Maritime Arbitration: Recent Developments in Brazil

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As widely known, arbitration is the most efficient means of modern alternative dispute resolution. As such, maritime arbitration is deeply rooted in shipping practice through arbitration clauses appearing in contracts or being voluntarily adopted by the parties in other circumstances.

It is also a fact that in some countries maritime arbitration has been facing some criticisms due to its high costs and/or the time expended for the arbitral awards to become final. Even in the countries where these criticisms are made, they have been assessed to reflect a decrease, to a certain degree, in the efficiency of arbitration as a means of dispute resolution, however, never enough to make it lose its precedence over court litigation in most, if not all, jurisdictions, as a more adequate tool to achieve a just solution for controversies.

Until the late nineties and early years of the new century, Brazil was apart from the developments of arbitration than taking place in the rest of the world. But in 1996 the Brazilian Congress enacted Law no. 9.307 which removed the legal obstacles to effectiveness of arbitration in Brazil, thus bringing Brazilian law in line with the most modern legislations in this area. Further, in 2002 Brazil ratified the 1958 New York Convention[1], therefore definitely joining the modern legal regimes on arbitration.

In an unexpected manner, Brazilian market and legal practice reacted very rapidly and strongly to the legal innovation. It took only five years for Brazilian arbitration to grow exponentially and rank in the fourth position of ICC International Court of Arbitration’s statistics. Ever since Brazil has held this position, coming after only USA/Canada, Germany and France. On top of that, 186 arbitrations were filed in 2010 with the other six major Brazilian arbitration entities (other than ICC-Brazilian branch) and the amounts at dispute in these six entities totaled R$4.8 billion.

Brazilian arbitration is now widespread. Its main areas are corporate, infra-structure and energy disputes.

The central reason for this extraordinary development lies, certainly, in the overwhelming workload that Brazilian Judiciary has been facing, especially since the enactment of new Constitution in 1988. Although this Constitution has greatly expanded the federal court system and some States have done the same with State systems, the democratic access guaranteed to all under the new constitutional regime combined with the increasing growth of civil society segments, have channeled to all branches of the Judiciary a quantity of work that the system has in general been unable to cope with. Litigation increased and it continues to grow on a yearly basis. In 2013 around 95 million cases were in progress before Brazilian Judiciary, a growth of 3.3% in relation to 2012. The congestion percentage rose from 70.0% to 70.9% [2].

Notwithstanding this exceptional development of Brazilian arbitration in general, maritime arbitration strangely did not follow the trend of all other areas. Although arbitration solution is highly familiar to shipping activity, almost all standard forms incorporating arbitration clauses, Brazilian shipping did not develop, at first, a national arbitral culture and, hence, Brazilian parties in the shipping sector did not refer their disputes to local arbitrations. But, paradoxically, at the same time Brazilian parties kept the longstanding tradition of often referring matters to foreign arbitration.

The negative consequences were obvious. Whenever foreign arbitration did not apply, Brazilian parties resigned themselves to letting local disputes to proceed to the courts, where litigation, in average, can easily take eight or more years to come to an end. Another negative alternative became quite a common practice: the amicable settlement by the defending party and/or their insurers, even when the party’s right is good, with positive prospects of defence. Particularly P&M Clubs and other foreign insurers choose this otherwise unjustifiable settlement avenue as the lesser of two evils, due to the punishing rates of Brazilian monetary correction (around 6% p.a.) and legal interest (12% p.a.), much higher than any rate of return of US and EC investments.

However, this landscape is now changing. Last year, Brazilian Maritime Law Association Chamber of Arbitration, the only specialised entity in Brazil for maritime arbitrations, received arbitration applications of two cases, which when added to one pre-existing case still in progress, totalled three cases simultaneously processed — a number never achieved before. Also in 2014, the Chamber of Arbitration of Getúlio Vargas Foundation in Rio de Janeiro — a very reputable academic institution, which, amongst other things, is also devoted to arbitration — instituted four proceedings on maritime disputes. So, in all, at least seven maritime arbitrations were brought before arbitral entities in Rio de Janeiro. Although still shy in absolute numbers, 2014 definitely marked a remarkable beginning for Brazilian maritime arbitration.

In last January, 2015 another initiative showed the intensity with which maritime arbitration is now becoming a part of the overall picture of Brazilian arbitration. Several companies, including Transpetro — the greatest Brazilian shipowner and Petrobras’ shipping branch —, local law firms and marine adjusters have joined together to set the second specialised Brazilian arbitration chamber for maritime disputes. Re-enacting the same format of the well-succeeded experience of Singapore International Arbitration Centre (SIAC), the newly incorporated Brazilian Centre of Maritime Arbitration (in Portuguese, CBAM – Centro Brasileiro de Arbitragem Marítima) is an arbitral entity designed to be managed by the very potential users of arbitration services [3].

