III CONGRESSO INTERNACIONAL DE DIREITO E INTELIGÊNCIA ARTIFICIAL (III CIDIA)

FORMAS DE SOLUÇÃO DE CONFLITOS E DIREITO PREVENTIVO

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Apresentação

O Congresso Internacional de Direito e Inteligência Artificial (CIDIA) da SKEMA Business School Brasil, que ocorreu em formato híbrido do dia 08 ao dia 10 de junho de 2022, atingiu a maturidade em sua terceira edição. Os dezesseis livros científicos que ora são apresentados à comunidade científica nacional e internacional, que contêm os 206 relatórios de pesquisa aprovados, são fruto das discussões realizadas nos Grupos de Trabalho do evento. São cerca de 1.200 páginas de produção científica relacionadas ao que há de mais novo e relevante em termos de discussão acadêmica sobre a relação da inteligência artificial e da tecnologia com os temas acesso à justiça, Direitos Humanos, proteção de dados, relações de trabalho, Administração Pública, meio ambiente, formas de solução de conflitos, Direito Penal e responsabilidade civil, dentre outros temas.

Neste ano, de maneira inédita, professores, grupos de pesquisa e instituições de nível superior puderam propor novos grupos de trabalho. Foram recebidas as excelentes propostas do Professor Doutor Marco Antônio Sousa Alves, da Universidade Federal de Minas Gerais (SIGA-UFMG – Algoritmos, vigilância e desinformação), dos Professores Doutores Bruno Feigelson e Fernanda Telha Ferreira Maymone, da Universidade do Estado do Rio de Janeiro (Metalaw – A Web 3.0 e a transformação do Direito), e do Professor Doutor Valmir Cézar Pozzetti, ligado à Universidade Federal do Amazonas e Universidade do Estado do Amazonas (Biodireito e tutela da vida digna frente às novas tecnologias).

O CIDIA da SKEMA Business School Brasil é, pelo terceiro ano consecutivo, o maior congresso científico de Direito e Tecnologia do Brasil, tendo recebido trabalhos do Amazonas, Bahia, Ceará, Distrito Federal, Espírito Santo, Goiás, Maranhão, Minas Gerais, Mato Grosso do Sul, Mato Grosso, Pará, Pernambuco, Piauí, Paraná, Rio de Janeiro, Rio Grande do Norte, Rio Grande do Sul, Santa Catarina, Sergipe e São Paulo. Tamanho sucesso não seria possível sem os apoiadores institucionais do evento: o CONPEDI – Conselho Nacional de Pesquisa e Pós-graduação em Direito, o Instituto Brasileiro de Estudos de Responsabilidade Civil – IBERC e o Programa RECAJ-UFMG - Ensino, Pesquisa e Extensão em Acesso à Justiça e Solução de Conflitos da Faculdade de Direito da Universidade Federal de Minas Gerais. Destaca-se, mais uma vez, a presença maciça de pesquisadores do Estado do Amazonas, especialmente os orientandos do Professor Doutor Valmir César Pozzetti.

Grandes nomes do Direito nacional e internacional estiveram presentes nos painéis temáticos do congresso. A abertura ficou a cargo do Prof. Dr. Felipe Calderón-Valencia (Univ. Medelín - Colômbia), com a palestra intitulada “Sistemas de Inteligência Artificial no Poder Judiciário - análise da experiência brasileira e colombiana”. Os Professores Valter Moura do Carmo e Rômulo Soares Valentini promoveram o debate. Um dos maiores civilistas do país, o Prof. Dr. Nelson Rosenvald, conduziu o segundo painel, sobre questões contemporâneas de Responsabilidade Civil e tecnologia. Tivemos as instigantes contribuições dos painelistas José Luiz de Moura Faleiros Júnior, Caitlin Mulholland e Manuel Ortiz Fernández (Espanha).

Momento marcante do congresso foi a participação do Ministro do Tribunal Superior do Trabalho – TST Maurício Godinho Delgado, escritor do mais prestigiado manual de Direito do Trabalho do país. Com a mediação da Profª. Drª. Adriana Goulart de Sena Orsini e participação do Prof. Dr. José Eduardo de Resende Chaves Júnior, parceiros habituais da SKEMA Brasil, foi debatido o tema “Desafios contemporâneos do gerenciamento algorítmico do trabalho”.

