CIArb Guidelines on jurisdictional challenges: a practical perspective and its relevance for Brazilian domestic arbitrations

Christian Carbajal Valenzuela, FCIArb[1]

Izabela Moriggi Costa[2]

Created in London in 1915, the Chartered Institute of Arbitrators (CIArb) is an international centre for the practice and profession of alternative dispute resolution (ADR).[3] Based across 149 countries, supported by an international network of 42 branches and with over 17,000 members, it provides education and training for arbitrators, mediators and adjudicators worldwide. Since middle-2019, Brazil has its own branch promoting the debates of ADR also in a cross-cultural and national-basis, supporting the development of international arbitration and assisting with CIArb activities in other countries of South America.

The CIArb has a series of guidelines related to arbitration, which serve to promote harmony and uniformity in the practice of these proceedings. Overall, there are 13 guidelines, which deal with several subjects and provide valuable guidance to the players of arbitration.[4] Although not mandatory, they provide useful and refined

[1] Lawyer graduated from Pontifical Catholic University of Peru, with a Master's degree in International Economic Law from the University of Warwick – England, specialized in International Law, International Arbitration and Protection of Foreign Investment. Fellow of the Chartered Institute of Arbitrators, Brazil branch. Partner of Arbitration & ADRs of the firm Wöss & Partners S.C., based in Mexico and Washington DC and of the firm Braz Campos Advogados, with offices in São Paulo and Curitiba, Brazil. Director of Arbitration of the Chamber of Arbitration and Mediation of Santa Catarina, south of Brazil (CAMESC). Former Secretary-General of the International Arbitration Center of the Lima Chamber of Commerce (CCL), Peru. President of the Committee on Public and Private International Law of the Inter-American Bar Association (IABA), Washington DC.

[2] Lawyer graduated from Federal University of Paraná, Brazil. Associate at Justen, Pereira, Oliveira & Talamini, in São Paulo, Brazil, working within Arbitration, Mediation, Infrastructure and Regulatory law. Member of the Chartered Institute of Arbitrators (CIArb), Brazil branch. Member of the Young Arbitrators' Committee (CJA/CBMA). Researcher at the Advanced Study Group in Arbitration of Arcades Foundation, in support of the University of São Paulo (USP).

[3] This short article is a result of the 2021 YMG CIArb Brazil Mentoring Program.

[4] Such as: (1) Interviews for Prospective Arbitrators, (2) Terms of Appointment including remuneration, (3) Jurisdictional Challenges, (4) Applications for Interim Measures, (5) Security for Costs, (6) Managing Arbitrations and Procedural Orders, (7) Party Appointed and Tribunal Appointed Expert Witnesses, (8) Documents Only Arbitration Proceedings, (9) Party Non-Participation, (10) Drafting Arbitral Awards Part I - General, (11) Part II - Interest, (12) and Part III - Costs, and (13) Witness Conferencing. Also, a recent and practical document called "COVID 19 Risk Assessment 2021". In: CIARB. Guidelines & Ethics in International Arbitration. Available at: https://www.ciarb.org/resources/guidelines-ethics/international-arbitration?paarge=1

approaches in key issues regarding arbitration and stimulates the efficiency of the proceedings.[5]

One guideline of special importance is the 3rd CIArb Guideline on Jurisdictional Challenges, which sets out the best practice in international arbitration regarding jurisdictional conflicts. In general, it advises on how to deal with challenges to jurisdiction, types of challenges which may arise (including jurisdiction and admissibility-related challenges), factors that arbitrators should consider in determining when and how to deal with these challenges and the form in which a ruling on jurisdiction should be made.

For the purpose of this article, a practical approach will be made considering article 1.1 of this guideline. Article 1 deals with the general principles of jurisdictional challenge, in which it is mentioned in item 1: *"unless otherwise agreed by the parties, arbitrators should consider and rule on their own jurisdiction when a party raises a jurisdictional challenge*".[6] It also addresses the fact that the arbitrators may not be the final ones to judge the matter as *"in certain circumstances, their decision on jurisdiction will be reviewed by a competent national court"*.

