Revista Brasileira de
Alternative Dispute Resolution

RBADR

03

Ano II · Número 03
Jan./Jun. 2020

Publicação Semestral
ISSN: 2596-3201

CBMA | CENTRO BRASILEIRO DE MEDIAÇÃO E ARBITRAGEM

FORUM

PPGDIN

Arbitration in Brazil: are users really happy?

Joaquim de Paiva Muniz

Sócio de Trench, Rossi e Watanabe Advogados. Presidente da Comissão de Arbitragem da OAB-RJ. Autor de livros como *Curso Básico de Arbitragem*. Fellow do Chartered Institute of Arbitrators.

Abstract: Since the enactment of the 1996 Arbitration Act, arbitration in Brazil has boomed. The he country currently is one of the main arbitration users worldwide. However, the main arbitration's participant – the client – is not fully pleased. This article discusses the arbitration's upsides, taking into consideration what are the client's main complains. It elaborates on each arbitration's weakness and provides possible solutions to enhance even more the practice of arbitration in Brazil.

Keywords: Arbitration. Brazil. Civil procedure. Project management. Brazilian law.

1 The pains of the success of arbitration in Brazil

Arbitration in Brazil is a history of success. Before the enactment of the Arbitration Act of 1996,[1] there was barely no arbitration in Brazil, mainly due to two reasons. First, the arbitral award was subject to confirmation by judicial courts, which could easily take over a year. Second, the commencement of the arbitration depended on the consent of both parties, even if the parties had entered into a valid arbitration clause. Thus, respondent could under its discretion bar the commencement of the arbitral proceedings – potentially faster and more effective than the judicial one.

The 1996 Arbitration Act removed those hurdles, leaving room for arbitration growth. Furthermore, in 2001 the Brazilian Supreme Court held the constitutionality of the 1996 Arbitration Act and thus recognized parties' commitment to arbitrate.[2] Afterwards, arbitration has boomed in Brazil. According to a research by Professor

[1] Law 9.307, enacted on September 23, 1996.

[2] The tribunal held this decision on the judgment of an appeal for execution of foreigner award (SE 5.206). Available on: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=345889, access on October 31, 2019.

Selma Lemes,[3] one of the authors of the bill that became the 1996 Arbitration Act, from 2010 to 2017 the number of arbitrations has increased 114%, reaching a total value of approximately BRL 87 Billion (Brazilian Reais). As a result, the International Court of Arbitration of the International Chamber of Commerce (ICC), the most renowned international arbitration court, opened an office in Brazil in 2017. In 2018, Brazil was ranked as third on the top countries with parties represented in ICC cases.[4] Some say we are living the golden era of arbitration in Brazil.

The growth of arbitration in this decade has benefited lawyers, arbitrators, arbitral institutions, experts and even third party-funders, which justify the goodwill on this form of dispute resolution. Nonetheless, there is a key stakeholder that is not fully pleased: the client, which is the ultimate user of the arbitral proceeding.

No wonder arbitration has its upsides. First, it tends to be faster than judicial procedures in Brazil.[5] Second, it usually provides better decisions in specialized areas such as construction, M&A as well as regulated areas, like power and oil & gas, as those areas are usually not so familiar for a judge. However, arbitration is not a panacea. There are significant complains on the duration (*infra* 2) and cost of arbitration (*infra* 3), as well as against a trend for arbitrators to "split the baby" (*infra* 4), which sometimes leaves a bad taste on the users' mouth.

Arbitration is a form of conflict resolution provided by private entities *i.e.* arbitrators and arbitral institutions, as opposed to public services such as state courts. Accordingly, the arbitration will only keep the current favorable trend in Brazil if the arbitral community hears the inputs from the users and tackles the issues identified above. The purpose of this article is to analyze some practical actions that arbitrators, counsel and arbitral institutions could implement to render arbitration faster, cheaper and even more reliable.

