Kluwer Arbitration Blog

Impartiality and Disclosure: Will the Brazilian Supreme Court Change the Current Standards?

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Despite being a relatively young market at just over 20 years old, Brazilian arbitration has experienced rapid growth. As of 2020, Brazil ranked second in the number of arbitrations filed with the International Chamber of Commerce (ICC), surpassing all European, African, and Asian jurisdictions. Brazil is also among the top five nationalities represented among arbitrators, places of arbitration, or choice of law, accounting for approximately 40% of all ICC cases in Latin America. However, researchers estimate that the ICC's share of the Brazilian market is modest, ranging from only 8.7% to 13%, if compared to the more than one-third of all ongoing Brazilian proceedings held by CAM-CCBC. Accordingly, Brazil is considered one of the most sophisticated, well-rounded, and arbitration-friendly jurisdictions globally, with its courts traditionally working in close cooperation with arbitral tribunals (as previously explored in this blog here, here and here).

Therefore, concern arose when a Brazilian political party filed a constitutional action ("Ação Direta de Inconstitucionalidade", "**ADI**"), comparable to the American Facial Challenge or the French *Question Prioritaire de Constitutionnalité*, before the Brazilian Supreme Court. The ADI seeks a judicial review of the Brazilian Arbitration Act ("**BAA**") to regulate arbitrators' duty to disclose in commercial arbitrations.

This post examines the ADI's legal basis, compares the relief sought with international best practices, and contextualizes it within a broader political movement.

ADI's Factual Assumptions

The ADI presents several factual assumptions about arbitration, focusing on the duty to disclose and arbitrators' impartiality, providing that:

- Arbitrators frequently change the scope of their duty to disclose.
- The arbitration environment lacks transparency, judicial appeals, and binding precedents, allowing arbitrators to maintain "*intimate connections*" with parties and lawyers due to the absence of accountability.
- The revolving door effect, wherein the same individuals often serve as arbitrators, lawyers, and experts simultaneously, leads to a "*dangerous promiscuity*" between arbitrators and party representatives.

- Brazilian lower courts have issued contradictory decisions concerning: (i) the duty of arbitrators to disclose, (ii) the extent of disclosure, (iii) the mandatory application of standards from the Brazilian Code of Civil Procedure, and (iv) the applicability of soft law instruments, such as the IBA Guidelines on Conflict of Interest.
- An "*interpretative chaos*" exists in Brazilian courts, with some using the IBA Guidelines as an interpretation guide even when parties did not agree to their application.
- Arbitrators have recently shifted from a full disclosure standard to a more limited one, enabling them to serve on more tribunals without raising concerns about potential conflicts of interest. According to the ADI, this change contributes to the lack of transparency and impartiality in the arbitration proceedings.
- Lower courts have applied time bars and the estoppel doctrine to prevent parties from arguing arbitrator partiality during court annulment proceedings in cases where a party was aware of but did not challenge the arbitrator during the arbitration. The ADI contends that this practice allows arbitrators to avoid scrutiny and undermines the importance of impartiality.

Relief Sought by the ADI v. International Standards

The ADI requests the Brazilian Supreme Court to establish binding standards for interpreting the BAA, which will be applicable to both Brazilian seated arbitrations and to enforcement of foreign awards. The ADI's proposed standards and their comparison to international best practices are outlined below.

1. **Arbitrators' Absolute Duty to Disclose**: The ADI demands that the Brazilian Supreme Court declares that arbitrators have an absolute duty to disclose any information requested by the parties, while parties have no duty to investigate potential conflicts. This view diverges from the IBA Guidelines, item 7(d), which emphasizes that parties have a responsibility to investigate conflicts. Additionally, the parties' "*duty of curiosity*", as established by the International Chamber of the Paris Court of Appeal in the Vitadel LTD decision and by the Swiss Federal Tribunal's decision in Sun Yang, requires parties to actively exercise caution and a degree of diligence.
2. **Failure to Disclose as Grounds for Removal**: The ADI aims to establish that a failure to disclose by itself is sufficient to remove an arbitrator, even if the undisclosed fact would not amount to any breach of impartiality. This does not align with international practices, which often require a demonstration of a real risk of bias. The UK Supreme Court's decision in in Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48 and the United States Supreme Court's classic ruling in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) both required an assessment of whether the non-disclosure created justifiable doubts as to the arbitrator's impartiality, rather than simply relying on the failure to disclose as grounds for removal.
3. **No Reference to the IBA Rules**: The ADI wants to prevent arbitrators and judges from consulting the IBA Guidelines on Conflict of Interest unless parties have expressly agreed to be bound by them. In contrast, the Guidelines have been used by national courts in several jurisdictions such as the UK, Colombia, Switzerland (as discussed here). In Brazil, research points that 90% of arbitrators consult them when making disclosures. According to the International Arbitration Survey (2015) conducted by Queen Mary University of London, the guidelines are the most well-known set of soft law in arbitration, with 90% of professionals claiming to know them.

