Arbitration (LCIA), the Vienna International Arbitral Centre (VIAC), the Hong Kong International Arbitration Centre (HCIAC), the already-mentioned SCC, and others, new names appear on the market for this service, as for instance is the case of the Mauritius International Arbitration Centre (MIAC) or Saudi Center for Commercial Arbitration (SCCA),some of which mayeven sound too exotic for a more conservative user of international arbitration.

So how about Slovakia, a small landlocked country in the heart of Europe which is almost never mentioned in connection with international arbitration, except for the (in)famous *Achmea*investment arbitration case? Could Slovakia also be one of those new arbitration centres and persuade the international arbitration players to change the pristine beaches of Mauritius or hot sands of Saudi Arabiafor the fresh mountain air?

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This article deals with the position of arbitrationin Slovakia, especially after the important amendment to the Arbitration Act adopted in 2014, with the relationshipbetween arbitration and judicial power and with the situation on the market with arbitral institutions.

1. A Painful Journey to Normality (Just a Little Bit of History)

The evolution of arbitration in Slovakia is anything but linear. On the contrary, it oscillates between two extremes, and the equilibrium was finally found only after several trials and errors. In the socialist Czechoslovakia, domestic trade disputes were dealt with in the so-called *state arbitration*[1], which is an oxymoron *par excellence* – the condition to be met for the commencement of arbitration was nothing more than filing the statement of claim, or even a*suasponte* decision of the state arbitration commission; no arbitration clause was needed. Whenthe New York Convention, which changed the arbitration world forever, was adopted, in the then Czechoslovakia, the attitude of communist goverment towards private property and private businesses meant thata strange hybrid was born, having almost nothing in common with a common commercial arbitration. However, international arbitration was used in a limited way to resolve disputes between state-owned companies from different communist countries.[2]

The first self-contained arbitration legislation in Slovakia was adopted in 1996[3], three years after the proclamation of independence of the country, and ~~only~~ seven years after the fall of the communist regime. This Act was subsequently replaced by a new one adopted in 2002[4], where the objective of the legislator was to implement the UNCITRAL Model Law on International Commercial Arbitration. Despite some problems appearing in practice (mainly concerningthe non-arbitrability of some kind of disputes) the Arbitration Act 2002 was a modern legal codex reflecting the evolution and changes in the area of international arbitration. The legislator also showed a very welcoming approach to arbitration and,even though the question of establishment of arbitral institutions is covered only in very few European legal orders, the Slovak legislator decided to do so and to do it in a very liberal way. The goal of this liberalization was obviously to unburden the courts from a load of disputes with a low value that were based on the same legal reasoningsin the claims (for instance unpaid fees for mobile network operators, unpaid micro credits, etc.). Asis often the case, however, the road to hell is paved with good intentions – this almost limitless liberalization led to galloping establishment of arbitral institutions throughout the country (called arbitration courts in Slovak) resulting in a nation of some 5.5 million people having almost 200 (!) such arbitration courts[5], many of which (if not most of which) were created on the direct commission of larger companies,whowere then served by those „courts" in resolving their claims (of course, always in their favour). The result was a freak show of arbitration institutions with their seats not only in the biggest cities, but also in small towns with barely 10.000 people, or even in a village with less than 4.000 people, which is probably the European record, if not the world one.

Arbitration found itself in another extreme position – all disputes were resolved by arbitrators nominated directly by the claimant (through establishment ofits own arbitral institution). Usually a huge number of consumer disputes with very small amounts in dispute were resolved by a small pool of arbitrators, many times totally ignoring consumer protection legislation. It is more than obvious that such proceedings were a far cry from the requirement of independence and impartiality of arbitrators, who were*de facto* employees of the company in whose favour they were deciding, not to speak of other due process requirements. Such functioning of those institutions, many times with splendid names trying to hide their purely commercial reason of existence, resulted in a situation where even those institutions respecting due process requirements and consumer protection legislation were perceived in the same negative way.

This liberal approach became exactly *the* point which made enemies between the courts and those institutions (and arbitration in general). The reason for this was an enormous number of arbitral awards which the courts needed to deal with, either in set aside proceedings or at the enforcement stage. The legislator´s objective – to unburden the courts, was not met;on the contrary, the courts became even more congested with cases.

In its effort to find a solution to this situation, the legislator kept coming with amendements to the Arbitration Act, trying to implement more provisions aiming at consumer protection, which, of course, would have been a fully legitimate goal in consumer arbitration. However, the problem was that courts applied those provisions automatically also for common commercial arbitration between non-consumer parties, which thus lost any attractiveness whatsoever. Commercial arbitration in Slovakia got into a very complicated position and needed not just an essential reform, but a totally new restart.

