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An Important Decision From Brazilian Courts on the Duty to Disclose: Non-disclosure by an Arbitrator is not Sufficient to Justify the Annulment of an Arbitration Award

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On 18 June 2024, the Brazilian Superior Court of Justice issued an important decision, which it clearly established the distinction between the breach of the duty of disclosure and the loss of impartiality or independence of arbitrators. Among other arguments, there was the claim of a violation of the duty of disclosure, capable of generating the annulment of the arbitration award, which was qualified by the defeated party in the arbitration as an award rendered by a person who could not be an arbitrator.

Background

After being ordered by the Arbitral Tribunal to pay the sum of R$4,242,997.44, the claimants (BRANDAO & VALGAS SERVICOS MEDICOS) filed an action for annulment of the arbitral award alleging that the arbitrator, appointed by the respondent (ESHO EMPRESA DE SERVICOS HOSPITALARES), had breached his duty of disclosure. In summary, the controversy over the impartiality of the arbitrator was related to the allegation that he had failed to disclose, at the initial and appropriate time, that (i) he had never acted as an arbitrator on other occasions; and (ii) he omitted the circumstance that the law firm of which he is a member provides services to the company Kora Saúde Participações S/A, which has a commercial relationship with the Respondent (ESHO EMPRESA DE SERVICOS HOSPITALARES).

Regarding the first allegation, the Brazilian Superior Court of Justice rejected this in its decision, because the arbitrator's questionnaire and curriculum vitae stated that he was a member of the OAB/SP Mediation, Conciliation and Arbitration Chamber and that he had more than 25 years of experience in arbitration, including in rendering awards in the area. The decision pointed out that, although the Claimants had access to the arbitrator's questionnaire and curriculum vitae since he was appointed to the position, the Claimants did not raise before or during the arbitration proceedings any fact that would discredit the arbitrator, but did so only after the award that was unfavorable to them was handed down. Besides the fact that the arbitrator never said that he had not previously acted as an arbitrator, but informed them that he was experienced in arbitration, the Superior Court of Justice took special consideration of the fact that those questions could (and should) be raised during the arbitral proceeding, but the Claimants failed to do so.

As per the second allegation of a close relationship between the arbitrator's firm and a company related to Respondent, the Superior Court of Justice rejected it on the grounds that:

> "*the fact that the co-arbitrator acted as a lawyer for a healthcare company that has commercial relations with Amil, in itself, is insufficient to affirm a conflict of interest. Thus, the assumptions raised by the plaintiffs are insufficient to even indicate a possible relationship between ESHO and the law firm of which the co-arbitrator is a partner.*" (courtesy translation)

Analysis

The decision got it right, as it indirectly recognized that arbitrators must be careful, interpret the duty to disclose expansively, and inform the parties of all situations that might in any way create doubt as to their eventual impartiality or independence, although certain obvious information is excluded from the duty to disclose and the party has a duty to challenge any failure to disclose as soon as possible. The assessment of the professional's suitability is made in light of the circumstances of the concrete case, not admitting that the professional should refrain from disclosing information because, in his or her opinion, it is not relevant (*see* "Although disclosure is on matters that potentially affect the arbitrator's independence in the **eyes of the parties** (this is not an objective test, unlike that in many other rules or statutes), a challenge can be mounted on not just lack of independence but **any other credible basis."** Chan, Leng Sun. "Arbitrators' Conflict of Interest: Bias by Any Name." *Singapore Academy of Law Journa*l, vol. 19, no. 2, September 2007, pp. 245-266, p. 249). However, not every piece of information is important enough to be revealed, and especially with regard to impartiality, mere subjective allegations are not capable of ruling it out.

