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Brazilian Bill No. 2.925 of 2023: The Publicity of Class Arbitrations involving Corporations, its Investors, Officers and Major Stakeholders

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Bill no. 2.925/2023 ("Bill") is intended to amend federal law no. 6.385/1976 (regulating the Brazilian stock market and that created the *Comissão de Valores Mobiliários*, the Brazilian Securities and Exchange Commission – "**CVM**") and law no. 6.404/1976 (regulating joint-stock companies/business corporations).

The goal is to ensure transparency in class arbitration proceedings involving stock market investors, corporations, officers, and major stakeholders ("Securities Disputes"), seeking to further protect the investors' interests.

The Bill was being discussed earlier this year by the Brazilian Congress as a matter of urgency, which is no longer in effect since the urgency regime was revoked by the Executive on September 13, 2023.

The current framework of confidentiality of arbitration in Brazil

As already noted in this blog, here and here, the Brazilian Arbitration Act does not expressly provide for confidentiality of arbitration proceedings. The parties are usually free to agree on a confidentiality clause or to adopt a set of institutional rules that provides for secrecy. If that is the case, such provision shall be observed by the judicial authorities hearing any enforcement actions on the underlying award (see article 22-C, sole paragraph, of the Brazilian Arbitration Act and article 189, IV, of the Brazilian Code of Civil Procedure), although in some cases secrecy has been ignored by Brazilian Courts (as discussed, for instance, here).

Publicity is not incompatible with arbitration in Brazil *per se*, although the parties most commonly agree on confidentiality either by contract or by choosing institutional rules that provide so.

In some specific cases, Brazilian law may also expressly provide for the publicity of arbitral proceedings. For instance, article 2, § 3, of the Brazilian Arbitration Act requires the publicity of the case records when the public administration is a party of the arbitration.

It follows that many Brazilian States regulate arbitration with the Public Administration – by means of the so-called State's Decrees – and also provide, through different detailing degrees, the publicity of arbitration disputes involving the Public Administration (as discussed here and here).

As to Securities Disputes, the current framework does not impose a requirement of publicity of case records of given arbitral proceedings. Joint-stock companies are, however, required, in accordance with CVM Resolution no. 80/2022 ("Resolution"), Annex I, art. 2, item I, to disclose the main information about the arbitral dispute, including its existence, the parties involved, amounts in dispute, assets or rights at stake, main facts, and the reliefs sought by or against the joint-stock company, within 7 (seven) days of the commencement of the proceedings.

In addition, in accordance with the same article, item III, joint-stock companies shall also provide information concerning the response to a request for arbitration, the execution of the terms of reference, decisions on interim measures, decisions on jurisdiction, and on joinder/exclusion of parties, as well as related to partial or final awards, within 7 (seven) days of awareness.

However, the sole paragraph of the aforementioned article expressly provides that disclosure of documents containing the whole content of the decision is not mandatory, which is corroborated by art. 1, § 2, of Annex 1 of the Resolution asserting that the duty to inform arbitral disputes shall observe the secrecy grounded in law.

The Resolution is, thus, aligned with CVM's administrative rulings concerning the balance between, on the one side, the right of full disclosure to investors, and on the other side, the confidentiality of arbitration proceedings imposed by institutional rules. In a ruling rendered in the administrative proceedings CVM no. RJ 2008/0713, the CVM has established that the confidentiality of arbitration proceedings does not jeopardize the investors' right to be informed nor transparency, as it does not hamper the duty of the joint-stock companies to provide information to the market and its investors in accordance with CVM's regulations.

The publicity of the Securities Disputes envisaged by the Bill

Among other modifications envisaged by the Bill, it suggests the inclusion of art. 27-H in the Law no. 6.385/1976, concerning civil liability of officers and major stockholders before investors, that would read as follows:

> "*Art. 27-H. The legitimate investors may file, on their behalf and on the interests of all the securities holders of the same type and class, civil liability class actions due to damages arising from violation of laws or regulations of the securities exchange market*." (free translation)

In turn, in accordance with the new wording of Art. 27-I of the Law no. 6.386/1976, by-laws, regulations, deeds or documents issuing securities may provide that the claims referred to in art. 27-H be settled by arbitration, as long as: (i) they are compatible with arbitration; (ii) other investors can also intervene in the arbitration, and (iii) these proceedings are made public, as a rule.

The compatibility of the claims referred to by article 27-H with arbitration is clear where legitimate

investors file a claim on their own behalf (an individual claim). However, in cases where a claimant seeks to file a class action claim on behalf of securities' holders, adjustments may be required in the procedure so that it becomes simultaneously compatible with the particularities of class actions heard in the national courts and of arbitration proceedings, particularly considering that the cornerstone of arbitration is consent.

Given the Bill's goal to increase transparency to better protect investors' rights, arbitration disputes concerning the matters listed in article 27-H shall be made public. This is an important measure to allow existing and prospective investors to carry out their own risk assessment when making business decisions, for instance, whether to allocate resources into a particular business corporation. Publicity also provides means for other investors to intervene in the arbitration proceedings.

Art. 109 of the Law no. 6.404/1976 is also to be amended by the Bill, which proposes the inclusion of the following paragraphs to what is relevant to the present post:

> "§ 4º The arbitral proceedings concerning joint-stock companies will be public, under the limits established by the regulation to be issued by the CVM.
>
> 5º The arbitral institutions will publicize its caselaw of disputes involving joint-stock companies and will make it available at their websites, organized by the decided subject matter.
>
> 6º CVM may provide for additional requirements to arbitral institutions for proceedings involving joint-stock companies, including related to the need of expressly providing in their rules the procedure for consolidation of arbitral proceedings in cases of connection and continency (…)". (free translation)

Under the proposed text, CVM may limit the publicity set forward by the Bill through its regulations. CVM may also establish additional requirements to be met by arbitral institutions administering proceedings involving joint-stock companies, such as the need for rules of procedure for consolidation of ongoing arbitrations.

The Bill directly imposes on the arbitral institutions the burden of publicizing the caselaw of disputes involving stock-joint companies on their websites, to be organized by subject matter, a mechanism that will also enhance legal certainty, favoring that investors make more informed business decisions, including whether or not to resort to arbitration against a certain company.

Conclusion

While it is true that the current framework concerning the publicity of Securities Disputes does not jeopardize the investors' right to be informed, the Bill may benefit both prospective investors as well as existing investors of business corporations by shifting transparency to a whole new level.

Prospective investors may be better informed of the Securities Disputes involving the corporations they intend to allocate funds, *i.e.*, by having access to the full case records of Securities Disputes,

prospective investors may conduct their own and independent risk assessment.

Existing investors will be aware of the Securities Disputes in course enabling them to make informed decisions as to, *inter alia*, disinvest or to intervene in these proceedings by means, for instance, of consolidation, envisaged by the Bill with the amended text of art 109, § 6, of Law no. 6.404/1976.

At the same time, by publicizing caselaw concerning joint-stock companies, it is expected an increase of legal certainty, benefiting not only investors, either prospective or existing, but also corporations, their officers, and major stakeholders, in making business decisions and in deciding whether or not to resort to arbitration.

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