2 Is arbitration taking too long?

According to the aforementioned study by Professor Selma Lemes, an arbitration in Brazil takes in average from 13.2 to 19.6 months in a domestic

[3] Selma Lemes, Pesquisa 2018. Available on: http://selmalemes.adv.br/artigos/An%C3%A1lise-%20Pesquisa-%20Arbitragens%20Ns.%20e%20Valores-%202010%20a%202017%20-final.pdf, access on October 22, 2019.

[4] International Chamber of Commerce. ICC Arbitration figures reveal new record for awards in 2018. Available on: https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/, access on October 22, 2019.

[5] The average length of arbitration among domestic arbitral institutions rage from 13 to 19 months, which is much less than a judicial lawsuit of medium level of complexity takes to be judged at first level.

arbitration institution,[6] whereas ICC arbitrations take around 24 months[7] and LCIA arbitrations take around 16 months.[8] Therefore, albeit users might feel that arbitral proceedings in Brazil are taking too long, this might not be exactly the case.

In fact, the main issue of time is not the length of the arbitration itself, but the unforeseeability of the next steps. In general Brazilian practice, the terms of reference executed by the parties at the commencement of the arbitration sets forth deadlines of the procedure until the end of the submission phase. However, they usually do not deal with the production of expert evidence or the hearing, not to mention the issuance of the award. In other words, the parties generally do not know at the outset how the expert evidence will be produced, when the hearing will take place and when the award will be issued. This has a significant potential to trigger frustration if the procedure does not go in the direction that a party expected it to. So, at the end of the day, the cause of some complains from users as to the duration of the arbitral proceedings is actually the unpredictability of the procedure.

A possible manner to address this issue is to establish dates for the whole procedure up to the award in the terms of reference and/or in the first procedural order. Brazilian arbitrators tend to avoid doing so because of the culture of the court civil procedure, under which the judge decides on the production of evidence after an initial exchange of submissions. Since arbitration is much faster than civil procedure, for a seasoned court practitioner such an inefficiency might not seem to be a problem. The arbitrators should overcome such mindset for the benefit of efficiency.

The Brazilian arbitrator might be afraid to rule on evidence before been well acquainted with the case. However, the tribunal could address this legitimate concern by asking the parties to give an overview of their respective cases and the defenses in the hearing for discussion of the terms of reference. Such hearing generally have not been much useful and some institutions such as ICC have been replacing them for a conference call. To hold a brief presentation of the case could be a good opportunity to revamp the hearings for signature of terms of reference and avoid opportunistic tactics, such as for the parties to hold a complete description of the case until the last submission.

Some civil law practitioners might say that deciding on evidence just after an oral pleading, before reading the full-fledge statement of claim and statement of defense is risky, because the arbitrators will not be fully aware of the positions of

6 *Cf. Supra* note 2.

7 ICC Dispute Resolution 2018 Statistics, p. 15.

8 LCIA Releases Updated Costs and Duration Analysis. Available on: https://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx, access on October 22, 2019.

the parties. However, the point here is not for the arbitrator to decide in full on the methods for the production of evidence, but rather on the timing.

Pragmatically speaking, there are three main types of evidence production under Brazilian Law: witnesses' testimony, production of documents and expert examination ("*perícia*"). In the vast majority of arbitrations, there are both witnesses' testimony and document production. Therefore, it is not unreasonable to establish the timeline of the proceeding including those steps. Expert witnesses are used in the majority of the cases. Seasoned arbitrators could anticipate, even from an early stage of the proceeding, whether experts will be required, leaving the decision on the exact content thereof for a second moment. For instance, the arbitrators could order the parties to present any expert report together with their respective first full-fledge written submissions or to separate time in the procedural calendar for a court expert examination.

Although it is not an easy task, a full discussion of the procedure at the time of the terms of reference increases the chances of a consensus on the next steps as well as on the production of evidence. On one hand, it will raise the legitimacy of the arbitration and, consequently, the users' satisfaction will increase. On the other hand, postponing the debate on certain procedural issues to a later stage will trigger small battles along the arbitration, which will divert the focus from the merits.

