Dealing with Arbitration and Infrastructure in Brazil

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Abstract: Keynote speech given at the event *Arbitration and Infrastructure*, organized by DCA – Dias Carneiro Advogados and Akin Gump Strauss Hauer & Feld LLP. First, it addresses the specific difficulties on establishing causation on claims relating to infrastructure projects. It then moves on to some good practices to be considered by arbitrators and counsel when acting in this type of dispute. Finally, it briefly touches upon the interaction between public entities and infrastructure arbitration.

Resumo: Palestra de abertura do evento *Arbitragem e Infraestrutura*, organizado por DCA – Dias Carneiro Advogados e Akin Gump Strauss Hauer & Feld LLP. Primeiramente, trata das dificuldades específicas em estabelecer causalidade em pleitos relacionados a projetos de infraestrutura. Na sequência, elenca algumas boas práticas para árbitros e advogados atuando nesse tipo de disputa. Finalmente, toca brevemente na interação entre a Administração Pública e as arbitragens de infraestrutura.

Keywords: Arbitration, Infrastructure, Causation, Good Practices, Public Administration

Palavras-chave: Arbitragem, Infraestrutura, Causalidade, Boas Práticas, Administração Pública

I would like to address two topics that I find relevant on infrastructure arbitration proceedings, being the first a little bit more theoretical and the other one more practical. And, to conclude, also address a few points regarding the increasing link between public entities and infrastructure arbitration.

To start, I should say that infrastructure disputes are one of the most complex and time consuming arbitration due to the variety of claims that – not rarely – entails multiple proceedings within a single arbitration.

The volume of documents, evidence and expert reports marshalled by the parties is huge, which demands from the parties, counsel and arbitrators a lot of effort and availability to deal with such enormous workload.

Infrastructure arbitration proceedings begin by properly identifying the facts and causes of each individual claim and by framing them under the contractual provisions and the rules of civil liability.

Difficulties begin already on the contractual level. As they are typically long-term, infrastructure contracts are bound to be incomplete, to some extent.

In other words, it is not possible nor expected that these contracts will provide for every single situation or circumstance that may arise throughout its execution. There will always be gaps and flaws; moreover, duties, obligations and rights are not usually clearly set out.

On the other hand, infrastructure projects are usually integrated, being several companies involved – contracting parties and subcontractors from different specialties, such as civil engineering, electrical-mechanical assembly, and sometimes activities relating to geology and environmental impact – all working on the same site, with activities more often than not dependent on one another.

This means that one contractor activities often depend not only on its own proper execution of the contract, but also on other companies fulfilling adequately and on due time their respective activities. And frequently those companies have no contractual relationship at all.

If that was not enough, it is not rare for the contractual provisions to be overlooked and not complied with, due to the on-site proper dynamics. Day-to-day execution of the contract brings practices and conducts that ultimately contradict the blackletter of the contract.

Often the actors on site – engineers, workers, managers, etc. – fill gaps or modify previously established contractual rules through their day-to-day course of actions and behaviors, with knowledge and no objection by the parties involved.

This may lead to the tacit modification of the contract, a further circumstance to be considered and dealt with by counsel and arbitrators.

In addition, it is quite common for contractual milestones' deadlines to be unable to accommodate supervening facts, given the haste with which the contracting party wants to conclude the project.

Those circumstances then require an efficient plan of attack and the careful, rigid and speedy coordination by the contracting party, or by its project manager, so that all parties develop their respective activities on due time.

In other words, the delay of a single activity may impact the work of several companies, which commonly happens in this kind of project.

And here sits one defining characteristic of the implementation of infrastructure projects: the project requires several participants to fulfill their duties of cooperation, information and protection.

What stands out from all infrastructure arbitration is that delays are frequent, and not dealt with adequately. In addition, the duties of cooperation and protection are not always accomplished.

The technical doubts, the disconcert between the activities, among other circumstances, are not solved in adequate time, leading to the dissatisfaction of both contracting parties and to an arbitration where Claimant and Respondent bring forth a multitude of claims and counterclaims.

As I mentioned from the outset, it is not uncommon for infrastructure arbitration to be a collection into a single proceeding of several small arbitrations, each with its own distinct facts and legal basis, and each

claim coming from a different contractual breach and having different consequences.