For this reason the amendment made to the Arbitration Act in 2014[6] was fundamental. It clarified some problematic issues regarding the non-arbitrability of some special kinds of disputes (in favour of their arbitrability), narrowed the pool of subjects which can establish an arbitral institution (narrowed and specified even more with later amendments) and in its provisions it fully reflected the UNCITRAL Model Law. The most important change, however, was the removal of consumer arbitration into a separate act[7], allowing arbitral institutions to administer consumer arbitration only after meeting relatively strict licensing criteria.

Arbitration in Slovakia thus got the opportunity to bounce offthe *de facto* bottom and to be again an attractive option for business people, for resolution of their disputes. However, we must add that thiscould not be, and in realityis not (as we will see), a simple and a quick process – the credibility of arbitration was so low and the aversion of courts so intense that in astudy made in 2014 for European Parliament,the legislation and arbitration practice Slovakia was ranked, together with Latvia, as the worst in whole EU.[8]

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Cumil statue in the Laurinsky street of the Slovak capital Bratislava - Slovakia | Uhland38

2. So Nowadays Everything is Fine? Well ...

Today Slovakia serves the needs of (international) commercial arbitration with a modern legal framework, in full conformity with the UNCITRAL Model Law. However, the attractiveness of a particular jurisdiction for arbitration users is creatednot only by the existence of good laws, but rather by a combination of different factors – their good co-operation is one of the most important considerations of parties when choosing the seat of their arbitration. One of those factors is, of course, the relationship between arbitration and domestic courts. To adopt a high-quality law without the necessary judicial support is simply not enough, and the situation in which Slovakia found itself caught is exactly the classic example of the courts taking an antagonistic, and in some cases outright hostile attitude towards arbitration.

A survey carried out by the Slovak Bar Association, with its results published in the Bar Bulletin issue March 2019[9], indicates that in many cases this attitude (especially towards domestic arbitration) did not change. Despite indications of improvements in some areas, many of the questioned practitioners, many of whom specialize in arbitration, describe the attitude of Slovak courts towards arbitration and arbitral institutions as a negative one.

According to one opinion, general courts often don´t know the principles of arbitration at all, which results in a wrong interpretation of arbitral awards, as well as proceedings leading to the rendition of the award. They also often approach the arbitral award from a superior position, acting as if they were *quasi* appelate body. The courts´ procedures are often wrong; they bring legal uncertainty into the lives of arbitration users, which too burdens the business environment and harms the arbitral institutions without them having blame in this situation.[10]

According to the opinion of another attorney, even if there are some signs of improvement, the relationship between the Slovak courts and arbitration is still perceived as suspicious, and even hostile, save some exceptions. What is positive is the fact that when dealing with recognition and enforcement of foreign arbitral awards, the courts´ practice is more consistent and logical thanwhen dealing with their domestic counterparts. To earn the reputation as a country with not only good arbitration laws but also with predictable and logical court decisions, there is still a long way to go for Slovakia. However, according toanother practitioner´s opinionin recent years there have been changes in this relationship towards a higher predictability and trust.[11]It seems, however, that this opinion is still in the minority.

Obviously, to improve the attitude of domestic courts towards arbitration and to improve the disrepute of arbitration in the eyes of its potential users is a long-termprocess. This is forpractical reasons as well – between signing the arbitration clause and the commencement of arbitration there is usually some stretch of time, and so not even several years from the last arbitration law amendments may be enough to change the climate in this area.

A very important moment with a potential to improve the quality and to harmonize the decision-making process of courts was thereforethe adoption of new civil procedurecodex in 2015, which assigned only three courts for the whole Slovakia to deal with arbitration-related disputes.[12] This law could mean the so-much-needed change in the attitude of domestic courts towards arbitration, as it enables both the courts and the judges

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serving in those courts to specialize in arbitration. Of course, the idea is one thing; the reality takes many times its own course – this specialization can be possible only with the readiness and willingness of the judges themselves to acquire the knowledge and to learn about the realities of (international) commercial arbitration, for instance about the routinely used soft law toolsand concepts unknown in domestic law, or even in the continental legal system, and especially with their willingness to stop looking at arbitration through litigation eyes.

As we can see, the Slovak legislator has for some time been making continuous efforts to bring Slovak arbitration closer to international standards. It is a pity indeed that those efforts have beentorpedoed in a very successful way by the government and through the statements of its officials.

Answering an identical question about the court-arbitration relationship, a high official of the Ministry of Finance, with international arbitration as part of her remit, said this: "From our point of view the legal reasonings (sic) of arbitration courts are not convincing enough. If the existence of arbitration courtsshould be maintained – nowadays there exists a sufficiently developed judical apparatus – it is necessary to lay stress on the quality and qualification of arbitrators. Also, a conflict of interest may be perceived when active attorneys serve as arbitrators."[13] Sometimes not more than three sentences are more than enough to show, in a crystal clear way, an absolute misunderstanding of the principles of (international) arbitration. First, it it not the state´s task (through its court system) to examine the quality of legal reasoning of any arbitral award. Second, the legitimacy of the existence of arbitration and arbitral institutions has nothing to do with the level of development of judicial apparatus.[14] Third, no conflict of interest is created by the mere fact that an attorneywears the double hat and serves as an arbitrator as well.