It should be clear that establishing a timeline for the arbitration until the issuance of the award does not mean that the deadlines in the arbitration will be written in stone. Depending on the exact content on the evidence to be produced (e.g. complexity of expert evidence or amount of documents to produce), the deadlines could be reviewed.

The Brazilian arbitration community should concentrate less on the Brazilian Civil Procedure – which does not apply to arbitration – and more on project management lessons. For instance, one of the most popular management tools are the "Lean" principles. Those principles recommend the adoption of a stream of sequential and parallel steps that provide the most value when executed in the right order, at the right time, with the minimum waste.[9] They aim to eliminate redundancies and avoiding wastes such as waiting, unnecessary activities, over planning, micromanagement and excessive reporting.[10]

When the tribunal fails to establish the entire procedure until the issuance of the award at the time of the terms of reference, the door for redundancies is open. For instance, the parties may present expert opinions during the exchange of

[9] Eric Verzuh, The Fast Forward MBA in Project Management, 3rd edition, p. 409.
[10] Eric Verzuh, supra 7, p. 411.

submissions and afterwards ask for a full-fledge expert examination (which usually brings about delays in the procedure). The arbitrators will only be able to set forth the most efficient procedure if they have whole proceedings picture from the start.

Further, to foster celerity, the arbitral institutions could publish data on the average length of arbitral proceedings in which each arbitration sits. The statistics should exclude time spent with arbitrators' challenges and/or suspension for settlement negotiation, which are beyond the arbitrators' control. This could give valuable information for the parties in the selection of arbitrators and raise awareness on the need for efficiency.

The counsel is also responsible for delays of arbitral proceedings when pushes the choice of famous arbitrators who are clearly overwhelmed with work. Users should make sure that they do not select arbitrators just because of excellent reputation, but should also consider their availability.

Summing up the foregoing, in my view the issue with duration of arbitrations in Brazil is not the timing itself, but the absence of a foreseeable timeline for the final decision, which triggers frustration. The tribunal should be more proactive to understand the issues at stake from the outset to define as soon as possible the arbitral procedure. The arbitrators should depart from the court civil procedure culture and embrace a more business-oriented approach, in light of project management principles.

3 Is arbitration too expensive?

At first look, arbitration is more expensive than court litigation. For instance, in the State of Rio de Janeiro, for an ordinary civil procedure, there is a cap of BRL 39.089,15 (approximately USD 10,000) of initial fees. This amount includes the administration fee, duties and judiciary fee.[11] Moreover, according to the National Council of Justice, in 2018 33% of the concluded cases were exempted from legal fees.[12] This lies on different grounds, like low income of the plaintiff, subject matter (*e.g.* consumer litigation) or other reason.

However, one should consider that, according to the Brazilian Code of Civil Procedure, the loser should pay to the counsel for the winning party a compensation, equivalent to between 10% and 20% of the economic benefit arising from the decision (the so-called "*sucumbência*").[13] Adding the *sucumbência* to the

[11] Other fees might be added to this value. *Cf.* Tabela de custas TJRJ. Available on: http://cgj.tjrj.jus.br/documents/1017893/6081255/novas-custas-2019.pdf, access on October 22, 2019.

[12] Conselho Nacional de Justiça. Justiça em números. Available on: https://www.cnj.jus.br/wp-content/uploads/conteudo/arquivo/2018/08/44b7368ec6f888b383f6c3de40c32167.pdf, access on October 22, 2019.

[13] Art. 85 *et seq.* of Brazilian Civil Code of Procedure.

mentioned initial fees, in medium and high value cases the court civil procedure might end up more expensive than arbitration. Accordingly, one should distinguish the medium and low value litigation from the high value litigation.

On *high value litigation*, the issue of the cost of arbitration in Brazil is more a matter of timing and liquidity, because the parties must pay the fees in the beginning of the arbitration and, in principle, no *sucumbência* applies. Art. 27 of the Brazilian Arbitration Act grants discretion regarding decision on this subject, so Brazilian arbitrators are likely to abide by the international standard of "costs follow the event", according to which losers shall reimburse the winning the parties of the expenses incurred.