At this moment starts the arbitrator's distress – or rather the arbitrator's headache – to establish who has and who has not fulfilled the agreement and how should the contractual clauses be interpreted and the indemnification be allocated and liquidated.

This feeling is increased due to the characteristics of infrastructure arbitration for a major project, including all that said above: multiple tasks performed by multiple parties, coordination mistakes, interdependency of activities, and lack of cooperation.

This leads most of times to the impossibility of attributing the cause of the damage to a single party. Often there is concurrent causation, where more than one cause triggers the damage.

And here is one of the dilemmas that must be faced by counsel and arbitrators.

In order to deal with this issue, the first step is to analyze the causal link between a chain of events and a damage and, having demonstrated the existence of damage and causal link, to verify whether it results from an act or omission of a single company, or of other companies altogether.

This verification is needed as, under Brazilian law, the defaulting party is responsible *for all damage*, but only for the *damage caused by it*.

Hence the difficulty that arbitrators face in infrastructure arbitration is due to uncertainties in the imputation of responsibility arising from the possibility that several causes lead to a single damage.

In other words, when two or more companies cause a damage, but by separate and independent acts.

It is relevant to highlight that, in such cases, the difficulty of the analysis – due to its *ex post* nature – lead scholars and case law to consider reasonable that determination of responsibility for the damage occurred on the basis of a high probability criteria.

I mean, the absolute certainty that the events "x", "y" and "z" caused the damage is not required, but rather that there is a *high degree of probability*.

Another particularity in pinpointing the person that caused the damage is the need to verify within the chain of interdependent causes whether a company had the best opportunity to avoid the damage, and failed to do so[1].

This is another criteria to investigate responsibility and, as far as I know, it differs from the one adopted at the United States, called the *last clear chance* doctrine.

However, verifying who had the best opportunity to avoid the damage has proven rather difficult, due to the common fact that the multiplicity of causes, acts and facts often makes this analysis impossible.

Other data to consider when verifying who effectively caused the damage is to verify if the second fact or event is totally independent from the first, to the point of breaking the causal link.

Aside from that, there may be situations on which there is a single cause but the creditor itself contributed to the extension of the damage. This is the so-called concurrent responsibility.

It should also be verified the creditor's own actions on mitigating the damages, which is another important element to reduce indemnification.

All these nuance are important and must be considered by the arbitrator when deciding on who caused the damage.

Hence, attributing responsibility to one or more causer of the damage is very sensitive, and the allocation of the percentage of responsibility on the chain of events – concurrent causation – finds its limits on the rule that prohibits unjust enrichment.

Being so, counsel should take into consideration as a procedural strategy to convince the client to accept part of the responsibility – which in a lot of cases it has –, in order to advance to the arbitral tribunal how should the concurrent causation be interpreted. However, on my experience, and unfortunately, this has been proved mere wishful thinking, because, as a matter of fact, "the counterpart is always one hundred percent mistaken".

Now, moving to the second topic, some words are needed on the role that Arbitrators and Attorneys can play in arbitration.

So, starting with the Arbitrator's contributions to an effective arbitration, the first parameter that comes to mind is availability, which, apart from confidentiality and specialty, is traditionally considered one of the main advantages of arbitration.

But how can we measure the degree of availability? A common method is to take into account the number of arbitrations the Arbitrator is currently involved in.

However, in my opinion, this is not necessarily the best or most suitable measurement.

What I mean is that one may have only 2 or 3 arbitration proceedings, and a lot of room on its agenda, but frequently has no time to answer e-mails, to review procedural orders, etc.

It may also happen that despite seating in only a couple of arbitral tribunals the additional areas of work of the Arbitrators (*v.g.* M&A, Court litigation, teaching, producing academic works) does not leave much time for them to devote the attention required by the arbitration proceeding.

Therefore, although the element of availability is of utmost importance, it is generally difficult to be quantified beforehand, as the availability mostly depends on the Arbitrator's dynamism and, let's say, work style.

It should be pointed out that Arbitrators need to be very objective and pragmatic on conducting the proceeding, since it demands, in a variety of circumstances, practicality and common sense.

On the other hand, to seat in an arbitral tribunal requires a certain level of open-mindedness. Each case is

different and the solution to every new problem may require thorough reanalysis of the Arbitrator's handbook.

In this sense, previous understandings and points of view need to be loosened in order to cope with the dispute at hand.