Even more difficult to comprehend is the subject matter of the press release published by the Ministry of Justice under the threatening title "The Ministry will intervene against the dubious arbitration proceedings"[15] on its official website in early September 2019,informing about an upcoming amendment to the Arbitration Act. In this press release, the Minister of Justice partially quotes the above-mentioned words of the high official of the Ministry of Finance, but sadly it did not stop there.

According to this press release, the upcoming amendment to the Arbitration Act will have as its goal, on one hand, to minimize the interference of courts with the arbitration proceedings, and will therefore exclude courts from the decision making on issues such as nominating the arbitrator, termination of its office and objections to the independence and impartiality of arbitrators.On the other hand, it willintroduce new qualification criterion for a sole arbitrator where only Bar members or notaries public could serve as one; in the case of a tribunal at least one of its members would need to meet this condition.

Even if such amendment hasnot been adopted so far, such motion and its reasoning onthe part of the Ministry of Justice once again reflects the evolution of arbitration in Slovakia, as if its destiny is to move only fom one extreme to the other without being able to maintain its hard-won equilibrium. On one hand, the ministry talks about excluding the courts from intervening with arbitrations *exactly* in the situations where such intervention can be indespensible for the efficiency of the arbitration proceedings; on the other hand, such a a rigid setting of qualification criteria for arbitrators again only mirrors a total misunderstanding of the principles of modern arbitration. Besides the fact that such criterion would effectively ban many highly-qualified professionals (e.g. professors or trade specialists) who are not Bar members from serving as arbitrators,[16] it would allow the same for notaries public, which is an absolutely extreme position. To think that a notary whose tasks and common daily business have nothing to do with arbitration (or even dispute resolution as such) will be a good arbitrator just because he is a notary (and so he needed to meet some conditions to become one) is not only ridiculous, but also dangerous for the quality of arbitration.

In case such excesses from the part of the government officials will continue (be it only in the form of legally non-binding statements and opinions), there will be no way for arbitration in Slovakia to move forward and gain trust, despite having good arbitration laws.

3. Arbitral Institutions. Some Better ones

The realities of arbitral institutions in Slovakiawereportrayed above. Due to its initial liberal approach the legislator had to correct its position and to narrow the pool of subjects which can establish an arbitral institution, now including onlythe Slovak Olympic and Sports Commitee, national sports federations[17]and a bar created by law. The goal of this restrictive approach was to stop the uncontrollable spreading of arbitral institutions of questionable quality, and to keep in existence only a few of the institutions as the guarantors of quality and stability for the users of arbitration. The question is how successful this model will eventually prove to be.

Among the most known arbitral institutions in Slovakia are the Arbitration Court of the Slovak Chamberof Commerce and Industry(Rozhodcovský súd Slovenskej obchodnej a priemyselnej komory, hereinafter as RS SOPK) and the Arbitration Court of the Slovak Bar Association (Rozhodcovský súd Slovenskej advokátskej komory, hereinafter as RS SAK).

RS SOPK is the most traditional of the Slovak arbitral institutions, dealing with disputes coming from both domestic and international trade. In 2019,arbitrators under the administration of this institution were resolving disputes withatotal valueof EUR 1.400.000, of which disputes from international trade made up EUR 530.000 (in its annual report the institution did not provide the number of claims filed).[18]Typical claims were, for instance, unpaid supplied goods, unpaid leasings, etc. Taking into account the total amount of money claimed in all disputes, even lacking their number, itis obvious that the RS SOPK deals mainly with low valuedisputes, including disputes from international trade. There are 70 persons from different jurisdictions on the institution´s list of

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arbitrators, namely attorneys, academics, as well as arbitration specialists – the list of practitioners is thus of high quality and well balanced(however, not when it comes to gender – there are only 10 women on the list). Unfortunately, the procedural rules of the RS SOPK, in spite of being regularly amended[19], contain several problematic provisions, which can make this institution a less attractive option for international arbitration.