The parties have been tackling the cost issue through a market solution: third party funding, which is also booming in Brazil. This tool should be welcome, since it enables further access to an efficient dispute resolution mechanism, despite the need of some regulation on matters *e.g.* to avoid conflict of interest.

One might mitigate the feeling that high value arbitration is expensive if compensation of the arbitrators are somehow linked to their timing performance. For example, the arbitral rules could contemplate an increase in the fees if arbitrators decide faster than the average of the court. Likewise, a decrease in case of delay can also be an effective approach.[14]

There is a discussion whether "*sucumbência*" should be applied in arbitral proceedings.[15] Some Brazilian authors state that arbitrators might include the payment of "*sucumbência*" in domestic arbitration.[16] In my view, "*sucumbência*" is not the best idea, since it will significantly increase the costs of high value arbitrations. It would rather be more efficient to set forth some "soft law" guidelines on to decide the amount of reimbursement in case of multiple claims with different results. The arbitrators could also establish some limits to the amount of reimbursement of attorney's fees at the time of the terms of reference, to avoid a "race to the bottom" on legal expenses.

[14] For instance, the ICC reduces fees if an arbitrator fails to draft an award within three months of the last substantive hearing. The greater the delay, the grater the reduction. *Cf.* https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/, access on October 22, 2019.

[15] Please see, against "sucumbência" in arbitration, José Roberto Neves. Os honorários advocatícios de sucumbência na arbitragem. *In:* Carmona, Lemes e Martins. 20 anos da Lei de Arbitragem. Atlas, 2017, p. 639 - 649.

[16] Carlos Alberto Carmona. Arbitragem e processo, 3ª ed., São Paulo, Atlas, 2009, p. 374; Ricardo de Carvalho Aprigliano. Alocação de custas e despesas e a condenação em honorários advocatícios sucumbenciais na arbitragem. *In:* Carmona, Lemes e Martins. 20 anos da Lei de Arbitragem. Atlas, 2017, p. 676.

As to the *medium and low value litigation*, it is relevant to keep the fees on reasonable levels. Both international institutions such as ICC[17] and domestic ones such as the Brazilian Center of Mediation and Arbitration (CBMA)[18] have established a lower scale of fees for cases whose value at stake is below a certain threshold. And the future competition from online dispute resolution systems might drive the costs further down.[19]

The users also have some responsibility to avoid arbitrations disproportionally expensive vis-à-vis the amount at stake. Arbitration is a creature of the contract. If the parties choose, in a low or medium value contract, a fancy arbitral institution and three arbitrators, they contributed to the cost issue. Some education is required to allow drafters of arbitration clauses to put together a dispute resolution mechanism more customized to the financial capacity of the parties.

4 Are arbitrators "splitting the baby"?

The users' feeling that arbitrators often "split the baby" is difficult to technically confirm, given the subjectivity of such a statement. This feeling is influenced by the fact that the parties usually appoint at least one of the arbitrators each.

Certain authors point out the potential contradiction between, on one hand, the arbitrators' independence and impartiality and, on the other hand, the fact that they are appointed by the parties. For this reason, Jan Paulsson, in his famous lecture on "Moral Harzard in International Arbitration", sustained that the arbitrators should preferably be appointed otherwise, such as by the arbitral institutions. I do not share this perception, since one of the upsides of arbitration is exactly the power granted to the parties to interfere in the selection of the most suitable decision-maker. The parties are the ones most knowledgeable of the dispute and most able to identify the fittest individuals for the role. Moreover, it could be risky to grant too much power to the arbitral institutions.

One should bear in mind the practical effects of the fact that each side frequently appoints one out of the three arbitrators. If the case deals with a controversial issue as to which there are majority and minority positions, it is natural that each side tends to appoint someone aligned with the position most beneficial to it, thereby increasing the "split the baby feeling". The solution should come from a proper procedure for appointment of the chair, who should be someone attentive

[17] Article 30 and Appendix VI of the ICC Arbitration Rules 2017. The expedited procedure rules apply for disputes up to USD 2 million.