The knowledge of the applicable arbitration law is also important because it – at the very least – facilitates the conduct of the procedure and helps to avoid surprises, as, for instance, utter and blind devotion to the rules of the Code of Civil Procedure.

Based on my experience, arbitration proceedings are significantly more fluent where Arbitrators and Lawyers know the arbitration rules and are willing to accept the dynamics of the arbitral procedure.

Likewise, common sense and cooperation facilitates the quality and agility of the decisions and improve the level of the debate among arbitrators.

The Arbitrator also needs to bear in mind that a dissenting opinion is not to be perceived as an affront, or even a rebellion. Rather, it has to be deemed as no more than a different consideration or understanding on the same subject. Hence, no one should be upset or feel insulted if his opinion does not prevail.

Arbitrators should also adopt an attitude that is suitable to ensure a steady and safe conduct of the proceedings.

Where necessary, Arbitrators should even apply penalty for bad faith litigation. Although trivialized, on the one hand, and nothing or very little applied on the other, in my understanding, the Arbitrators should not be afraid to make use of this legal tool.

Arbitrators should also attempt to point out to the Parties which are the crucial topics that require further clarification. However, in most cases, this is best addressed after the hearing.

Usually, only at this point of the proceedings Arbitrators, Lawyers and Parties are at the same level of knowledge. I mean, everybody has the very same picture of the dispute at hand. They are all symmetric on their level of understanding.

Moving to Lawyers, what is their contribution to an effective arbitration?

First, the Lawyer must act with a collaborative spirit. The procedural timetable is a classic example. Frequently, one can observe hours of discussion over two-day extra or fewer days on a deadline. It makes no sense at all!

On the other hand, problems may also arise where the Parties seek to establish deadlines for the gathering of documents and technical and legal opinions. Parties – at least in our domestic arbitrations – seem to believe that deadlines were established not to be met.

If it is likely that the Parties will not meet the deadline, it is better simply not to fix it.

Establishing a date while not adhering to it is much more detrimental, as it causes incidents, delays and end up increasing litigiousness between the Parties.

On the topic, it may be interesting to set aside a few days for the hearing (case presentation or deposition) at the time of signature of the Terms of Reference, in order for everyone to better organize their future schedule.

However, whenever doing so, the proceeding timeframe must be met despite any potential incident in the course of the proceeding. Cooperation between Lawyers and good faith attitudes are welcome.

Lawyers should avoid petitioning in response to any simple request by the opposing Party. If it deems necessary, it should first approach the Arbitral Tribunal and ask for permission, even by e-mail. And, commonly, the permission is granted.

Otherwise, it is not unlikely that the constant exchange of petitions will unduly delay the drafting and approval of the Procedural Order and, hence, delay the whole proceeding.

Lawyers should also be proactive and try to solve small issues directly between themselves, be it a document that will not readily open in the system, a document attached in a wrong format, or the need to extend a deadline. Cooperation will help to save time and to develop a good relationship amongst Lawyers and, hence, the Parties.

Politeness is a virtue that plays a positive role to the benefit of Lawyers. Aggressive language and a variety of adjectives should be avoided, for the sake of the arbitration proceeding.

I have seen impolite petitions that have zero chance to improve the Party’s position, but merely lead to an unpleasant reading.

In fact, the memoranda that provide for the most pleasurable readings are those that come straight to the point and that avoid adjectives and unnecessary wording.

Moreover, discourtesy and a rude attitude can undermine potential negotiations to amicably solve the dispute, as it intensifies the tensions between the Parties.

The same happens where the statements’ words are too aggressive given that nowadays the Parties are more present working side by side with the Lawyers, reading the petitions and providing comments and suggestions.

Lawyers can also contribute a lot with concise, objective, non-repetitive and well-structured petitions, which indicate the supporting documents, for the sake of focus and clear understanding.

A very lengthy statement usually implies the repetition of arguments, which, at the end of the day, distract and overwhelm the Arbitrators.

In order to act in arbitration, Lawyers must be fond of it or at the very least not have a negative attitude towards it.

In other words, if counsel hates arbitration and loves judicial litigation, it is predictable that when working in an arbitration proceeding the course of it will be rather rough than smooth.

Manners are also reflected in the way by which a Lawyer challenges an Arbitrator. While it is a Party's procedural right, I have seen that it is most appropriate when addressed with elegance, moderation and education, even because – polite or impolite – the outcome is the very same.