Commentaries C and D of the Guideline sets outs interesting thoughts regarding these issues.[7] Commentary C addresses that if a party commences a parallel judicial court proceeding to challenge the arbitral tribunal's jurisdiction *"arbitrators need to decide whether to stay the arbitration pending the court decision or issue an anti-suit injunction"*. If the Arbitral Tribunal considers that it is a reasonable challenge (considering its probabilities of success and the existence of good faith), then it may be appropriate to wait for the Court's ruling, but, if it considers it unreasonable, with the

[5] For the relevance of the CIArb Guidelines for Domestic Arbitration in Brazil, see: NUNES, Thiago Marinho. **The Relevance of the CIArb Guidelines for Domestic Arbitration in Brazil.** In: CBAr website. Available at: https://cbar.org.br/site/the-relevance-of-the-ciarb-guidelines-for-domestic-arbitration-in-brazil/

[6] "1. Unless otherwise agreed by the parties, arbitrators should consider and rule on their own jurisdiction when a party raises a jurisdictional challenge. However, they may not be the final arbiters of the matter, because, in certain circumstances, their decision on jurisdiction may be reviewed by a competent national court." Op. Cit., p. 4.

[7] "c) If a party commences parallel court proceedings to challenge the arbitrators' ruling on their own jurisdiction, the arbitrators need to decide whether to stay the arbitration pending the court decision or issue an anti-suit injunction. Considerations to be taken into account include the likely success of the challenge and whether they consider that it was made in good faith or just as a device to disrupt and/or delay the arbitration. If the arbitrators consider that the challenge is reasonable, it may be appropriate to wait for the court's ruling. Conversely, if they consider that the application to court has been made unreasonably to delay the resolution of the dispute, they should continue with the arbitration proceedings. d) If parallel court proceedings are initiated outside the place of arbitration and the relevant court rules that the arbitrators have no jurisdiction, arbitrators are not bound by such a ruling and they should therefore proceed with the arbitration proceedings." Op. Cit., p. 6.

only purpose of disrupting the arbitration proceeding, then the Arbitral Tribunal should continue the proceeding. Commentary D sets out that if the parallel court proceeding was initiated outside the place of arbitration and the court rules that the arbitrators have no jurisdiction, the arbitrators are not bound by such a ruling and should continue the proceeding.

It would be especially useful for Brazilian Courts and Arbitral Tribunals to know and use more frequently the valuable recommendations mentioned in this guideline on jurisdictional challenges. For example, two relevant domestic cases involving Petróleo Brasileiro S.A. (Petrobras) approached the matter of jurisdictional challenges and anti-suit injunctions. It will be analysed in this article one of these cases.[8]

The case was the Jurisdictional Conflict n° 139.519/RJ (Rapporteur Justice Napoleão Nunes Maia Filho),[9] between an ICC's Arbitral Tribunal and the Federal

[8] This article does not intent to analyze aspects of the merits of the decision, but rather to approach a practical perspective concerning jurisdictional challenges and its resolution.

[9] "CONFLITO POSITIVO DE COMPETÊNCIA. JUÍZO ARBITRAL E ÓRGÃO JURISDICIONAL ESTATAL. CONHECIMENTO. ARBITRAGEM. NATUREZA JURISDICIONAL. MEIOS ALTERNATIVOS DE SOLUÇÃO DE CONFLITOS. DEVER DO ESTADO. PRINCÍPIO DA COMPETÊNCIA-COMPETÊNCIA. PRECEDÊNCIA DO JUÍZO ARBITRAL EM RELAÇÃO À JURISDIÇÃO ESTATAL. CONTROLE JUDICIAL A POSTERIORI. CONVIVÊNCIA HARMÔNICA ENTRE O DIREITO PATRIMONIAL DISPONÍVEL DA ADMINISTRAÇÃO PÚBLICA E O INTERESSE PÚBLICO. CONFLITO DE COMPETÊNCIA JULGADO PROCEDENTE.