4. **Impartiality as a Matter of Public Order**: The ADI requests the Brazilian Supreme Court to rule that the impartiality of arbitrators is a matter of public order, not limited by the estoppel doctrine or time bars. This expands the scope of public policy considerations when challenging awards and could create uncertainty in arbitration proceedings. Both international and Brazilian practices limit public policy considerations to fundamental principles of justice and fairness, rather than extending them to all aspects of arbitrator impartiality. The French decision in in CNAN & IBC v. CTI & Pharaon (2021), for example, held that a party's failure to timely raise the issue results in forfeiture of the right to challenge the arbitrator's appointment, unless the specific facts of the case point to an actual "*violation of International Public Policy*." Unlike the French approach, endorsement of the ADI would allow any party to refrain, knowingly and without reason, from making a timely challenge, raising the irregularities only *after* the award is signed.

In conclusion, the relief measures the ADI seeks diverge from what is generally considered good and sound. The ADI risks undermining the credibility and effectiveness of commercial arbitration in Brazil. Then, why does it exist?

Contextualizing the ADI: A Political Movement Against Arbitration in Brazil

The ADI is part of a rather obscure movement in Brazil. This controversial action was preceded by the anti-arbitration bill (previously discussed here) . The anti-arbitration bill aimed to establish new and unorthodox requirements for arbitrations, affecting aspects such as the appointment of arbitrators, composition of arbitral tribunals, arbitrators' duty to disclose, and confidentiality.

Although it appears to have gained traction with the addition of the ADI, the identities of its civil society proponents remain unknown. No academics, practitioners, institutions, or NGOs have publicly supported it. On the contrary, the (i) Brazilian Arbitration Committee (CBAr), the (ii) Brazilian National Council of Mediation and Arbitration Institutions (CONIMA), the (iii) Brazilian Institute for Procedural Law (IBDP) and the (iv) American Chamber of Commerce of São Paulo (AMCHAM) submitted *amicus curiae* briefs opposing the ADI's cause of action, and several, if not all, relevant organizations opposed the anti-arbitration bill. The groups nominally responsible for the ADI and the anti-arbitration bill encompass a range of ideologies, which makes it difficult to discern what social movement is demanding these changes.

Conclusion

The anti-arbitration bill and the ADI's proposed remedies pose significant risks and neglect more subtle practical solutions, but they draw attention to legitimate concerns in arbitration, such as the revolving door effect — a well-established sociological phenomenon. Regrettably, the absence of voices from the ADI's civil society proponents has stifled an open discussion on these matters. In contrast to investment arbitration, where social movements address issues, the ADI seems to lack visible advocates within civil society, corporations, or any other groups.

Organic dialogue ought to precede legislative and judicial action. Without it, the ADI seems to have materialized out of nowhere. Nevertheless, there is abundant opportunity to engage Brazilian practitioners in conversation and convey any shortcomings in the system. Having worked in the

country's largest arbitral institution before transitioning to private practice, I can confirm that both organisations and practitioners are genuinely open to criticism and, if required, changing their ways.

Over the past two decades, Brazilian state entities and markets have embraced arbitration, propelling the nation's private dispute resolution boom. But for the anti-arbitration bill and the ADI, one might not even detect any dissatisfaction with commercial arbitration. Consequently, two crucial questions linger: who is championing this movement, and why?

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