With regard to technical opinions, especially in the area of engineering, counsel should put themselves in the position of the Arbitrator and try to make it as readable and understandable as possible.

For that purpose, conciseness and objectiveness is also relevant.

In this sense, Attorneys should review paragraph by paragraph the technical report and suggest changes and, whenever appropriate, deletion of unnecessary information, to turn it didactic to non-technical readers, as the Arbitrators.

This review is also important for the Attorney itself, as it will help it truly understand the crux of the technical problems and to formulate adequate and straightforward questions at the hearing.

Speaking of hearings, Lawyers must be well prepared for it, most likely the utmost important phase of the arbitral proceeding.

For that purpose, it is welcome to establish a clear and straightforward strategy, be acquainted with the documents marshalled by the Parties and list what the relevant questions are to be addressed in the cross examination.

And, please, ask only what is strictly necessary! Avoid the temptation to go ahead questioning the witness who is clearly, firmly and convincingly answering the questions to the detriment of your client.

Focusing the opening statements on the key factual, legal and contractual issues is another objective to be accomplished by Lawyers.

In my experience, opening statements are very effective, because, within the time allocated for the presentation, Lawyers can summarize the hundreds and hundreds of pages of written statements in what it is really key and relevant.

These will grant efficiency to the case and shall lead the arbitral tribunal's attention to what Lawyers' contentions are strong in the whole dispute.

Request for clarifications are a plague of arbitration in Brazil. Any and all awards issued are challenged despite the lack of fulfilment of the legal requisite thereto.

Lawyers have this common – and undue – practice. One needs to understand that arbitration offers no recourse. It is a silver bullet!

The last topic I would like to briefly touch upon is the potential for increase in the use of arbitration for

infrastructure projects due to the development of legislation in Brazil.

As known, major infrastructure projects often involve the participation of public entities, especially here in Brazil.

Since 1996, the Brazilian Arbitration Law allowed for arbitration in such disputes, as its first Article is quite broad.

The 2004 Public-Private Partnership Law (PPP) came to confirm this possibility (Art. 11, III).

However, public agents remained fearful that including an arbitration clause into their contracts could lead to some kind of personal responsibility before Federal or State Audit Courts or Public Prosecutors.

Hence, on 2011, the State of Minas Gerais enacted law specifically to regulate arbitration involving the State itself and its entities.

On 2015, Federal Law nº 13.129 amended the Brazilian Arbitration Law in order to specifically mention that direct and indirect public administration could make use of arbitration, and to clarify who could sign such clauses, helping alleviate any fear from its agents.

Since then, the Federal Government also enacted a Decree allowing for arbitration in disputes relating to port activity (2015), and important arbitral institutions (CAM-CCBC, CAMARB) regulated how to conduct proceedings involving the public administration.

Earlier this year, the State of Rio de Janeiro enacted Decree nº 46.245, also addressing the particularities of arbitration involving its public entities.

I should mention that all those regulations impose some particularities to arbitration involving the public administration, such as establishing the language to Portuguese, having Brazil as the seat of arbitration, and imposing specific requirements on arbitral institutions.

Those may seem very restrictive requirements. However, it is the most we can achieve for the moment in order to bring the public administration to arbitration.

In such very sensitive area, we can say that “better” is the enemy of “good”.

Hence, despite some restrictions and flaws, this should not discourage the private sector to engage in arbitration with State entities.

In any event, together with several initiatives by public attorneys to ready themselves for arbitration, this goes to show the increasing will of the State to be an actor in arbitrations.

At the end of the day, this may lead the State to ease the restrictions while public entities become acquainted with this still very strange animal called arbitration.

And this most certainly will positively affect infrastructure arbitration, considering the public entities as

the major actors behind infrastructure projects in our country.

To give an example of the fast growth of arbitration in Brazil, between 2005 and 2016, the amounts in dispute at domestic arbitrations multiplied 98 times (or 9.700% in twelve years), going from US$85 million to nearly R$8,5 billion[2].

These figures show the amazing role arbitration has played since the enactment of the Brazilian Arbitration Law.

1. This is not the North-American criteria of the *Last Clear Chance*, but rather the verification of who had the best opportunity to avoid the damage and stood still. ?
2. LEMES, Selma. *Arbitragem em Números*. Available at http://selmalemes.adv.br. ?