First of those provisions are those setting the qualificiation criteria for an arbitrator – he/she must have a legal education, at least 10 years of legal practice and must possess relevant experience for serving as an arbitrator.[20]Besidesthe vague language ofthe last condition, which in reality serves no purpose(buton the contrary, can have a potential to create problems - who is going to decide if the potential arbitrator´s experience is relevant enough and on which criteria?), such general conditions disqualify from serving as arbitrators all specialists with anon-legal background and education. These criteria must be met even in disputes from international trade,and by foreign arbitrators.[21] It must be saidthat such rigid criteria go way beyondthe conditions set in the Arbitraton Act, where only full age, clean criminal record and full legal capacity are needed.[22]

Another rather pointless provision can be foundin Art.4 of the procedural rules, dealing with language of the proceedings. Besides being written in a rather confusing way and using different language for the same situationsin an obviously arbitrary way (arbitral award v. arbitral decision[23], records of the hearings v. records of the oral hearings[24]), it also sets a condition for the records of the oral hearings and for the arbitral decision (but what kind of decison? only of the award? or also of any procedural order?) to be produced also in Slovak. In a proceedings with a language different than Slovak the only result of such condition, in the author´s opinion, is thatof addictional costs.

A significantly bigger problem can be found in Art.10 of the procedural rules, which deals with the Statement of Defense. This provision fixes the defendant´s time limit to file the Statement of Defence to only 10 days, which can be extended upon the defendant´s motion but only for an additional 10 days. Even if such a short time limit maybe enough in the majority of simple disputes, it is fartoo short for any more complex international dispute, and can create a considerable disadvantage for the defendant.

Article 11 of the Rules, on the other hand, allows the defendant to file a counterclaim not only together with his Statement of Defense, but anytime until the beginning of the oral hearings, or in the case of written proceedings only, until the date of the termination of the proceedings. There is no reason to elaborate too much about the dilatory possibilities for the defendant who feels he is about to lose.

A rare condition can be found in Article 15.2 of the Rules, which asks both parties to nominate not only their arbitrators, but also their substitutes. In case the parties fail to nominate both arbitrators and their substitutes during the time limit, all of them will be nominated by the Chair of the RS SOPK.

If nominating substitute arbitrators can be perceived as a rare condition, the conditions for rendering an additional award (Article 32) areeven harder to comprehend. The additional award can be only rendered after another round of mandatory oral hearings (!) with the presence of all the parties.

Such potential pitfalls for the effectiveness of the arbitration proceedings can have for some parties the same effect as a piece of red cloth waved in front of an angry bull. The fact that those risks obviously do not manifest in the proceedings administered by this arbitral institution is likely due to the type of disputes which appear before the institution; in the case of a defendant determined to use all dilatory tactics available,those rules willoffer lots of opportunities. Needless to say, it is a pity, as this institution can not only build on tradition but also disposes of a list of high-quality practicioners many of whom regularly serve as arbitrators in international arbitration.

However, there exists another kind of harsh criticism – according to the words of one practitioner, the functioning of this institution is not transparent, and there is not a properly working ICC committee in Slovakia. This practinioner, on the other hand, considers the reestablishment of the The Arbitration Court of the Slovak Bar Association as a hope that also in Slovakia there can be properly working and credible arbitral institution.[25]

It is precisly this arbitration court, working again since 2016, which is considered also by the author as a hope for such kind of institution in Slovakia, thanks to its modern procedural rules which fully reflect international standards. Another important feature is its emphasis on education of arbitrators through conferences and lectures with international guests, as well as through web seminars about different current issues of international arbitration.

Speaking about the Rules of the RS SAK, they try to avoid all the above-mentioned potential pitfalls of the RS SOPK Rules. As examples, we can mention a standard time limit for filing of the Statement of Defence (with possible extension)[26], filing of the counterclaim together with the Statement of Defense[27] and the possibility to choose as a language of the proceedings not only Slovak and Czech, but also English and German[28], which fully reflects the needs of practice and the realities of international trade. However, the author sees as a drawback, similar to the rules of RS SOPK,therequirement, in case of Court´s or tribunal´s decision, to produce sworn translations of written statements or of submitted evidence into Slovak. If such necessity ever appears during the proceedings,the author sees no reason why common translation would not suffice.

The procedural rules of RS SAK contain additional rules in case of arbitration of corporate disputes. The web page of the RS SAK also offers a model arbitration clause, a model declaration about independence and impartiality of arbitrator, and a model Procedural Order No.1.[29]

Sadly, this institution also decided to set rigid conditions for potential arbitrators to be put on the list of arbitrators – legal education and at least 10 years of legal experience or 5 years of

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experience as an attorney[30]again goes farabove the basic criteria set in the Arbitraton Act. Obviously, the reason for such strict criteria is the effort of the institution to ensure high-quality decision-making, but this can be achieved also by other, less strict means (for instance in the form of award scrutiny as done by the ICC and informally by many other institutions). Also, this arbitration institution decided to set another vague criterion, even more opaque than the one in the rules of RS SOPK: the candidate must possesscertain personal traits for serving as arbitrator. For the question who will decide what those traits are and if a certain set of traitsis or is not enough for a particular candidate, the Statute gives no aswer.

There are 18 persons on the list of arbitrators (out of which three women only); all of them are also members of the Slovak Bar.

