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Recent Issues Regarding Confidentiality in Arbitration in Brazil

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It is well-known that confidentiality is a particularly important mechanism for protecting the information and data contained in a process in which disclosure could cause prejudice to the parties. That is because the mere existence of a lawsuit may sometimes lead to considerable consequences for the parties, as it may affect the perception of third parties about the relationships, the procedures and even the financial standing of the entities involved. Thus, the possibility of ensuring total confidentiality of arbitral proceedings can be extremely valuable, especially in highly competitive commercial environments.[1)]

Fouchard, Gaillard and Goldman emphasize that confidentiality is one of the benefits why private parties choose arbitration for the resolution of their disputes, listing confidentiality as a fundamental principle of commercial arbitration.[2)]

Besides that, confidentiality is widely recognized as an intrinsic element of commercial arbitration.[3)] In fact, confidentiality is subject to the parties' choice. Indeed, the power arising from the autonomy of the parties, allows them to reach an agreement regarding confidentially.[4)] This autonomy is revealed when the parties choose the applicable rules to their arbitration. Therefore, confidentiality is a rule set forth in several arbitration rules.[5)]

It was precisely because of the confidential nature of commercial arbitration and evolution of Brazilian case law and commentary on arbitration, that led the legislator to include the provision contained in article 189, IV of the Brazilian Civil Procedure Code (**"CPC"**), according to which: "*Although procedural acts are public, lawsuits shall be prosecuted under a gag order when: (…) IV – they deal with arbitration, including the enforcement of arbitral decisions by means of a written request sent by the arbitral tribunal to the judiciary, provided the confidentiality stipulated in the arbitration proceedings is proven before the court.*"

However, the Appellate Court of São Paulo ("**TJSP**"), in a recent and polemic decision, found that this provision violates articles 5, LX, and 93, IX of the Brazilian Federal Constitution.

The TJSP's Decision

The underlying dispute in this case concerned compensation of Escotilha Participações Ltda. for damages arising out of the termination of the partnership of GLS Brasil Serviços Marítimos Ltda. After filing for arbitration and losing, the claimant alleged that the arbitral award breached the arbitration agreement, *inter alia*, and sought the annulment of the arbitral award.

With respect to the publication of the documents produced in the arbitration, the TJSP stated that:

> "*Procedural acts, as a rule, are publicized, according to articles 5, LX, and 93, IX, of the Brazilian Federal Constitution. … The generalized imposition of secrecy and confidentiality in arbitral tribunals, contrary to what happens in the processes and judgments of the Judiciary, "is harmful to the legal system, because it causes information asymmetry and hinders the formation of law… the appellate decision by Judge PAULA DA ROCHA E SILVA FORMOSO, states quite accurately. The users have the right to be informed about existing case-law; businessmen, specifically, have the right to foresee, through the coherence that is always expected from those who have the noble mission of adjudicating, the probable result of judgments, and taking that into consideration when entering into commercial deals (…)*" (TJSP, Interlocutory Appeal nº 2263639-76.2020.8.26.0000, reporting Justice Cesar Ciampolini, date of Judgment March 2nd, 2021).

In Brazil, all the documents produced by the parties during the arbitration proceedings are kept confidential. However, when the TJSP ruled on the request for annulment of the arbitral award, all the documents became publicly available, violating article 189, IV of the BCPC.

Implications for Arbitration in Brazil

Contrary to what is suggested in the TJSP's decision, the purpose of article 189, IV of the BCPC is not "*The banalized imposition of judicial secrecy or confidentiality in arbitration proceedings*", which would prevent "*the development of law (consolidation of precedents and case law).*" The legislator's intention, after several years observing and studying arbitration practice in Brazil, was to preserve the functionality and soundness of the arbitration system, which is autonomous and dissociated from the Judiciary. Knowing that the arbitral and judicial systems work in a coordinated and cooperative manner, the legislator succeeded in improving the Brazilian procedural system to preserve one of the most important elements of commercial arbitration, which is its confidential nature.