I - Conflito de competência entre o Tribunal Arbitral da Corte Internacional de Arbitragem da Câmara de Comércio Internacional e o Tribunal Regional Federal da 2ª Região, suscitado pela Petróleo Brasileiro S/A - PETROBRAS. Reconhecida a natureza jurisdicional da arbitragem, compete a esta Corte Superior dirimir o conflito.

II - Definição da competência para decidir acerca da existência, validade e eficácia da Cláusula Compromissória de Contrato de Concessão firmado para exploração, desenvolvimento e produção de petróleo e gás natural, cujas condições para execução foram alteradas unilateralmente pela agência reguladora por meio da Resolução da Diretoria (RD) n. 69/2014.

III - O conflito de competência não se confunde com os pedidos e causa de pedir da ação originária, na qual se objetiva a declaração de indisponibilidade do direito objeto da arbitragem e consequente inaplicabilidade da cláusula arbitral e a declaração de nulidade do procedimento arbitral em decorrência da Resolução da Diretoria n. 69/14, alterando a área de concessão controvertida, cumulado com pedido de anulação do processo arbitral, qual seja, de anti-suit injuction, destinada a evitar seu processamento junto ao Juízo Arbitral.

V - O CPC/2015 trouxe nova disciplina para o processo judicial, exortando a utilização dos meios alternativos de solução de controvérsias, razão pela qual a solução consensual configura dever do Estado, que deverá promovê-la e incentivá-la (art. 3º, §§ 1º e 2º). A parte tem direito de optar pela arbitragem, na forma da lei (art. 42).

VI - A Lei n. 13.129/15 introduziu no regime jurídico da arbitragem importantes inovações, com destaque para os princípios da competência-competência, da autonomia da vontade e da cláusula compromissória (arts. 1º, 3º e 8º, parágrafo único).

VII - No âmbito da Administração Pública, desde a Lei n. 8.987/95, denominada Lei Geral das Concessões e Permissões de Serviços Públicos, com a redação dada pela Lei n. 11.196/05, há previsão expressa de que o contrato poderá dispor sobre o emprego de mecanismos privados para resolução de conflitos, inclusive a arbitragem. No mesmo sentido a Lei n. 9.478/97, que regula a política energética nacional, as atividades relativas à extração de petróleo e a instituição da ANP (art. 43, X) e a Lei n. 13.129/15, que acresceu os §§ 1º e 2º, ao art. 1º da Lei n. 9.307/96, quanto à utilização da arbitragem pela Administração Pública.

Court of Appeals of the 2nd region, raised by Petrobras. The anti-suit injunction against Petrobras was filed during the beginning of the arbitration proceeding, just when ANP took notice of it. The preliminary injunction was denied by the 5th Federal Court of Rio de Janeiro and later confirmed by the Court's judgment. The ANP and the State of Espírito Santo (which later was not admitted as a party by the Court) filed appeals and precautionary actions requiring the suspension of the arbitration proceeding under the argument that there would be a risk of the Arbitral Tribunal to render an award before the judgement of the appeals. The request was granted to suspend the arbitration. After a special appeal, the decision was confirmed by the Federal Court of Appeals of 2nd Region and, due to its understanding that the Judiciary should manifest about both, jurisdiction and merits' issues of the case. A jurisdictional conflict was established.