Encerrando a programação nacional dos painéis, o Prof. Dr. Caio Augusto Souza Lara, da SKEMA Brasil, dirigiu o de encerramento sobre inovação e Poder Judiciário. No primeiro momento, o juiz Rodrigo Martins Faria e a equipe da Unidade Avançada de Inovação do Tribunal de Justiça do Estado de Minas Gerais contaram sobre o processo de transformação em curso do Judiciário Estadual mineiro. Em seguida, o Prof. Dr. Fabrício Veiga Costa fez brilhante exposição sobre o projeto denominado “Processo Coletivo Eletrônico”, que teve a liderança do Desembargador Federal do Trabalho Vicente de Paula Maciel Júnior (TRT-3ª Região) e que foi o projeto vencedor do 18º Prêmio Innovare. O evento ainda teve um Grupo de Trabalho especial, o “Digital Sovereignty, how to depend less on Big tech?”, proposto pela Profª. Isabelle Bufflier (França) e o momento “Diálogo Brasil-França” com Prof. Frédéric Marty.

Os dezesseis Grupos de Trabalho contaram com a contribuição de 46 proeminentes professores ligados a renomadas instituições de ensino superior do país, os quais indicaram os caminhos para o aperfeiçoamento dos trabalhos dos autores. Cada livro desta coletânea foi organizado, preparado e assinado pelos professores que coordenaram cada grupo, os quais eram compostos por pesquisadores que submeteram os seus resumos expandidos pelo processo denominado double blind peer review (dupla avaliação cega por pares) dentro da plataforma PublicaDireito, que é mantida pelo CONPEDI.

Desta forma, a coletânea que ora torna-se pública é de inegável valor científico. Pretende-se, com ela, contribuir com a ciência jurídica e fomentar o aprofundamento da relação entre a graduação e a pós-graduação, seguindo as diretrizes oficiais da CAPES. Promoveu-se, ainda, a formação de novos pesquisadores na seara interdisciplinar entre o Direito e os vários campos da tecnologia, notadamente o da ciência da informação, haja vista o expressivo número de graduandos que participaram efetivamente, com o devido protagonismo, das atividades.

A SKEMA Business School é entidade francesa sem fins lucrativos, com estrutura multicampi em cinco países de continentes diferentes (França, EUA, China, Brasil e África do Sul) e com três importantes acreditações internacionais (AMBA, EQUIS e AACSB), que demonstram sua vocação para pesquisa de excelência no universo da economia do conhecimento. A SKEMA acredita, mais do que nunca, que um mundo digital necessita de uma abordagem transdisciplinar.

Agradecemos a participação de todos neste grandioso evento e convidamos a comunidade científica a conhecer nossos projetos no campo do Direito e da tecnologia. Foi lançada a nossa pós-graduação lato sensu em Direito e Tecnologia, com destacados professores e profissionais da área. No segundo semestre, teremos também o nosso primeiro processo seletivo para a graduação em Direito, que recebeu conceito 5 (nota máxima) na avaliação do Ministério da Educação - MEC. Nosso grupo de pesquisa, o Normative Experimentalism and Technology Law Lab – NEXT LAW LAB, também iniciará as suas atividades em breve.

Externamos os nossos agradecimentos a todas as pesquisadoras e a todos os pesquisadores pela inestimável contribuição e desejamos a todos uma ótima e proveitosa leitura!

Belo Horizonte-MG, 20 de junho de 2022.

Profª. Drª. Geneviève Daniele Lucienne Dutrait Poulingue

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HOW TO AVOID PATHOLOGICAL ARBITRATION CLAUSES
CÓMO EVITAR LA CLÁUSULA DE ARBITRAJE PATOLÓGICA

Débora Monteiro Souza Santos [1]

Resumo

Arbitration is a form of conflict resolution which allows parties to decide the procedures that will be applicable. To bind the dispute to this form of resolution, it is necessary to have an arbitration agreement. Considering that the arbitration clause is more common, this expanded abstract aims to talk about how to avoid pathological clauses, in order to have an efficient resolution. At the end, it is concluded that choosing institutional arbitration and the method of choice of arbitrator is more reasonable. Also, the clause must be clear about the binding power of arbitration.