Since its renewed activity in 2016 the number of cases administered by this institution grows continuously. Where in 2017,9 cases were filed[31], one year later it was 14 disputes[32] and in 2019 already 24[33], including disputes from international trade. Thanks to its unambiguous and modern rules (except for the above mentioned issues) and due to the fact that the institution cares for the education of its arbitrators and tries to raise the awareness of arbitration in the eyes of business community, itis possible to foresee its positive future growth, which is for both domestic and international arbitration in Slovakia only a good thing.

4. Arbitrating in Slovakia? Sure, Why Yes?

Can thus Slovakia compete with more popular jurisdictions, and can Slovak arbitral institutions compete with their more well-known cousins? From what was said above we can assume the obvious negative answer to the question. However, Slovakia does not have this ambition for now, and due to the the still existening problems having such ambition would be nothing but premature.

After many years of trials and errors when arbitration, due to its specific evolution (and due to its outright misuse by many subjects), was moving from one extreme position to the other, Slovakia posseses now a modern arbitration legal framework, fully in conformity with the UNICTRAL Model Law. Certainly, the existence of such legal framework is the *sine qua non* for arbitration being accepted by the business people as a fully equal (or better) option for dispute resolution, however, the attitude of the courts towards arbitration is of vital importance as well. As we could see, the relation between judiciary and arbitration is still far from being a perfect one and even several years after the last important changes to arbitration legislation it remains controversial. The concentration of arbitration-related court proceedings to only three courts could lead to specialization within those courts and to shift the relationship to the necessary co-operation rather than competition,with the courts fulfilling only their limited specialized tasks and not positioning themselves into paternalistic *quasi* appelate authority, which is surely not the goal contemplated by the law. A healthy relationship between arbitration and judiciary is one of the most important conditions in order to radically improve the trust of merchants in arbitration which, due to the above-mentioned problems, was everything but high.

The re-establishment of the Arbitration Court of the Slovak Bar Association as a modern arbitral centre with procedural rules that avoid potential traps also givessome optimism for arbitration in Slovakia. The regular growth in the number of cases, including international disputes, is a proof of quality of its work and of the trust which it tries to build among potential arbitration users. Surely itis also thanks to the work of the Bar itself, where its members are able to persuade their clients about the advantages of their disputes being resolved in arbitration.

Slovakia is thus not currently, and very probably will not be (at least for the near future), a sought-after jurisdiction for international arbitration. On the other hand, Slovakia is regularly the seat of proceedings administered under the ICC or VIAC Rules. Apotential party to an arbitration need not to worry abouthaving the seat in Slovakia thanks to modern arbitration legislation. For the common disputes out of international commerce, at least the RS SAK can be a quality alternative to bigger and more expensive arbitration centres. A cautious or even suspicious attitude of domestic courts towards arbitrationhas the potential to create some complicated situations, also due to lesserexperience of those courts with international arbitraton. The author believes, however, that with the specialization of the courts this attitude will begin, step by step, to change.Also, some diplomatic tact and good advocacy skills can lower this risk to a minimum. Neverthelss, in order to avoid any unpleasant surprises, it will be necessary to carefully monitor the attitude of government officials towards arbitration, as well as any future changes to the arbitration legislature.

Despite many of the above mentioned negative features the evolution of arbitration in Slovakia can be described, at least for the last several years, as a positive one. Let´s hope that this fragile balance won´t change once again towards any extreme position.

Pavol Kuspan

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2 Zákon č. 98/1963 Zb. o rozhodcovskom konaní v medzinárodnom obchodnom styku a o výkone rozhodcovských rozhodnutí (International Arbitration of International Commerce and Enforcement of Arbitral Awards Act) a Dohovor o riešení občianskoprávnych sporov vznikajúcich zo vztahov hospodárskej a vedecko-technickej spolupráce v rozhodcovskom konaní (Convention of Arbitration Settlement of Civil Disputes Resulting out of Economic and Science-Technical Co-operation, vyhláška MZV č.115/1974 Zb.) with the following contractual parties: Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Romania and USSR
3 Zákon č.218/1996 Z.z o rozhodcovskom konaní (Arbitration Act 1996)
4 Zákon č.244/2002 Z.z. o rozhodcovskom konaní (Arbitration Act 2002)
5 the official web page of The Ministry of Justice registers exactly 199 arbitration courts
6 Zákon č. 336/2014 Z.z, ktorým sa mení a dopíňa zákon č. 244/2002 Z. z. o rozhodcovskom konaní v znení neskorších predpisov a o zmene a doplnení zákona č. 371/2004 Z. z. o sídlach a obvodoch súdov Slovenskej republiky a o zmene zákona č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov, effective as of 1.1.2015
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11 Bulletin of the Slovak Bar Association, March 2019, p. 11
12 § 28 zák. č. 160/2015 Z.z. Civilný sporový poriadok (Act Nr. 160/2015 Z.z. Code of Civil Procedure)
13 Bulletin of the Slovak Bar Association, March 2019, p. 12
14 under this logic there would be no place for arbitration in the majority of European countries
15 Ministerstvo spravodlivosti zakročí proti pochybným rozhodcovským konaniam, www.justice.gov.sk, 2.9.2019, last visit 8.9.2020
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19 last version of the procedural rules is effective as of 1.3.2018
20 Art. 5.2 of the Statute of the RS SOPK
21 Art. 5.3 of the Statute of the RS SOPK
22 § 6.1 of the Arbitration Act 2002
23 rozhodcovský rozsudok v. rozhodcovské rozhodnutie
24 zápisnica o pojednávaní v. zápisnica z ústneho konania
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[BIOGRAPHIES]

