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Arbitrators' Duty to Disclose under Brazilian Law: The Case of Government Attorneys Seating as Arbitrators

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Under article 14, §1 of the Brazilian Arbitration Act ("BAA"), arbitrators bear the duty to disclose "*any circumstances likely to give rise to justifiable doubt as to their impartiality and independence*". Because the concept of "*justifiable doubt*" is subjective, Brazilian jurisprudence often features incohesive and contradictory understandings of the scope and effects of such duty vis-à-vis the validity and enforceability of arbitral awards.

On 28 November 2023, Justice Humberto Martins, from the Superior Court of Justice ("STJ") issued a new decision on the duty to disclose. It concerns an arbitration in which a government attorney, member of the Attorney General's Office ("AGU"), had acted as arbitrator in a three-member tribunal seated in Rio de Janeiro, Brazil.

This post discusses such decision in light of the applicable regime to government attorneys that act as arbitrators, and a potential clash with the parties' "duty of curiosity" in arbitration.

Background

As reported here, the underlying arbitration was brought in 2018 by pension fund Fundação Petrobras de Seguridade Social ("Petros") against Mosaic Fertilizantes P&K LTDA ("Mosaic"), under the auspices of Centro Brasileiro de Mediação e Arbitragem ("CBMA").

The government attorney, appointed as arbitrator by Petros, had previously acted under several capacities, between 2010 and 2015, at the governmental entity Superintendência Nacional de Previdência Complementar ("Previc"). More recently, and after the arbitration was concluded, he was reported to have served as Previc's chief attorney from April to November 2023. Previc is responsible for supervising and overseeing all pension funds in Brazil, *i.e.*, social security entities established for employees of private companies, and/or public servants at all levels of government. It is also responsible for enforcing public policies in the private pensions' market (for further details, see here).

Petros is the pension fund established in benefit of employees of Brazilian state-owned company, with privately held shares, Petróleo Brasileiro S.A.("Petrobras") and is, hence, subject to Previc's supervision in several instances. For example, Previc is in charge of approving Petros' statute and any and all corporate restructuring the entity may be subject to (for further details, see here).

Following the end of the arbitration, Mosaic brought annulment proceedings of the arbitral award rendered by the government attorney and fellow arbitrators. While the annulment proceedings before the Court of Rio de Janeiro are not publicly available, Justice Humberto Martins' provisional decision on appeal before the STJ, provides enough background to delve into two aspects of the duty to disclose under Brazilian law: (I) the applicable regime for government attorneys to act as arbitrators; and (II) the clash between the arbitrator's duty to disclose and parties' "duty of curiosity" towards publicly available information.

(I) What Government Attorneys Must Attain to When Serving as Arbitrators?

Independence and impartiality of arbitrators are safeguarded by public policy in Brazil, which is directly linked to the validity and enforceability of an arbitral award. In this regard, article 21, §2 of the BAA states that: "[a]*ll arbitration proceedings shall respect the principles of the right to a full answer and defense, the equal treatment of the parties, and reasoned, impartial and independent decision making by the arbitrator*"; while article 32, VIII determines that: "[a]*n arbitral award is null and void if:* (…) *VIII – it violates the principles stated in article 21, second paragraph of this Law*".

The duty to disclose is, therefore, one of the mechanisms that allows one to verify the independence and impartiality of the arbitrators (see, for instance, BARALDI, Eliana; VAZ, Paula Akemi Taba. Art. 14. In: WEBER, Ana Carolina; LEITE, Fabiana de Cerqueira (org.). Lei de Arbitragem Comentada. São Paulo: Revista dos Tribunais, 2023. p. 179-192, p. 182). That is why a failure to disclose is not a standalone breach of public policy, but it may amount to one depending on whether the non-disclosed information is able to give rise to justifiable doubt as to the arbitrator's impartiality and independence (as previously reported on this blog here).

In their appeal before the STJ, Mosaic sought the annulment of the arbitral award, because it was rendered by arbitrators who (i) could not have acted as such; (ii) breached the duties of disclosure and impartiality; (iii) are subject to administrative disciplinary proceedings for breach of public attributions.

The BAA also provides that an arbitral award is null and void if it was rendered by someone who could not have served as arbitrator (Article 32, II). The grounds under which one cannot serve as arbitrator are provided, non-exhaustively, under Article 14 of the BAA:

> *Arbitrators who have a relationship with the parties or to the dispute submitted for arbitration which would constitute grounds for recusal of a judge may not act as arbitrators, and the duties and responsibilities provided for in the Code of Civil Procedure apply to such arbitrators, mutatis mutandis.*

The BAA's provision mirrors those imposed for recusal of a judge under the Brazilian Code of Civil Procedure. In addition, given the involvement of a government attorney in this case, Laws n. 73/1993 and n. 8112/1990 – respectively regulating AGU and its attorneys, and all public servants at federal level – are applicable, as well as AGU's normative n. 57/2019, which expressly prohibits AGU's attorneys to undertake private engagements related to alternative dispute resolution, *e.g.*, arbitration, mediation, conciliation, and negotiation.