The Superior Court of Justice (STJ) had to discuss questions such as the existence, validity and effectiveness of the arbitration clause in a Concession Agreement for the exploration, development and production of oil and natural gas, which had its conditions modified by the Board Resolution nº 69/2014. Based on several Brazilian legal provisions, related to the use of alternative dispute resolution methods by Public Entities (including arts. 1st, §§1st and 2nd of the Brazilian Arbitration Act),[10] the Superior Court of Justice, confirmed the competence of the Arbitral Tribunal, naming "premature" the anti-

VIII - A jurisdição estatal decorre do monopólio do Estado de impor regras aos particulares, por meio de sua autoridade, consoante princípio da inafastabilidade do controle judicial (art. 5º, XXXV, da Constituição da República), enquanto a jurisdição arbitral emana da vontade dos contratantes.
IX - A jurisdição arbitral precede a jurisdição estatal, incumbindo àquela deliberar sobre os limites de suas atribuições, previamente a qualquer outro órgão julgador (princípio da competência-competência), bem como sobre as questões relativas à existência, à validade e à eficácia da convenção de arbitragem e do contrato que contenha a cláusula compromissória (arts. 8º e 20, da Lei n. 9.307/96, com a redação dada pela Lei n.3.129/15).
X - Convivência harmônica do direito patrimonial disponível da Administração Pública com o princípio da indisponibilidade do interesse público. A Administração Pública, ao recorrer à arbitragem para solucionar litígios que tenham por objeto direitos patrimoniais disponíveis, atende ao interesse público, preservando a boa-fé dos atos praticados pela Administração Pública, em homenagem ao princípio da segurança jurídica.
XI - A arbitragem não impossibilita o acesso à jurisdição arbitral por Estado-Membro, possibilitando sua intervenção como terceiro interessado. Previsões legal e contratual.
XIII - Prematura abertura da instância judicial em descompasso com o disposto no art. 3º, § 2º, do CPC/2015 e os termos da Convenção Arbitral.
XIV - Conflito de competência conhecido e julgado procedente, para declarar competente o Tribunal Arbitral da Corte Internacional de Arbitragem da Câmara de Comércio Internacional. Agravos regimentais da Agência Nacional do Petróleo, Gás Natural e Biocombustíveis e do Estado do Espírito Santo prejudicados".
(STJ, CC 139.519/RJ, Rapporteur Justice NAPOLEÃO NUNES MAIA FILHO, j. 11.10.2017)

[10] "Art. 1º As pessoas capazes de contratar poderão valer-se da arbitragem para dirimir litígios relativos a direitos patrimoniais disponíveis. §1º A administração pública direta e indireta poderá utilizar-se da arbitragem para dirimir conflitos relativos a direitos patrimoniais disponíveis. §2º A autoridade ou o órgão competente da administração pública direta para a celebração de convenção de arbitragem é a mesma para a realização de acordos ou transações".

suit injunction, as it was not in line with the arbitration clause and the applicable legislation.

Even though this is a Brazilian domestic case, the CIArb Guidelines on jurisdictional challenges could be used as a guidance by the Arbitral Tribunals in both cases. In the case, there was a vast set of rules related to the possibility of arbitration by a public entity and which led to the understanding by the Court that the request itself was "premature". In this regard, the suspension of the arbitration proceeding by the Arbitral Tribunal (even if granted during the State Court proceeding) remained unnecessary, since it was likely that the anti-suit injunction would not be granted.

As the challenge was considerable unreasonable, a rather approach would be to continue the arbitration proceeding regardless the State Court process. This would allow the Arbitral Tribunal to guarantee one of the main purposes of arbitration – the celerity and specialization of the proceeding itself, in conformity with international practice. It does not mean, however, that the Arbitral Tribunal should disrespect any State Court's decision. As the CIArb Guidelines states, arbitrators are not bound by such a ruling only if the parallel court proceeding was initiated outside the place of arbitration – which is not the case at hand, as a domestic arbitration.

In this sense, although the CIArb Guidelines deals with international arbitration practice, they can also set out useful rules for domestic arbitrations, since they are in conformity with the constant search of the arbitral community for efficiency in arbitration. Therefore, we strongly recommend arbitration users to use more frequently the valuable recommendations contained in the CIArb Guidelines.