Palavras-chave: Pathological clause, Arbitration, Arbitration clause

Abstract/Resumen/Résumé

Arbitraje es una forma de resolución de conflictos que permite a las partes decidir los procedimientos aplicables. Para vincular el conflicto al arbitraje, es necesaria una convención de arbitraje. Considerando que la cláusula compromisoria es más común, este resumen ampliado pretende discutir cómo evitar patologías en estas cláusulas, favoreciendo un procedimiento arbitral más eficiente. Al final, se concluye que optar por un arbitraje institucional y un método de selección de árbitros son opciones más cuidadosas. Además, la cláusula compromisoria debe ser explícita sobre el poder vinculante del arbitraje.

Keywords/Palabras-claves/Mots-clés: Cláusula patológica, Arbitraje, Cláusula compromisoria

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1. INTRODUCTION

Arbitration is a way of dispute resolution in which the parties are free to decide the procedure, the institution, the scope of arbitration and even the arbitrators. This form is required specially by the companies, because arbitration is known to be fast and efficient.

However, the first step to promote an arbitration resolution is the arbitration agreement (submission or clause) which must be well drafted in order not to delay the commence of the judgment. Since arbitration clause is more common (and likely to be poorly drafted), this expanded abstract is going to focus on it. To be more precise, this article is going to discuss how to avoid pathological clauses.

For that, the methodology used was deductive and bibliographic research. On the next part, it will expand more on arbitration.

2. ABOUT HOW THE ARBITRATION WORKS

Arbitration is a form of conflict resolution in which the disputes are solved outside the judicial system (MOSES, 2008). According to Situmorang, the "[…] arbitration authority is not from state power, arbitration authority is born because of the acceptance, trust, and appreciation of parties towards arbitration" (2021, p. 448). Therefore, since autonomy is crucial for this type of resolution, the parties, who have agreed on the arbitration, are allowed to decide how the Tribunal will work, including the seat, the law, the arbitrators, and the language that will be applicable.

Nevertheless, not any dispute can be submitted in the arbitral judgement. According to the Brazilian Law nº 9.307/1996, only negotiable and patrimonial conflicts are allowed to be discussed in the arbitration (BRASIL, 1996). However, it does not mean that the consequences of the violation of these rights cannot be debated, on the condition that these consequences were arbitrable.

To consolidate the decision of arbitration, the parties must make an arbitration agreement, which, based on the New York Convention, must be written and signed by the parties (NEW YORK CONVENTION, 1958). There are two different types of agreements: arbitration clause and the submission agreement. The first one is more common, and it is recommended when there is no conflict at all, the parties are still entering into a contract in which it´s agreed that any future dispute will be solved by arbitrators. On the other hand, the submission agreement is made when "[…] there is no arbitration clause in the parties' contract, and a dispute arises […]" (MOSES, 2008, p. 17). Then, while the arbitration clause refers to possible and future conflicts, the submission involves the present one.

Normally, the companies accept to submit their disputes in the arbitral tribunal instead of judicial one, once the arbitration spurs both parties to decide and control the process, so as to make the most appropriate resolution. As a result, it´s possible for the parties not only to choose the arbitrators of the case, but also to specify the abilities needed (NANNI, 2016). Thus, "[…] the opportunity to select arbitrators who are knowledgeable in the subject matter of the dispute, make arbitration particularly attractive" (MOSES, 2008, p. 1)

Moreover, since the arbitration is confidential, it is more reliable for the companies that take part in an arbitral tribunal, once their data is supposed to keep just among them (NANNI, 2011). Yet, it is advisable to make a confidentiality clause between the parties and with the witnesses, because "[…] some arbitral rules place [confidential] obligations only on the administrators and arbitrators […]" (MOSES, 2008, p. 49).

