Kluwer Arbitration Blog

The Newest Proposal to Amend the Brazilian Arbitration Act: A Threat to Arbitration in Brazil?

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The 1996 Brazilian Arbitration Act (the "BAA"), which subjects domestic and international arbitrations to the same set of rules, has been modified only once through the 2015 amendment (the "2015 Amendment"). On July 6, 2022, Brazilian party leaders signed a Motion of Urgency to bypass the standard legislative process – which usually comprises public consultations and lengthy steps in internal commissions – and called for a vote on a controversial bill to amend the BAA on an urgent basis, two years after it was first introduced in Congress (the "Bill"). A third of the party leaders in Congress signed the Motion of Urgency, from parties which hold 66,7% of the seats of both houses combined, including the Brazilian President's own party. Although congressman Enrico Misasi requested a public hearing to discuss the Bill before the Constitution, Justice and Citizenship Commission on August 1, 2022, the Presiding Officer of the Chamber of Deputies may call on the vote for the Motion of Urgency at any session from this point on.

If the Bill passes, it will create unprecedented requirements for arbitrations, affecting aspects such as appointment of arbitrators, composition of arbitral tribunals, arbitrators' duty to disclose, and confidentiality. Unlike the 2015 Amendment, which was predominantly praised by the arbitral community (as discussed in a previous post), the Bill has been criticized for being against the cornerstone of arbitration: party autonomy. In this regard, the Brazilian Institute of Lawyers (IBA) has called the Bill the "Anti-Arbitration Bill".

On this post, we first introduce the reasons behind the Bill, as written by the congresswoman who introduced it. Second, we summarize which provisions of the BAA would be changed by the Bill. Third, we address the question posed by the title of this post.

Background

According to the Bill's explanatory notes, congresswoman Margarete Coelho, elected by the state of Piauí, introduced the Bill to further regulate arbitrators' conduct and, thus, improve the BAA.

To achieve such goals, the Bill proposes new limitations and regulations to five different axes: (1) availability of arbitrators; (2) composition of arbitral tribunals; (3) arbitrator's duty to disclose; (4) appointment of members of arbitral institutions' Executive Committees or Secretariats to act as an arbitrator or counsel; and (5) transparency of awards.

First, the Bill's explanatory notes assert that, even though arbitration is designed to offer a quicker path for resolving disputes, the BAA and the rules of almost all arbitral institutions in Brazil allow (1) members of the arbitral tribunal to conceal the number of arbitrations in which they are acting as an arbitrator, and (2) recurrent appointments made by the parties.

According to the Bill's explanatory notes, this causes arbitration cases to concentrate in the hands of a few gatekeepers, generating delays in proceedings and opening the doors for an increase of set aside applications before Brazilian courts. To avoid this scenario, the Bill's first proposed change is to forbid arbitrators from acting in more than ten ongoing arbitrations.

Second, unlike the careful treatment given by the UK Supreme Court in *Haliburton v. Chubb*, the Bill also proposes to outright forbid identical arbitral tribunals (either fully or partial) to conduct ongoing arbitrations, regardless of whether they relate to the same subject matter. In *Haliburton v. Chubb*, the UK Supreme Court ruled that the fact that an arbitrator acted in multiple proceedings arising from the explosion of an offshore drilling unit in the Gulf of Mexico, having similar subject matters and repeating parties, did not, by itself, point to bias. Rather, it would depend on the particular facts of the case. The Bill's explanatory notes, however, consider that the proposed change would (1) avoid the risk of an arbitral tribunal unduly favoring one of the parties, while it would (2) open the arbitration market for new professionals, thereby increasing legal certainty, diversity, and quality of awards.

Third, the Bill establishes a legal regime on the conflict of interest for arbitrators. It first prevents arbitral institutions' Executive Committee or Secretariat members from acting as arbitrators in cases administered by the institution they are affiliated with. It also expands their duty to disclose, forcing arbitrators to disclose the number of tribunals of which they are members, as well as any other facts that raise "minimum doubts" as to their impartiality or independence.

Fourth, the Bill imposes a broad scope of transparency in all type of arbitrations, regardless of whether they involve public or private entities, or whether they are domestic or international. The Bill proposes to make publicly available not only the (1) the names of the arbitrators once the tribunal is constituted and (2) information about set aside applications, but also (3) the award itself, noting, however, that parties may request to omit confidential information they may deem necessary.