The Founders

PEDRO SOUSA UVA

Pedro Sousa Uva is an international dispute resolution lawyer focused in international arbitration and cross-border disputes. Based in Munich, he is Founder of SUA - Sousa Uva Arbitration & Conflict Management, a new law firm dedicated to international dispute resolution.

As to date, Pedro has gathered over 15 years of work experience in Dispute Resolution. He was Of-Counsel at the Lisbon based full service law firm pbbr until July 2020, where he previously headed the arbitration and litigation department of the firm. Before, he handled at Miranda law firm international disputes, often based in former Portuguese colonies in Africa or Asia for almost 5 years. Seconded to the London office of Wilmer Hale in 2009/2010, Pedro worked on international arbitration matters alongside a worldwide team of lawyers. He started his career at Abreu Advogados, where he represented foreign and national clients in court and arbitral proceedings for nearly a decade.

Pedro holds a LL.M degree in Comparative and International Dispute Resolution from the School of International Arbitration (Queen Mary University of London). Before graduating in Law at the Lisbon Law School of the Portuguese Catholic University (2003), he studied as a scholarship student International Arbitration at the Katolieke Universiteit Leuven in Belgium in 2001/2002. Pedro is a regular speaker on arbitration events and hosts conferences, including São Paulo, Vienna and Lisbon. He was one of the invited lecturers for the 7th Post Graduation Course of Arbitration at the University Nova, in Lisbon (2018).

Pedro co-chaired the Sub40 Committee of the Portuguese Association of Arbitration (APA) from 2013 to 2018, being an active member of the Co-Chairs Circle (CCC). He was a member of APA's Ethics Committee. Pedro co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA).

During the last years, Pedro authored several articles on international and national arbitration topics, notably "*International Arbitration Shifting East*", published in Iberian Lawyer in December, 2017, "*Getting the Deal Through - Arbitration 2016*" (co-author, Portugal; 11th Edition), "*World Arbitration Reporter -2nd Edition*" (co-author, Jurisnet 2014), "*Interim Measures in International Arbitration* - Chapter 30 (Portugal)" (co-author, Jurisnet 2014) and "*Portugal finally approves its new arbitration law*" (co-author, Revue de Droit Des Affaires Internationales / International Business Law, no. 3, June 2012). His dissertation was published in the American Review of International Arbitration under the title "A *Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence*".

Pedro has been recently considered a leading individual in Portugal again by *Who's Who Legal (WWL) – Arbitration Future Leaders 2020*.

Pedro has been selected by his peers for inclusion in the 10th Edition of "The Best Lawyers in Portugal" for his work in Arbitration and Mediation, a recognition which he holds since 2015.

*

The idea for YAR was born in London and put into practice by the co-founders Pedro Sousa Uva and Gonçalo Malheiro in January, 2011. It is a pioneer project as it was the first under40 international arbitration review ever made.

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[BIOGRAPHIES]

The Founders

GONÇALO MALHEIRO

Gonçalo Malheiro is an associated partner of Abreu Advogados. He focuses his work on Arbitration and Litigation.

With around 20 years of experience, Gonçalo has a broad expertise in handling arbitration, civil, commercial and criminal litigation. He has represented foreign and national clients before Tribunals and Courts.

He has also handled numerous contract disputes including claims arising out of sales of goods agreements, distribution arrangements, unfair competition matters, banking and insurance, real estate, franchising disputes and corporate matters.

Gonçalo completed his LLM at Queen Mary – University of London (School of International Arbitration) and published his dissertation about interim injunctions in Portuguese Arbitration Law and a compared analysis with different jurisdictions.

Before, he already had attended a Summer Course at Cambridge University.

Between 2012 and 2015 he was Chairman of the Young Member Group of the Chartered Institute of Arbitrators and is currently member of the Chartered Institute of Arbitrators.

Gonçalo attended the 1st Intensive Program for Arbitrators organized by the Portuguese Chamber of Commerce and Industry in April 2015 and is Arbitrator at the Portuguese Chamber of Commerce of São Paulo, Brazil.

He has been a speaker in several national and international conferences focused on arbitration.