Despite these advantages, arbitration also has downsides. Considering that the arbitrators have no coercive power, it may be unavoidable for the parties "[…] to seek court assistance when [these] coercive powers are necessary to ensure compliance with the orders of the tribunal." (MOSES, 2008, p. 5).

However, if the arbitration agreement, especially the arbitration clause, is not well-drafted, perhaps the judicial assistance will be needed sooner than it is expected. Moreover, a poorly drafted clause can affect the efficiency of arbitration, since it creates an "[…] ambiguity on how the arbitration proceedings would be commenced […]" (OKOYE, 2022, p. 1). Therefore, in some cases, the Judiciary is requested to solve these ambiguities to preserve what had been agreed (WEBBER, 2021). Then, to avoid complications on the arbitration, it is highly recommended to draft a good clause. In the next chapter, it will discuss how to avert pathological arbitration clauses.

3. PATHOLOGICAL CLAUSES AND HOW TO AVOID THEM

An arbitration clause is known as "midnight clause," because, generally, it is the last clause to be drafted in the contract (NANNI, 2011). Thus, it is usually written without due care. The lack of caution, in its turns, can result in pathological clauses.

> A pathological clause is one that is defective in some way. It may be so defective that it invalidates the arbitration agreement. At the very least, the defect may create a basis for extensive disputes over the meaning of the clause and over how the arbitration will proceed (MOSES, 2008, p. 39)

It means that a defective clause can delay the resolution of the conflict, since both lawyers and parties would be more concerned about how to commence the arbitration than about the dispute as itself.

Based on Weber (2021), the pathological clause can be classified (i) due to its omission or (ii) due to the action of the contractors. The first group is characterized by its vagueness, which means that the clause doesn´t have enough information to initiate the arbitration (for example, unclear about the choice of arbitrators). The defect in the second group happens, for example, when the arbitral institution is wrongly mentioned.

Moreover, a clause can be contradictory, when it binds the same conflict to be solved in arbitration and in Judiciary; and ambiguous, when there is uncertainty whether the parties are or are not willing to submit their dispute in the arbitration (REYNOL, 2017; WEBBER, 2021).

According to Nanni (2011), an arbitration clause must deal with the procedure/institution applicable, the law, the numbers of arbitrators, confidentiality, language, and the scope of arbitration. In addition, as an optional element, it can deal with the fees and costs, the multi-step clause, precautionary measure etc.

Firstly, to avoid doubt whether the arbitration is mandatory or not, it is essential to use the word "shall" instead of "may." As per the CAMARB´s template clause (CAMARB, 2018) "all and any dispute arising from or related to this agreement shall be settled by Arbitration, to be administered by CAMARB […]" (emphasis added). If the word "may" was written instead of "shall", it would weaken the binding power of the arbitration, since it could be understood as optional (REYNOL, 2017; OKOYE, 2022)

Secondly, it is crucial to choose between an institutional or Ad hoc arbitration. In the institutional one, the parties elect an organisation to administrate all the procedures. Normally, the parties tend to apply the institution´s rules in the arbitration, especially regarding the choice of arbitrators (NANNI, 2016; REYNOL, 2017). Therefore, the parties are not in charge of elaborating a brand-new rule which is convenient since it saves time and energy to discuss only the matter.

"When ad hoc arbitration is chosen, however, the parties are free to select the rules to be applied in the arbitration. […]" (ULMER, 1986, p. 1339 e 1340). Since there´s no institution to supervise it, "[…] the selection of competent arbitrators for the case is particularly crucial" (ULMER, 1986, p. 1339 e 1340). It requires caution not to be bound to one specific arbitrator, because, at the time of the dispute, he or she can deny or be unavailable to arbitrate (REYNOL, 2017). Then, it is more appropriate to decide and write the method of choice (including the form of substitution) than the arbitrator´s name.

So, comparing to the institutional arbitration, an ad hoc not only takes more time, energy, and resources of both sides, but also is likely to be poorly drafted (considering the range of details to pay attention to).

