Kluwer Arbitration Blog

Brazilian Federal Court of Appeals Prevents Federal Revenue's Office from Accessing Data of Arbitration Proceedings

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In a dispute involving the Centro Brasileiro de Mediação e Arbitragem – CBMA ("CBMA") and the Brazilian Federal Revenue's Office ("FRO"), the Brazilian Federal Court of Appeals prevented FRO from accessing data of arbitration proceedings administered by CBMA.

The CBMA, an arbitral institution with headquarters in the city of Rio de Janeiro, State of Rio de Janeiro, Brazil, has been summoned in several occasions by the FRO to exhibit documents concerning arbitrations proceedings administered by it.

CBMA presented to the FRO documents concerning its own accounting and other arbitration related information that would not amount to the violation of the confidentiality, but denied to disclose other documents, in particular the arbitral awards or settlement agreements involving the parties in dispute, as well as documents containing the fees paid by the litigants in the period embracing the years of 2008 to 2011.

CBMA argued that the FRO's order violates the confidentiality clause of its Arbitration Rules ("CBMA Rules") and the secrecy, found on article 13, paragraph 6, of the Brazilian Arbitration Act ("BAA" – Law no. 9.307/1996) and also on article 229, I, of the Brazilian Civil Code[1)] ("BCC" – Law no. 10.406/2002).

FRO alleged that the request for information addressed to the CBMA was grounded on the general legal duty of cooperation with the public administration, whereby the private entities have the legal obligation to provide information concerning assets, business and activities that can potentially echo in the tax sphere. It mentioned the Income Tax Regulation ("ITR" – Decree no. 3.000/1999) – since then revoked by Decree no. 9.580/2018 – and articles 195 and 197 of the National Tax Code ("NTC" – Law no. 5.172/1966) to support its contention. The latter articles read as follows:

> Article 195. For the purposes of tax legislation, legal provisions excluding or limiting the right to examine goods, books, files, documents, papers and commercial or tax effects of industrial traders or producers, or their obligation to display them, have no effect.
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> Art. 197. Upon written notice, the following institutions are obliged to provide the

> administrative authority with all information available to them in relation to the assets, businesses or activities of third parties:
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> I – notaries, clerks and other official servants;
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> II – banks, banking houses, savings banks and other financial institutions;
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> III – asset management companies;
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> IV – brokers, auctioneers and official dispatchers;
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> V – the administrator of the estate/executor;
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> VI – trustees, commissioners and liquidators;
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> VII – any other entities or persons that the law designates, by reason of their position, occupation, function, ministry, activity or profession.
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> Single paragraph. The obligation provided for in this article does not embrace information regarding facts about which the informant is legally obliged to observe secrecy due to its position, occupation, function, ministry, activity or profession.

It further contented that the confidentiality of arbitration arises from a private agreement between the litigants which cannot be enforced upon third parties such as the FRO. From the point of the view of the authors of this post, the FRO relies on the privity of the contracts' principle.

At this point, two clarifications are important to the readers of this blog.

First, article 15.1 of the CBMA Rules in force during the period in which the information was demanded by the FRO sets that "*unless otherwise agreed between the parties, or if required by the applicable law to the parties, the members of the Tribunal and of the Center [CBMA] will maintain confidentiality about the matters related to the arbitration, except those already in the public domain or that have already been disclosed in some way*".

Second, article 13, paragraph 6, of the BAA establishes that "*[i]n performing his duty, the arbitrator shall proceed with impartiality, independence, competence, diligence, and discretion*". In the lack of an express reference to confidentiality in the BAA, the term discretion has been interpreted by some Brazilian scholars as a duty to keep the confidentiality of the proceedings:

> From our perspective, the Brazilian Arbitration Act, in art. 13, § 6, established and still does a duty of confidentiality upon the arbitrators, regardless of any contractual provision or institutional rules in this regard. (…) this duty of confidentiality also applies to the arbitral institution administering the proceedings, given the nature of its activity[2)]

Evidencing that this is not a straightforward issue, however, in 2019 the authors seem to have altered their previous position to conclude that there is no legal obligation of confidentiality under

the BAA.[3)]

Other commentators state that discretion is not to be confused with confidentiality: "*[o]ne thing is the temperance of the arbitrator, of whom is expected a discreet behavior; another very diverse thing is confidentiality.*"[4)]

In any case, there is *consensus* that confidentiality would stem from the applicable arbitration rules or from the arbitration agreement.[5)]

The Litigation Commenced by CBMA

Upon receival of the summon ordering CBMA to exhibit arbitration-related documents to FRO, CBMA filed a *writ of mandamus* filed under no. 0017682-42.2013.4.02.5101 before the 28th Federal Court of Rio de Janeiro ("Lower Court"), asking the court to enjoin the FRO from ordering the CBMA to share all the information requested by FRO concerning the arbitration proceedings administered by CBMA from 2008 to 2011 and to declare that CBMA would not be legally penalized by refusing to present such documents.

The *mandamus* was dismissed by the Lower Court decision without prejudice, on the ground that it would need further evidentiary production to make a decision, which would be incompatible with the strict procedural rules applicable to the *writ of mandamus* in general.

