

Kluwer Arbitration Blog

Is the Arbitrator's Failure to Disclose a Sufficient Ground to Set Aside an Arbitral Award? – A Brazilian Perspective

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It is undisputed that arbitration depends on the trust placed by the parties in the arbitrators. The Brazilian Arbitration Act (the “**BAA**”) reaffirms this principle when it provides that an individual may only act as an arbitrator if he/she “*is trusted by the parties*” (BAA, Article 13) and when it puts the burden to disclose “*any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence*” on the arbitrator’s shoulders (BAA, Article 14, §1). However, the limits of the arbitrator’s duty to disclose and the consequences of non-compliance are still not clear under Brazilian law.

Recently, such unclarity has resulted in a controversial bill to amend the BAA and a constitutional action before the Brazilian Supreme Court, both aiming at regulating arbitrators’ duty to disclose in commercial arbitrations (as previously mentioned [here](#) and [here](#)). This article delves into the topic, focusing on a noteworthy decision of the São Paulo Court of Appeals (the “**Court**”) that set aside an arbitral award because one of the co-arbitrators failed to disclose that he had previously worked for the party who appointed him (the “**Munich Re case**” – Appeal No. 1055194-66.2017.8.26.0100, 6 August 2021).

Below, we summarize the main arguments raised by the Appellant for seeking to set aside the award and the decision reached by the Court. In a second part, we also analyse the decision’s alignment with international practice, to conclude that Brazilian national courts should seek a more cohesive approach that is aligned with international practice to the arbitrator’s duty to disclose.

Background

An arbitral award was rendered in a dispute related to the termination of a reinsurance contract. Claiming that the arbitrator nominated by its counterparty (the “**Arbitrator**”) was partial, one of the parties filed a set-aside application before the first instance judge of the Court of São Paulo (the “**Appellant**”). Allegedly, the lack of impartiality of the Arbitrator resulted from the fact that he failed to disclose that the party that nominated him was his employer between 1998 and 2008.

The first instance judge decided to set aside the award, ordering the constitution of a new arbitral tribunal, composed of arbitrators who had no conflict of interests in the terms of the BAA.

The first instance decision was further challenged before the Court, which reached a unanimous

decision on 6 August 2021 (the “**Decision**”).

Main arguments raised by the Appellant

On the merits, the Appellant argued that the Appellee could not rely on the Arbitrator’s alleged breach of his duty to disclose on the basis that it was time-barred. Particularly, the Appellant sustained that Brazilian law requires parties to challenge arbitrators as soon as they become aware of a fact and/or circumstance that is capable to raise doubts as to his/her impartiality and/or independence. Nonetheless, even though the Appellee knew about the Arbitrator’s employment relation with the Appellant since the beginning of the arbitration proceedings, the Appellee only raised this fact when an unfavourable award was rendered.

According to the Appellant, the Appellee’s counsel was aware of the Arbitrator’s employment relation with the Appellant, because while working for the Appellant, the Arbitrator himself had hired the Appellee’s counsel to represent the Appellant in litigation proceedings.

Summary of the Decision

The Decision upheld the first instance decision to set aside the arbitral award, ordering the constitution of a new arbitral tribunal to decide the dispute. In the terms of the Decision, the Appellant failed to demonstrate that the Appellee knew about the Arbitrator’s employment relation with the Appellant. And, in any case, the duty to disclose relies solely on the arbitrator, regardless of the knowledge, by one of the parties, of any fact and/or circumstance that may raise doubts about the arbitrator’s impartiality and/or independence.

Moreover, the Court pointed out that Article 13 of the BAA provides that an individual must have the parties’ trust to act as an arbitrator. In the Court’s opinion, this can only be reached and maintained if the arbitrator respects his/her duty to disclose. However, in the case at hand, the Arbitrator failed to comply with his duty to disclose according to the Court, since he failed to inform the parties about his past employment relation with the Appellant. The Court then concluded that such failure resulted in a breach of the parties’ trust, justifying the set-aside of the award.

It must be noted that Court did not analyse if the non-disclosed fact (*i.e.*, the employment relation between the Arbitrator and the Appellant) was sufficient to cast reasonable doubts on the impartiality and/or independence of the Arbitrator.

Analysis

The Decision analysed two main grounds: (i) the parties’ previous knowledge about the non-disclosed fact, and (ii) the consequences of the non-disclosure by the Arbitrator.

Regarding the first point, the Court held that the parties’ knowledge about a fact cannot be presumed, as only the arbitrator bears the duty to disclose a relevant fact and/or circumstance

“likely to give rise to justifiable doubts as to his/her impartiality or independence” (BAA, Article 14, §1). This understanding seems to clash with previous decisions from the Court, creating legal insecurity for both practitioners and parties. One example is the “*Esho case*” (Appeal No. 1097621-39.2021.8.26.0100, 22 November 2022), where a different judge from the same Court understood that “*the parties have an ethical duty to investigate potential grounds for disqualification, and they shall rely on these grounds on the first opportunity they have after the commencement of the arbitration*”. The *Esho case* is currently pending before the Brazilian Superior Court of Justice, and precisions on this point would be more than welcome.