Whatever type of arbitration, deciding who will arbitrate must be done carefully. The tribunals are usually made up of 1 or 3 arbitrators, depending on the extent of the conflict. According to Moses (2008), it is more manageable and less costly to have only one arbitrator, since the costs would be lower, and the meetings would be scheduled quickly. Nevertheless, "with respect to the complexity of the issues, three minds are generally better than one at absorbing all the necessary information, and arriving at a reasonable resolution" (MOSES, p. 42 and 43), not to mention the range of cultural background and knowledge that three arbitrators have instead of one. For that reason, it is more common to have three arbitrators: one chosen by the party, another by the other party, and both elected arbitrators then choose one more to preside the tribunal (NANNI, 2016).

The parties can define which qualifications are essential for an arbitrator to adjudicate the dispute. However, to avoid pathological clauses, it is important not to over specify these qualifications, once it may be difficult to find an arbitrator who meets all these requirements (NANNI, 2011)

The next factor to consider is the place of arbitration. Once the institution that will lead the adjudication has been chosen, it is not mandatory to bind the arbitration to where the institution is. In order not to let the arbitration impracticable, the parties should analyse not only the location of the seat (costs of travels, accommodations etc.), but also how friendly this country is when it comes to arbitration (REYNOL, 2017).

In addition, regarding international disputes, "parties will also tend to choose a country that is not the place of business of either party, so that they will be in a 'neutral' forum" (MOSES, p. 43). Regarding the language to be used, it is recommended to avoid many different languages at the same time, since the translation of the files can delay the resolution (REYNOL, 2017). Moreover, to avert doubts, the language chosen shall be included in the clause. Furthermore, it is recommended to discuss the payment of all the fees and costs as well.

Finally, in some cases, the parties can establish a multi-step clause, which binds the parties to negotiate the matter (either in mediation or conciliation), before applying to arbitration. That is a useful mechanism, especially if the parties are willing to maintain a good relationship (REYNOL, 2017; MOSES, 2008).

However, according to Reynol (2017), there are two important matters to consider before adding a multi-step clause. Firstly, will this mediation/conciliation be mandatory or

optional? In both cases, it is essential to be clear in the contract. Secondly, how long this negotiation will take? Answering it in the clause is crucial, otherwise, the other party could cause a lag to the start of the arbitration.

4. CONCLUSION

Arbitration is a form of conflict resolution which has appealing advantages, such as the autonomy of the parties during the process, the confidentiality, the celerity, and the freedom to decide the procedure. Nevertheless, these advantages will not be seen by the parties if the arbitration agreement was poorly drafted.

Considering that the arbitration clause refers to a dispute which hasn´t happened yet, it is likely to be unspecific about how the future (and possible) arbitration judgment would work. Not to mention that this clause is usually the last to be drafted in the contract. Therefore, it is likely to be a pathological clause.

So, this expanded abstract commented some valuable information that should not be forgotten when it comes to avoid pathological arbitration clause. However, it is important to be explicit that there is no "cake recipe" for drafting a good clause, but there are recommendations which can help to prevent some pathologies.

Firstly, the parties need to discuss if they intend to have an ad hoc or institutional arbitration. While the ad hoc gives more freedom to choose whatever the parties decide, the institutional arbitration offers more stability and security, since the rules have been already formulated by the institution.

Other factor to bear in mind is the choice of arbitrators. A clause can be pathological when it specifies the arbitrator required, but she or he isn´t available to arbitrate at the time of the dispute. Therefore, it is more reasonable to decide, in the clause, the method of choice than the arbitrators as themselves. Furthermore, the clause should not be so exigent about arbitrator´s competences, because it may be difficult to find someone who has all these qualifications.

Moreover, the seat of arbitration must be a place where is "arbitration-friendly." And the parties shouldn´t elect many languages, in order not to depend so much on translation.

Lastly, once the arbitration is chosen to be the form of resolution of the future conflict, the clause must be clear that this is the willing of both parties, leaving no room for doubts. Therefore, if there is a multi-step clause, it must be clear how it is going to work and for how long. In that way, it is possible to avert arising more problems from the dispute.

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