Law Office Carbone has taken a leading role in this unprecedented development of Brazilian Maritime Arbitration. One of its partners, Luís Felipe Galante, in his capacity as Legal Director of the Brazilian Maritime Law Association, is in charge of administering the arbitration services of the three cases now in progress in that Association. In addition, the Association under the presidency of Law Office Carbone’s head partner, Artur Carbone, is enacting an entirely new set of Arbitration Rules and Code of Ethics, so as to keep pace with the most recent legal developments of Brazilian arbitration. In the other four maritime cases before the Arbitration Chamber of Getúlio Vargas Foundation, Luís Felipe Galante is acting as co-arbitrator in three of them and as president of the arbitral tribunal in the remaining one. Law Office Carbone is also co-founder of the CBAM and another firm’s partner, Claudia Iabrud, is a member of CBAM’s Board of Directors. Finally, CBAM have just elected Luís Felipe Galante for a six year term as head of its Arbitration Commission, the body in charge of creating the legal/administrative structure of the Centre and subsequently manage arbitration services rendered to its users.

Further, in the course of 2015 a number of events will take place in São Paulo, Santos e Rio de Janeiro to promote maritime arbitration, by educating Brazilian lawyers acting in shipping area on the advantages, principles, procedural rules and ethics of arbitration. Law Office Carbone will co-sponsor or support these events together with Sammarco Law Firm from Santos. Support from Brazilian Bar – Santos Section and local companies is expected too.

Several reasons explain this sudden awakening of Brazilian maritime arbitration and its potential to follow the successful steps of Brazilian
arbitration experience in general:

- Modern domestic arbitration legislation.
- Brazil has become party to the New York Convention, which makes Brazilian arbitration awards enforceable in over 140 countries worldwide.
- Brazilian Courts are extremely supportive of arbitration.
- Brazilian arbitration is basically achieved through institutional arbitration rather than arbitration in LMAA style.

- Brazilian arbitration can be very time-efficient because time period for defence submissions are quite frequently 15 days (as in Brazilian Maritime Law Association, Getúlio Vargas Foundation and CBAM).

- Further increasing potential time-efficiency, parties are free to establish a time period for the arbitrators to render judgment of the dispute and if the arbitrators accept their appointment this provision becomes binding on them. But even when the parties are silent on this, which is in fact the rule, then the rules of Brazilian arbitration entities often contain deadlines for arbitrators to finish their work.

- In a final advantage in terms of time-efficiency, Brazilian arbitration awards are final as a rule. There are no appeals to Civil Courts. Awards can only be challenged before the Courts in a few circumstances expressly contemplated in the Brazilian Arbitration Act, seeking to annul the judgment of the arbitration tribunal in case of serious formal irregularities.

- Brazilian arbitration has much lower costs than those charged in almost any other major centre of arbitration such as London, Paris and USA. For instance, the arbitration costs of a US$500,000.00 and a US$53,600,000.00 disputes before the Brazilian Maritime Law Association and CBAM amount to US$55,150.00 and US$99,500.00, respectively. The same arbitrations as per ICC costs are US$13,105,000 and US$35,815,000, respectively. Arbitrators’ fees are freely agreed with the parties. But according to Table of Arbitrators’ fees of both Brazilian entities (which are indicative to arbitrators and non-binding) the average fees per each arbitrator in these two scenarios would be US$6,600.00 and US$17,500.00, whereas same fees in ICC’s arbitrations would be of US$26,500.00 and US$69,670.00.

- Availability of small claims procedures in almost all arbitral entities (including in Brazilian Maritime Law Association Arbitration Chamber and CBAM) to deal rapidly and in a cost-effective manner with lower disputes.

Therefore, Brazilian arbitration can now adequately solve a large number of disputes. By “adequate” we mean in significantly less time than the Brazilian Courts and at a much lower cost than foreign arbitrations, not to mention the inherent better quality of arbitral awards as a rule.

Furthermore, it must be noted that the potential benefits of arbitration can be greatly expanded by the voluntary adoption of arbitration solution even when previous arbitration clauses are absent, such as cargo claims and tort cases, e.g., collisions. Given the congestion and other problems of Brazilian Courts, Brazilian lawyers may be favourably inclined towards a solution other than litigation in Judiciary. Besides, Insureds and Insurers may save considerable amounts by avoiding the protraction of punishing Brazilian monetary correction and legal interest.

In other words, while obviously not a panacea, maritime arbitration, given the problems of the Brazilian jurisdiction, can now be a very efficient and quite widespread remedy to solve local disputes in a faster, less costly and more qualitative manner.

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[3] The stewardship of SIAC is in the hands of the Singapore Business Federation ("SBF"), the apex business chamber that represents the interests of the Singapore business community of more than 15,000 companies.