Kluwer Arbitration Blog

CBAR 21st International Arbitration Conference: Should Confidentiality Be Respected in Corporate Disputes?

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In line with current discussions in Brazil's arbitration community, especially in the context of Brazilian party leaders' initiative to call for a vote on a controversial bill to amend the Brazilian Arbitration Act ("BAA") on an urgent basis (previously covered here), one of the panels focused on the controversy of whether information regarding corporate arbitral proceedings should be disclosed.

Marcelo Barbosa, former president of the Brazilian Securities and Exchange Commission ("CVM"), moderated a discussion with the panelists Viviane Muller Prado (FGV São Paulo Law School, Professor), Otávio Yazbek (Yazbek Advogados, Partner), and Olivier Caprasse (Capresse Arbitration, Partner).

The panelists pointed out that the conflict between confidentiality and disclosure in corporate arbitrations is not simple. On the one hand, confidentiality is one of the pillars of commercial arbitration, and on the other hand, publicity is an important foundation of the capital market.

Confidentiality, arbitration, and corporate disputes. What is the current legal framework?

Olivier Caprasse highlighted that confidentiality is still one of the most valued benefits of commercial arbitration, which was evidenced in the 2018 Queen Mary International Arbitration Survey. This scenario provides a favorable argument for an opt-out system, by which a procedure should be kept confidential unless parties agree otherwise.

However, this is not a subject that can be generalized, and each case should be analyzed in its own context, considering the agreement of the parties, the law applicable to the arbitration agreement and to the main contract, as well as the applicable arbitration institution's rules.

Rules vary from country to country. Some laws expressly provide for confidentiality obligations in domestic arbitrations, but many are silent. Similarly, there is no such thing as a pattern of confidentiality obligations under Brazilian arbitration institutions' rules. As an example, the ICC Arbitration Rules do not address this issue, unlike the CAM-CCBC Rules, CAMARB Rules, and CIESP/FIESP Rules.

But even if parties agree on confidentiality of an arbitration proceeding, its scope can also vary. For instance, parties can decide that the very existence of the arbitral proceeding may be kept confidential, or that only certain aspects of the arbitration shall not be subject to disclosure, such as (i) documents, (ii) procedural orders, and (iii) awards. Also, some exceptions are usually accepted for circumstances such as to exercise a legal right or to respect a legal mandate.

With respect to the treatment of confidential documents, and in case of the IBA Rules on the Taking of Evidence apply to the dispute, it determines that documents submitted by a party in support of its own case, documents produced pursuant to a production request, or by an order issued by the arbitral tribunal shall be kept confidential. Accordingly, any document submitted or produced by either of the parties or nonparties in the arbitration is to be kept confidential and may be only used in connection with the arbitration.

What are the benefits of confidentiality?

In the corporate world, confidentiality offers certain benefits. Olivier Caprasse mentioned, as an example, the possibility of keeping future relationships between the parties, higher chances to promote a settlement, avoidance of damages – including to the company's image –, and protection from competitors, including trade or company secrets.

As a counterpoint, Otávio Yazbek pointed out that, despite the advantages of confidentiality, there are important discussions when public held companies seek to keep some information confidential. That happens because transparency is one of the pillars of the capital market and public held companies are usually considered a matter of public interest. In his view, full disclosure is necessary to place Brazil in a comparable position to other markets around the world.

In that regard, Viviane Muller Prado listed some advantages that publicity of awards may bring to arbitration in Brazil, especially in corporate disputes. In her opinion, it can be seen as barrier for the development and evolution of judicial precedents in Brazil, particularly on how clauses and legal notions are being applied and interpretated (*e.g.* related to risk allocation and valuation).

For instance, she mentioned that even in important events, such as the Conference, no delegate or panelist was comfortable with expressly mentioning arbitration cases they have acted as an arbitrator or counsel – even if some of them weren't confidential. In her opinion, although confidentiality is usually supported, a set of decisions could bring clarity regarding the understanding and application of Brazilian law on this issue. Ultimately, this could be seen as a matter of public interest, since Brazil faces a moment of fragmentation of knowledge.

Favorable to disclosure or not, the fact is that regulation regarding confidentiality is necessary to guarantee more predictability and legal security. For that, the two sides of the equation shall be kept in mind when regulating this matter: – the above-mentioned benefits of confidentiality on the one side; and the transparency and the dissemination of knowledge resulted from the disclosure on the other.

In any event, the decision to regulate confidentiality comes with a cost, including those to implement and supervise its effectiveness. The impression, however, is that such costs are minimal when compared to the gains explained above. After all, regulation is about creating constraints where that cost is justified, because it has a greater interest – which is the case here.

Confidentiality discussions before the Brazilian Securities and Exchange Commission and Brazilian courts

Confidentiality obligations have already been discussed in the CVM, but as the Commission has its competence restrained to the stock market and its powers are limited by law, this theme still lacks a general legal solution in Brazil.

CVM's regulations are binding for the companies inserted in the stock market, and the Commission firstly approached the issue in 2010, when it declared that shareholder have the right to obtain information and full disclosure, as provided by Section 109, III of Law no. 6.404/1976 (right to inspect).

CVM's interpretation proposes that relevant facts need to be disclosed, even though they might be confidential. This position, however, is not simple because it is not clear how to determine which facts are indeed relevant. This approach therefore seems subjective and creates room for parties to bypass confidentiality obligations – even maliciously.

After decisions issued by the São Paulo Court of Appeals ordering disputes related to arbitration to remain unsealed – despite the existence of confidentiality agreements (*see* TJSP, Case no. 2263639-76.2020.8.26.0000, judged by Grava Brazil, 1st Reserved Chamber of Business Law, 03.02.2021; TJSP, Case no. 1031861-80.2020.8.26.0100; judged by Cesar Ciampolini, 1st Reserved Chamber of Business Law, 06.30.2021), the CVM published in 2022 Resolution no. 80.

Resolution no. 80 establishes that publicly traded companies should disclose corporate litigations cases (judicial or arbitral) based on corporate or securities market legislation, or on rules approved by CVM. Since the resolution has just been published, it is still unknown how the courts will apply its content in future disputes. What will be in fact subject to publicity will depend on the context and whether there is a legitimate interest in keeping the dispute confidential.

Finally, confidentiality is also a hot topic in Brazil given the controversial bill to amend the BAA. As previously reported on Kluwer Arbitration Blog, this bill intends to impose 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. It 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.

Conclusion

Criticisms towards changing the rules of confidentiality lies in the fact that it is one of the main benefits of commercial arbitration, which is no less important because publicly traded companies disclose the existence of arbitrations and the respective provisioning on their balance sheets.

Ultimately, it would be necessary to have a large sample of arbitral awards to build criteria. Otherwise, a few decisions regarding a specific issue may give a false impression that something is consolidated when it is not the case.

The topic has different nuances, but the 21st International Arbitration Conference brought a unique opportunity to discuss this issue. For sure, there are valid arguments in favor and against disclosure, but the fact is that there is a need of regulation.

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