Besides publishing in English and Portuguese regarding various arbitration matters, Gonçalo is also Co-Founder of *YAR* - Young Arbitration Review.

Gonçalo also co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA), of which he is a member.

Gonçalo published recently articles about arbitration in Portuguese speaking countries and recently about rules of evidence in arbitration for the book "La prueba en el procedimiento arbitral".

Gonçalo was awarded as the Client Choice Award winner 2020 for litigation in Portuguese jurisdiction.

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Fernanda Nemr is an Associate at Muriel Medici Franco Advogados. She holds a Bachelor's degree in Law from the University of São Paulo - USP. Fernanda is a Founding member and coordinator of the Arbitration Study Group of the University of São Paulo (GARB-USP), as well as a founding member of the Center for Arbitration Research of the University of São Paulo (CEPARB-USP). She is also a Coach of the USP's arbitration teams for the Willem C. Vis Moot and the Brazilian Arbitration Competition.

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Pietro Webber is an Attorney at Judith Martins-Costa Advogados (Brazil), acting as administrative secretary in arbitration proceedings. He holds a Bachelor in Laws at the Federal University of Rio Grande do Sul (Porto Alegre, Brazil), where he also takes part as a coach for the Willem C. Vis Moot and Brazilian Arbitration Moot since 2018. Pietro was the Former President of the Brazilian Association of Arbitration Students – ABEArb.

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Riccardo Torre is a partner at Wald, Antunes, Vita, Longo e Blattner Advogados. He holds a J.D. and a Master of Laws degree in Civil Procedure from the University of São Paulo Law School (USP), where he is currently a Ph.D. candidate. Riccardo has also an LL.M. in International Business Regulation, Litigation and Arbitration from the New York University School of Law (Arthur T. Vanderbilt Scholar). He is director and secretary-general of the Mediation and Arbitration Center of the Portuguese Chamber of Commerce in Brazil, and secretary-general of the Special Commission for Foreign Law Consultants of the Federal Council of the Brazilian Bar Association (OAB). He has authored various articles and commentaries on Arbitration in legal publications in Brazil and abroad.

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Alvaro Horna is currently a Legal Assistant at the Arbitration Practice area of Payet, Rey, Cauvi, Pérez in Lima, Peru. He is a Graduated from Law School of the Pontifical Catholic University of Peru. He is a Teaching Assistant of several courses at the Pontifical Catholic University of Peru and the University of Pacific (Lima, Peru). He was member of the team of the Pontifical Catholic University of Peru that obtained first place in the oral phase of the X International Commercial Arbitration Competition organized by the Carlos III University in Madrid (UC3M) and the United Nations Commission on International Trade Law (UNCITRAL). He was also a member of the team of the Pontifical Catholic University of Peru that participated in the "International Commercial Arbitration Competition - Tenth Edition", organized by the Buenos Aires University and the University of Rosario from Bogota. He is currently coach of the team of the Pontifical Catholic University of Peru who participate in the International Commercial Arbitration Competitions organized by UC3M, UNCITRAL, the Buenos Aires University and the University of Rosario from Bogota.

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She obtained her Bachelor of Laws degree from the Pontifical Catholic University of Paraná, Brazil and holds a graduate degree in Business Law from the São Paulo Law School of Fundação Getulio Vargas.

Isabela is a former president of ABEArb – Brazilian Association of Arbitration Students (2015) and participated in several arbitration moot court competitions, both as an oralist and as a coach of the Pontifical Catholic University of Paraná team.

CRISTINA M. WAGNER MASTROBUONO

Cristina M. W. Mastrobuono FCIArb is a lawyer and arbitrator. She has acted for 27 years as a Legal Counsel for the Government of the State of São Paulo, Brazil, gathering over 15 year of experience in infrastructure, mainly in projects related to public transportation, tool roads, and hospital construction under concession and PPP models. She is a Fellow of the Chartered Institute of Arbitrators, coordinates the Leading Group of Arbitration and Mediation of InfraWomen Brazil – IWB, and is a member of the Arbitration Committee of São Paulo's Bar Association. Cristina is the founding partner of Cristina Mastrobuono Advogados, and as a panel member of CAM-CCBC, CAMARB and CIESP/FIESP, acts as an independent arbitrator in disputes related to commercial and financial issues, often linked to contracts with public entities.She studied law at the University of São Paulo, holds an LLM-Master of Laws from the University of Chicago, visited a program in International Commercial Arbitration at Columbia University NYC and is specialized in Corporate Law from FGV.

VITORIA SUMAN CAMPOS

Vitoria Campos is a lawyer based in São Paulo, graduated by the Federal University of Rio Grande do Sul.

With previous experience in business and corporate law, Vitoria today serves as Assistant Case Manager in the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), the largest arbitration center in Latin America, dealing on a daily basis with arbitrations and mediation procedures.