In addition, the Decision does not seem to be aligned with international practice, which imposes upon the parties a duty of investigation and/or curiosity under certain circumstances. For instance, in the *Dommo case* (No. 19/07575, 25 February 2020; discussed [here](#)), the Paris Court of Appeal considered that the arbitrator’s duty to disclose is partially offset by the parties’ duty of curiosity. In other words, the arbitrator is not required to disclose notorious facts, *i.e.*, easily accessible public information, which could be known by the parties before the beginning of the arbitration. However, it falls upon the arbitrator to disclose any facts and/or circumstances arising *after* his/her appointment. Similarly, the [IBA Guidelines on Conflicts of Interest in International Arbitration](#) (the “**IBA Guidelines**”) require the parties to an arbitration proceeding to “*investigate any relevant information that is reasonably available to them*” (*i.e.*, a duty of investigation).

On the second point, the Decision is based on the premise that a failure to disclose is sufficient to set aside the award, regardless of the nature of the non-disclosed fact. Once again, Brazilian courts fail to adopt a consistent position on this matter. On the one hand, the same rationale had already been adopted in the *Fazon case* (Appeal No. 1056400-47.2019.8.26.0100, 11 August 2020), as discussed [here](#). On the other hand, a recent decision in the *Esho case* held that the failure to disclose does *not* automatically render the award void. Rather, it is up for the judge to analyse whether the non-disclosed fact is sufficient to raise doubts as to the arbitrator’s impartiality and/or independence.

Moreover, the international practice seems to have a different view on the issue. For instance, the UK Supreme Court in the *Halliburton Company v. Chubb* case ([2020] UKSC 48) and the US Supreme Court in the *Commonwealth Coatings v. Continental Casualty* case (393 U.S. 145 (1968)) upheld that the failure to disclose in itself is not a sufficient ground for disqualification of an arbitrator. Instead, it is necessary to examine whether the non-disclosure raises justifiable doubts about his/her impartiality and/or independence. Also, the Paris Court of Appeal ruling in the *Dommo case* required an assessment of whether the non-disclosed facts created justifiable doubts about the arbitrator’s impartiality and/or independence. It is also noteworthy to recall that the IBA Guidelines provide that “[n]ondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so”.

Conclusion

The Brazilian arbitral community would benefit from a more uniform and precise caselaw regarding the arbitrator’s duty to disclose. As we can see, the same Court reached different outcomes in the *Munich Re* and in the *Esho* cases, even though both analysed the consequences of the arbitrator’s failure to disclose a fact that might be known by the parties. Such inconsistency creates serious risks of legal insecurity and compromises the reputation that Brazil has conquered

as an arbitration-friendly jurisdiction.

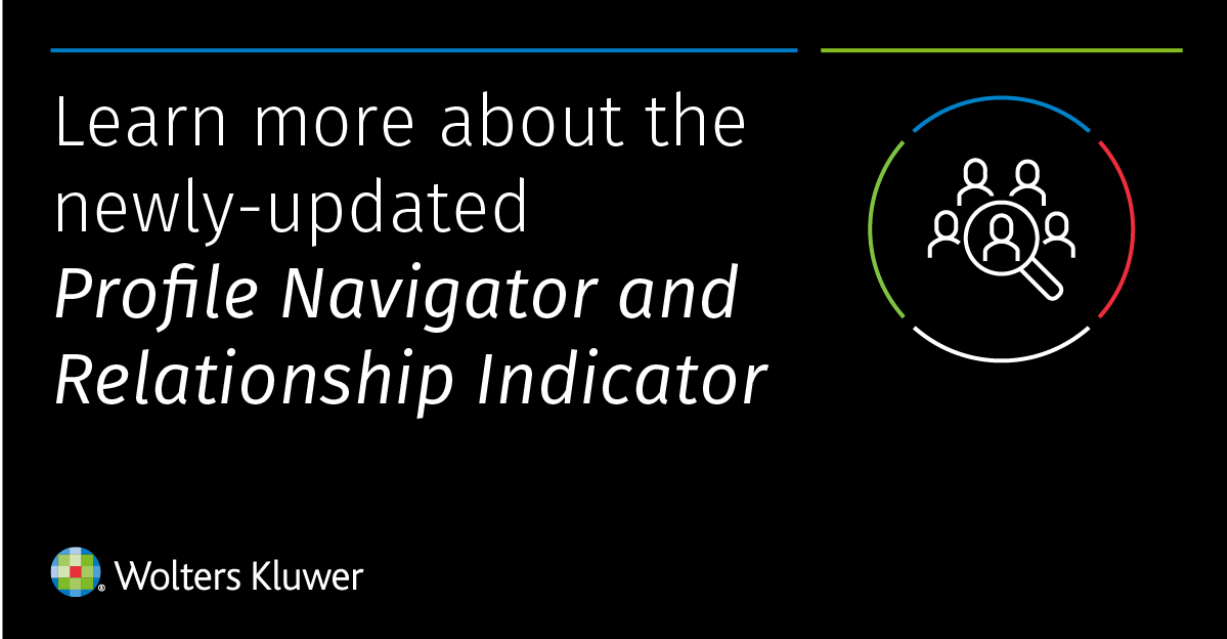
Having this in mind, Brazilian courts should resort to a comparative analysis with foreign decisions and international guidelines on this matter, which might guarantee that Brazil is aligned with arbitration international practice. Such an approach can help to provide clarity and consistency in the treatment of the arbitrator's duty to disclose within the Brazilian arbitration system.

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