[18] CBMA. Procedimento para Arbitragem Expedita. Available on: http://www.cbma.com.br/procedimento_arbitragem_expedita, access on October 22, 2019.

[19] *Cf. e.g.* https://www.arbresolutions.com/fees-/, access on October 22, 2019.

to the applicable case law. A good practice is the presentation of lists of potential chairs, granting to the parties the power to veto some names.

In my view, the main issue is not the method for selection, but rather the arbitrators' poor accountability. Since arbitral proceeding are usually confidential, few people become aware when the arbitrators somehow underperforms and/or renders a poor decision and/or goes against the applicable case law. A remedy would be to publish arbitral awards with the names of the arbitrators, albeit redacting the name of the parties as well as particulars that could lead to identification of the case. Sunlight is the best of disinfectants. If the arbitrators' decision are subject to public scrutiny, there will be less room for compromise, once it will adversely affect the professional's reputation as any contradiction with past behavior could be identified.

Another probable cause of the "split the baby feeling" is the fact that arbitrators sometimes are too lenient to the parties' requests to present further evidence or submissions. This is a side effect of the "due process paranoia", according to which the arbitrators might take a flexible approach on the procedure to avoid the risk of future allegations that the party did not have the chance to fully present its case and/or to defend itself. However, such flexible approach might leave the impression of weakness to the parties. In light of the Brazilian litigation culture, the losing party might challenge the result regardless of how flexible the arbitrators are. The arbitrators should not be afraid and should feel free to adopt a harder line in the conduct of the arbitral proceeding.

5 Is arbitration on the edge of a crisis?

Although arbitration is not the panacea that some people of the arbitral community try to sell, there is no crisis in the near horizon either. Arbitration is suffering growing pains. The significant increase in the number of cases slows down the procedures, makes the arbitrators and institutions less attentive to the users' price concerns and relaxes the scrutiny on the tribunals. Nevertheless, none of those issues is irremediable.

It is time to prepare for the next years of the arbitration wave, to keep the current goodwill and avoid that some users' negative experience become a resistance to the arbitration. In this sense, arbitrators should fix detailed timelines at the outset of arbitrations and should avoid delays. Arbitral institutions should work on cheaper procedures. The arbitral awards should be subject to publicity, so that the public could become aware of the arbitrators' quality of work. The tribunal should pay less attention to the "due process paranoia." Those are small steps that could bring about huge effects on the legitimacy of arbitration, which lies on just one pillar: the trust of the parties.

Bibliography

Arbitration Resolution Services, Inc. Available on: https://www.arbresolutions.com/fees-/, access on October 22, 2019.

BRASIL, Supremo Tribunal Federal, Case n. SE 5.206. Judged on the 12th September 2001. Available on: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=345889, access on October 31, 2019.

Conselho Nacional de Justiça. Justiça em números. Available on: https://www.cnj.jus.br/wp-content/uploads/conteudo/arquivo/2018/08/44b7368ec6f888b383f6c3de40c32167.pdf, access on October 22, 2019.

Eric Verzuh, The Fast Forward MBA in Project Management, 3rd edition, p. 409.

International Chamber of Commerce. ICC Arbitration figures reveal new record for awards in 2018. Available on: https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/, access on October 22, 2019.

International Chamber of Commerce. ICC Cout announces new policies to foster transparency and to ensure greater efficiency. https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/, access on October 22, 2019.

International Chamber of Commerce. ICC Dispute Resolution 2018 Statistics, p. 15.

Selma Lemes, Pesquisa 2018. Available on: http://selmalemes.adv.br/artigos/An%C3%A1lise-%20Pesquisa-%20Arbitragens%20Ns.%20e%20Valores-%202010%20a%202017%20-final.pdf, access on October 22, 2019.

The London Court of International Arbitration. LCIA Releases Updated Costs and Duration Analysis. Available on: https://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx, access on October 22, 2019.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

MUNIZ, Joaquim de Paiva. Arbitration in Brazil: are users really happy?. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 02, n. 03, p. 251-259, jan./jun. 2020.