CBMA filed an appeal against the Lower Court's dismissal of the case, which was judged on February 12, 2020 by the Regional Federal Court of the 2nd Region[6)] ("Federal Court of Appeals") and that reversed, by majority, the Lower Court's decision.

The prevailing opinion

The reporting judge Luiz Norton Baptista de Mattos' decision recognized that the *writ of mandamus* would be admissible given that it only discusses legal issues and, therefore, would not require an evidentiary stage.

On the merits, he relied on the principle of strict legality, applicable to the public administration, to grant the *mandamus* and to prevent the FRO from requesting CBMA to exhibit the documents.

His decision states that private entities do not have the legal duty to provide information requested by the FRO without a prior law, *strictu sensu*, that imposes such obligation to them.[7)] Other rules raised by the FRO such as the ITR could not support its demand since they cannot be considered law, strictly speaking.

The obligation to provide information concerning third parties can only bind the persons and entities expressly referred to in article 197 of the NTC. It differentiated the case at hand from the obligation of financial institutions to provide equivalent information from third parties, as in the latter case there are laws expressly authorizing it.

His decision further stated that “there are innumerous other appropriate means for the FRO to carry out tax inspection, including requesting banking data as above mentioned, not being allowed that the FRO acts outside of the boundaries of the legal and constitutional dictates”.

Regarding the contention of the CBMA that it is under the duty of secrecy and, thus, not obliged to provide the information requested, the Federal Court of Appeals denied the argument – although clarifying that it would be irrelevant for the final ruling since the assessment of article 197 of the NTC would suffice.

His ruling states that the duty to keep the secrecy would be only a private agreement between the litigants. As to the term discretion present in the BAA, it stated that “the duty of discretion (…) is not to be confused with secrecy, as the latter has bigger density as to the preservation of third parties information”.

On this subject, the oral concurring opinion, rendered by Federal Judge Marcus Abraham, has a different view. He stated that, although confidentiality is not expressly referred to in the BAA, “it somehow results from paragraph 3 of article 2, which sets that arbitration involving the Public Administration will respect the publicity principle (…). Therefore, in my opinion, the obligation to give publicity and disclose all the awards is only applicable in cases where the Public Administration is involved”.

The dissenting opinions

The dissenting Judge Luiz Antonio Soares rejected the *writ of mandamus* on the merits because, in his opinion, the FRO did not aim to obtain any information about third parties through the documents requested, but of the CBMA itself, as the debtor of tax obligations.

The opinion of Luis Antonio Soares was followed by Judge Cláudia Neiva, who addressed that the confidentiality of arbitral proceedings is of a private nature and could not be opposed to the FRO.

Conclusion

Although grounded on the absence of a *stricto sensu* law requiring private entities to exhibit third-party related documents and information, the decision of the Federal Court of Appeals preserves the secrecy of arbitral proceedings under administration of the CBMA, which is a practical result that seems to be aligned with the expectation of most of the domestic and international arbitral community.

At the same time, it preserves the public interest and the interest of the FRO, since the FRO has several other means to obtain information regarding taxpayers, and these parallel avenues do not jeopardize the confidentiality of arbitration proceedings.

The decision is still subject to appeal by the FRO. At the time of publication, time periods under Brazil’s procedural law are suspended due to the Covid-19 crisis. Once the suspension is lifted, the FRO will have approximately one month to challenge the court’s decision.

All texts in Portuguese that are mentioned or cited in this post have been freely translated into English by the authors.

References

?1 "Art. 229. No person may be compelled to testify about fact: I – that should be kept secret by virtue of a status or profession; (…)" Such article has been revoked by Law no. 13.105/2015.

?2 FITCHNER, José Antonio. MONTEIRO, André Luis. A confidencialidade na reforma da lei de arbitragem. In: ROCHA, Caio Vieira, SALOMÃO, Luis (coords.). *Arbitragem e Mediação – A Reforma da Legislação Brasileira*, 2. ed. São Paulo: Atlas, 2017.

?3 FICHTNER, José Antonio, MANNHEIMER, Sergio Nelson, MONTEIRO, André Luís. *Teoria Geral da Arbitragem*. Rio de Janeiro: Forense, 2019, p. 595.

?4 CARMONA, Carlos Alberto. *Arbitragem e processo: um comentário à Lei nº 9.307/96*, 3. Ed. São Paulo: Atlas, 2009, p. 246.

?5 "It is necessary, either way, to keep in mind that arbitration in Brazil is not necessarily confidential. It is the institutional arbitration rules that tend to establish that the procedure shall be confidential." CARMONA, Carlos Alberto. *Arbitragem e processo: um comentário à Lei nº 9.307/96*, 3. Ed. São Paulo: Atlas, 2009, p. 246.

?6 A second instance court competent to decide appeals of decisions issued by the Lower Courts of the States of Rio de Janeiro and Espírito Santo.

?7 *Stricto sensu* laws are rules issued by the legislative authorities in accordance with the procedure established by articles 49 to 59 of the Brazilian Constitution. Decrees are not embraced by such provisions.