Despite not expressly referred to, these impediments certainly support Justice Humberto Martins' decision, who held that there were enough circumstances to support the presence of *fumus boni juris*, one of the requirements for the granting of provisional measures. At AGU, the case gave rise to an administrative proceeding involving the government attorney and his interim removal from office at Previc.

Nevertheless, Petros and Previc are separate entities altogether. The first one is a non-profit private entity, while the second is a standalone governmental body. Although it can be said that Previc supervises and has a somewhat controlling influence on Petros, it remains unclear whether the relationship between these two entities could represent a "direct economic interest" under the wording of item 1.2 of the Non-Waivable Red List of the IBA Guidelines on Conflict of Interest ("IBA Guidelines"). Moreover, the IBA Guidelines do not directly address the relationship between private entities and their supervising regulatory authorities.

In addition to the allegedly non-disclosed condition of government attorney, the appointed arbitrator and the presiding arbitrator had become business partners in a publishing company established while the arbitration proceedings were ongoing. This relationship was also considered in Justice Humberto Martins' assessment of *fumus boni juris* because it was not voluntarily disclosed by the arbitrators. Together, these circumstances were enough to justify Justice Humberto Martins' award of provisional measures suspending the effects of the arbitral award to date. Although this is not a final decision, it can certainly serve as an alert for arbitration users and public attorneys who seat as arbitrators and wish to render an enforceable award.

(II) What About the Parties' Duty of Curiosity?

The parties' duty of curiosity is common practice in international arbitration and crystalized in certain jurisdictions through case law, such as France (see, for instance, Paris Court of Appeal, 25 February 2020, Dommo Energia SA v. Enauta Energia SA and Barra Energia do Brasil Petróleo e Gás, discussed here). It requires parties to investigate publicly available information accessible to the parties and that may raise doubts as to an arbitrator's independence and impartiality. An arbitrator is, hence, not expected to disclose "well-known facts, understood to mean public, easily available information that the parties could not have failed to look at before beginning the arbitration" (Paris Court of Appeal, 26 January 2021, Vidatel Ltd v. PT Ventures SGPS).

The IBA Guidelines, under its General Standard n. 7, requires parties to investigate *"relevant information"* reasonably available to them throughout arbitral proceedings in order to comply with their duties.

Similarly, §6 of the Brazilian Arbitration Committee (CBAr) Guidelines on Arbitrator's Duty to Disclose provides that parties bear the duty of informing themselves on facts of public knowledge and easily accessible as means to monitor whether the arbitrator duly performed the duty to disclose. It has also been stated in a previous decision by the Court of Rio de Janeiro on annulment proceedings that where the non-disclosed fact is of public knowledge and within the parties' reach, there cannot be a breach of the arbitrator's duty to disclose (see Court of Rio de Janeiro, 3 February 2021, EIT Empresa Industrial v. Neoenergia, case n. 0248041-79.2018.8.19.0001).

Against this backdrop, the fact that Petros' appointed arbitrator also serves as government attorney cannot be considered as non-relevant information or of limited access. On the contrary, an

assessment of the arbitrator's CV suffices to reveal his main capacity as government attorney and previous involvement with Previc. In the case at hand, if the information not disclosed by the arbitrator is considered of public knowledge, and Mosaic expected to have been aware of it, the founding allegation of nullity could be rejected by the STJ. Under Brazilian law and jurisprudence, a party's inertia in alleging a potential cause of nullity at the earliest opportunity, or only after an unfavorable outcome, is considered to violate procedural fairness and good faith (see Superior Court of Justice, Pet n. 14.472, Justice Paulo de Tarso Sanseverino, 16 August 2021).

Conclusion

Given the subjectiveness of the term "justifiable doubt" and of the extent of the duty to disclose under Brazilian law, the present case is another opportunity for the STJ to provide further clarity and cohesiveness in Brazilian arbitration case law, particularly in light of the on-going attempts to reform the legal framework of arbitration in Brazil, as reported here.

Meanwhile, the use of guidelines is evermore welcome in order to stay aligned with international practice. Given the IBA Guidelines General Principle 3(d) – that disclosure should be favored whenever in doubt – it seems advisable that certain circumstances simply be disclosed before they can even prompt a shred of doubt on the parties. In addition, it is true that under the BAA, article 13, any person detaining the confidence of the parties may be appointed as arbitrator. That does not mean that said person is released from their status under applicable legislation beyond the BAA, such as the regulations governing AGU and other members of the judiciary, including judges and ministers.

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