The TJSP's decision seems to imply that confidentiality in arbitral proceedings would be in the interests of the arbitrators, who would have "*generically established the confidentiality of their proceedings.*" This statement is incorrect. First, arbitrators must respect the will of the parties, who often seek confidentiality through the rules that will apply to the arbitration. Second, confidentiality does not only concern arbitrators, but the parties themselves, who consciously chose to settle their disputes in a private, reserved, exclusive sphere, separate from the Judiciary. And what would be the reason for this choice? The answer lies in the business world, in its market agents, who, for lawful reasons and in their own interests, have the legitimate right to protect their business.

Therefore, the abovementioned decision disregarded the parties' choice to settle their disputes confidentially as well as the protection of trade secrets that are inherent to commercial disputes. Although there is no public information that the dispute related to trade secrets, the subject is relevant to this post because during arbitration proceedings, parties may exhibit confidential documents and information which would be available to anyone if the case became public.

In this case, the decision failed to analyze the essentiality of trade secret, which is "*protected by the constitutional clauses of free initiative (Brazilian Federal Constitution, article 1, IV and 170, caput) and free competition (Brazilian Federal Constitution, article 170, IV), with its repercussions in the infra-constitutional legislation (e.g. protection against the crime of unfair competition, as classified in the Industrial Property Law, article 195, XI and XI and § 1°, and violation of the economic order, as defined in Law n° 8884/94, article 21, XVI)*".[6)]

Thus, it is of utmost importance for the parties in a commercial arbitration not to disclose their business data to the public. Even more so when the agreement containing the arbitration clause also has a confidentiality clause. The Brazilian Superior Court of Justice (**"STJ"**), even before the reform of the CPC in 2015 ruled in favor of total confidentiality in actions where the legal discussion involves commercial information of confidential and strategic nature.

It is common ground that the law does not contain meaningless words, and if the law established that arbitration proceedings are to be held confidentially, such provision was not added accidentally, and its reason for existence, as well as its usefulness, must be given effect.

Conclusion

Although the decision's holding could be reversed in the future, two problems shall be taken into account by arbitration practitioners in Brazil: first, the violation of party autonomy and the disregard of an essential element of commercial arbitration (confidentiality); second, the exclusion of confidentiality in the post-arbitral phase may reduce the interest of the parties to resort to this restricted, private, and appropriate method for resolving disputes, worsening the proper functioning of the market.[7)]

This year, the Brazilian Arbitration Act celebrates 25 years since its enactment. In order for arbitration to remain as the main method for the resolution of business conflicts and maintain its success with the business community in Brazil, it is essential that the unrestricted confidentiality of the proceedings – from the pre-arbitration phase to the post-arbitration phase – be respected, complying with the rule contained in article 189, IV of the CPC, and, ultimately, ensuring legal certainty and foreseeability for the users of commercial arbitration.

References

?1 BAPTISTA, Luiz Olavo. Arbitragem comercial e internacional. São Paulo: Lex Magister, 2011, p. 219

?2 The authors also refer to a case where the Paris Court of Appeals punished a party for filing an appeal before a court which lacked jurisdiction and allowed public debates on facts that should have been remained confidential. See, FOUCHARD, Philippe; GAILLARD, Emmanuel; GOLDMAN, Berthold. *Traité de l'arbitrage commercial international*. Paris: Litec, 1996. p. 629.

?3 In this regard, it is worth mentioning an essay written by José Antonio Fichtner, Sergio Nelson Mannheimer and André Luis Monteiro, who highlight confidentiality as a true quality of arbitration ("Confidentiality in arbitration: general rule and exceptions", Revista de Direito Privado, v. 49, 2012, p. 227-285, Jan. / Mar. 2012).

?4 For the avoidance of doubt, reference is made in this article only to commercial arbitration, leaving aside aspects related to arbitration involving public entities and those involving publicly listed companies.

?5 See, José Emilio Nunes Pinto. "Confidentiality in arbitration", Revista de Arbitragem e Mediação, São Paulo: RT, v. 2, 6, p. 25-36, Jul. / Set. 2005.

?6 NERY JÚNIOR, Nelson. "Trade Secrets – free initiative", Soluções Práticas. p. 361-370, Sept. 2010, 366-367.

?7 The operation of the market, the so-called "mercantile practice", as well as the standards of conduct best adapted to its operation are described by Paula Forgioni (A evolução do direito comercial brasileiro: da mercancia ao mercado. São Paulo: Thomson Reuters Brazil, 5th edition, revised, updated, and expanded, 2021, p. 168-174).

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