Regarding the first point, the Bill's explanatory notes assert that parties will be aware of the availability of arbitrators once the composition of tribunals is publicly available. As to the second point, it states that making set aside applications transparent will discourage parties from frivolously resorting to national courts to annul arbitral awards. It further explains that it will not be attractive for the losing party to have aspects of dispute, such as matters related to the merits of the case and the amount in dispute, made public. Lastly, as to the third point, it asserts that the publication of arbitral awards would create a "precedent system," thus avoiding contradictory decisions and increasing predictability in arbitration.

What are the changes proposed under the Bill??

Article 13, paragraphs 8 and 9

The Bill proposes to add two new paragraphs, paragraphs 8 and 9, to Article 13, which contains rules governing the mission and duties of arbitrators. Paragraph 8 forbids arbitrators from acting in more than ten ongoing arbitrations, and paragraph 9 determines that there must not be completely or partially identical arbitral tribunals in pending arbitrations, regardless of the role of the arbitrators within the tribunal and whether the proceedings relate to the same subject matter.

Article 14, paragraphs 1 and 3

The Bill changes Article 14, paragraph 1, which currently provides that an individual appointed to serve as an arbitrator shall disclose any circumstances likely to give rise to **justifiable doubts** as to his or her impartiality or independence.

The proposed new paragraph 1 states that an individual appointed to serve as an arbitrator shall, throughout the full duration of the proceedings, not only disclose any circumstances likely to give rise to a **minimum doubt** as to his or her impartiality or independence, but also the number of arbitrations in which he or she acts as single arbitrator, co-arbitrator, or chairman.

The Bill also adds a paragraph to Article 14, paragraph 3, which states that members of an arbitral institution's Executive Committee or Secretariat members must not act as single arbitrator, co-arbitrator, chairman, or counsel for one of the parties in arbitrations administered by the institution they are affiliated with.

Article 33, paragraph 1

Article 33, paragraph 1, currently provides the statute of limitations applicable to setting aside procedures (ninety days). The Bill adds a further requirement, stating that set aside applications will be subject to the principle of publicity.

Articles 5-A and 5-B

The Bill inserts two provisions to Article 5, which, together with Articles 6 and 7, set forth rules for the commencement of an arbitration. The proposed articles 5-A and 5-B provide, respectively, that the arbitral institution administering the arbitration will publish on its website (1) the names of the arbitrators and the amount in dispute (once the arbitral tribunal is constituted), and (2) the full content of the award once the arbitration is closed, unless there is a request for some excerpts or information to remain confidential.

Conclusion

The Bill would make Brazilian arbitration unattractive as an alternative to litigation, which otherwise thrives since the Brazilian Supreme Court recognized the constitutionality of the BAA in 2001. First and foremost, the parties' ability to freely choose their arbitrators–one of the most

important benefits of arbitration, as parties tend to select arbitrators who possess technical knowledge and experience–would be undoubtedly suppressed.

Second, confidentiality would be unwittingly breached once awards are published in full without the parties' consent. Confidentiality is one of the main reasons at least half of professionals seek arbitration, according to the QMUL 2019 survey. In this respect, ICC awards made as of 2019, as well as any dissenting and/or concurring opinions, may be published (see Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration). Also, CAM-CCBC's draft 2022 arbitration rules contain a provision authorizing the publication of excerpts of awards. However, in such cases, unlike the Bill's proposed reform, if a party objects, the award **will not be published**.

Third, the creation of a new standard of independence and impartiality ("minimum doubt") creates unnecessary confusion and uncertainty. Such a harsh standard of independence and impartiality would not only induce unduly long disclosures from arbitrators but also decrease the consistency of decisions on conflict of interest, given the uncertain meaning of the new terms. Expanding the legal ground for challenges will certainly increase the number of set aside proceedings before Brazilian courts, which contradicts the announced intention of the Bill. Moreover, we deem it unnecessary since the standard adopted by the BAA reflects international best practices–the Model Law's justifiable doubt standard, which is the result of UNCITRAL's work tracing back to 1985.

Answering the question posed in the title of this post: the Bill is a threat and will certainly close doors for both international and domestic arbitrations in Brazil. Unsurprisingly, institutions like the Chartered Institute of Arbitrators (Brazil Branch), the Brazilian Arbitration Committee, the Brazilian Institute of Civil Procedure, and many others, have opposed the Bill. What remains unclear, however, is how many doors will be closed.

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