KRYSTYNA KHRIPKOVA

Krystyna Khripkova is a senior associate at INTEGRITES, Kyiv, focusing on international investment and commercial arbitration and cross-border litigation. She has represented both, states and private clients in institutional and ad hoc arbitrations (including under ICSID, LCIA, ICC, SCC, SCAI (Swiss Rules), GAFTA, ICAC at the UCCI, ICAC at the RF CCI and UNCITRAL rules) seated in common and civil law jurisdictions. Her international arbitration practice spans a wide range of sectors, including financial services, energy and renewables, construction, international trade, and telecommunications. She has acted as counsel in numerous arbitration proceedings and has represented parties in cross-border disputes and setting-aside as well as enforcement proceedings before the Ukrainian courts. In 2015-2017, she worked as a foreign lawyer in the Tier 1 international arbitration practice in London after spending a year in Sweden obtaining her Master's degree in international commercial arbitration law from the Stockholm University.

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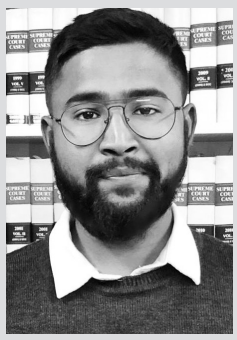
MYKOLA KRYS

Mykola Krys obtained the Master of Laws (LL.M.) from Chicago-Kent College of Law in May 2019, where he pursued courses in international and transnational law. Prior to this, in 2018, he graduated from the Ivan Franko National University of Lviv in Ukraine with the LL.M. degree in alternative dispute resolution.

He began his legal career advising clients on contract and corporate law issues while studying for the master's degree in Ukraine. After obtaining the LL.M. he continued his legal career as a law clerk in the law firm Sverdloff Law Group, P.C. in the USA, consulting in immigration law and immigration legal proceedings.

Currently, Mykola is a member of the International Arbitration and Cross-Border Litigation practice at INTEGRITES, Kyiv.

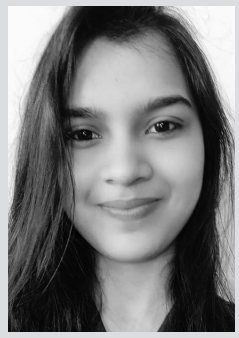


RAJARSHI SINGH

Rajarshi Singh is a final year candidate at National University of Study and Research in Law, India.

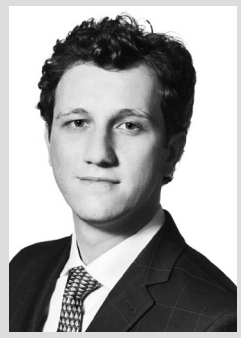
His core areas of interests are international arbitration, public international law, and investment law and policy. Having gathered practical experience in the field of arbitration by interning with top arbitration counsels and firms in India, he intends to craft a career in settlement of commercial disputes. Back home, he works closely with arbitration counsels and assists them in arbitration and court proceedings.

He constantly engages in academic writings on topics pertaining to investment arbitration law and practice and serves as an editor at The Competition and Commercial Law Review.



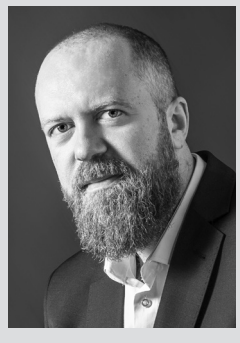
ANAMIKA SINGH

Anamika Singh is a final year student at National University of Study and Research in Law, India. Her areas of interests are corporate law and finance, international arbitration, and general commercial law. She has a keen interest in financial transactions and has pursued training courses at reputed institutions such as the Indian Institute of Management, Bangalore, which is a leading management institute in the country, specialising in corporate finance. She actively pursues academic research and writing in the field of arbitration and corporate law. She is positioned as a Visiting Editor at Bologna Law Review at the University of Bologna, Italy and enjoys writing on a multitude of issues ranging from legal to social issues.



GUSTAVO FAVERO VAUGHN

Gustavo Vaughn, associate lawyer at Cesar Asfor Rocha Advogados, in São Paulo, Brazil. Professor of arbitration at Ibmec-SP. Masters Candidate at the University of São Paulo Law School. Member of the Coordinator Committee of the Mediation, Conciliation and Arbitration Chamber of the São Paulo Section of the Brazilian Bar Association and of the Arbitration Commission of the São Paulo Section of the Brazilian Bar Association. NewGeneration/ CAM-CCBC. ACIArb.



PAVOL KUSPAN

Pavol Kuspan is a lawyer and arbitrator practicing in Slovakia and other jurisdictions for more than 10 years. He regularly serves as arbitrator in domestic arbitrations, as well as in international arbitrations. He speaks English, Slovak and Czech and he can receive written submissions and evidence, without the need for translation, in German, Spanish and Portuguese.

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