The Court decision expressly referred to IBA Guidelines on Conflicts of Interest in International Arbitration as a standard to be followed. Moreover, it stated that the fact to be disclosed by the arbitrator should, according to international parameters, be assessed according to an objective perspective, taking as reference, by part of the doctrine, the point of view of a disinterested third party (*see* VIŠINSKYT?, Dalia; ?UVELJAK, Jelena; JOKUBAUSKAS, Remigijus. The Duty of Disclosure as a Basis for Fair Investment Arbitration Proceedings. *International Comparative Jurisprudence*, vol. 8, no. 2, 2022, pp. 129-137, p. 132). The thesis that the doubt must be justified in the perception of a third party essentially derives from the provisions of the IBA Guidelines, which, in its general principles and explanatory notes, refer to the judgment of a reasonable third party with knowledge of the facts or circumstances that could raise justifiable doubts about the impartiality or independence of the arbitrator.

In the case at hand, regarding the issues related to the duty to disclose, the Superior Court of Justice outlined as questions to be answered (i) whether the breach of the arbitrator's duty of disclosure is sufficient to declare an arbitral award null and void; (ii) whether the Judiciary enters into the merits of the arbitration award when analyzing the evidence supporting the allegation of breach of the arbitrator's duty to disclose; (iii) whether a challenge to the arbitrator's impartiality can occur at any time. Despite having recognized the possible violation of the duty of disclosure, the decision went further in the analysis of the specific circumstances and, by finding that the facts

did not affect the impartiality, it was concluded that the arbitrator's performance did not indicate bias.

In a very clear manner, the Court recognized that:

> "*the arbitrator's failure to disclose to the parties a fact that may cast doubt on his impartiality and independence does not in itself mean that the arbitrator is biased or lacks independence, and the Judiciary must assess the relevance of the undisclosed fact in deciding the annulment action*." (courtesy translation)

It also established the exceptional nature of annulment and the need for the undisclosed fact to be serious enough to undermine the arbitrator's independence and impartiality. In the Court's words:

> "*the undisclosed fact capable of annulling the arbitral award must be shown to extinguish the party's trust and undermine the independence and impartiality of the arbitrator's judgment. To this end, strong evidence is required, and subjective allegations that lack relevance in terms of their impact are not enough*." (courtesy translation)

The decision also raised the discussion about which point of view should be considered for establishing the standards of disclosure (the reasonable third party or the parties – *see* "Disclosure should generally be viewed from the eyes of the parties; however, there are some situations which will virtually never lead to disqualification under the subjective test and, accordingly, these situations need not be disclosed, regardless of the parties' perspective." DE WITT WIJNEN, Otto L O, et al. "Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration." *Business Law International*, vol. 5, no. 3, September 2004, pp. 433-458, p. 450) but, in any case, concluded that the concepts of impartiality and independence are subjective and require a high degree of interpretation, and the annulment of the arbitral award, as a result of the breach of the duty of disclosure, should be directly related to the effective impairment of the arbitrator's performance or the effective breach of confidence in that professional.

If, as repeatedly said in the world arbitration literature, "arbitration is worth what the arbitrator is worth", it is essential that arbitrators do not violate the principle of trust or compromise the parties' right of defence, and disclosure of such situations should be the rule.

However, the decision went further in the analysis of the specific circumstances, concluding that the alleged violation of the duty to disclose was not enough to set aside the award, because all the circumstances could be investigated by the parties during the proceeding and, in any case, parties shall not be allowed to withhold certain arguments, waiting for the award and, only if they are defeated, raise it before State Courts.

A similar conclusion was reached and lead to the issuance of Enunciations 97 ("ENUNCIATION 97 – The concept of justified doubt in the analysis of the arbitrator's independence and impartiality must observe objective criteria and be made in the view of a third party who would reasonably analyze the issue taking into consideration the specific facts and circumstances" – courtesy translation) and 110 ("ENUNCIATION 110 – The arbitrator's failure to disclose to the parties a

fact that may cast doubt on his impartiality and independence does not mean, by itself, that the arbitrator is biased or lacks independence." – courtesy translation) by the Brazilian Federal Justice Council. According to these enunciations, the analysis of the fact must be based on an objective criterion, and the judge must consider the relevance of the undisclosed fact, since the failure to comply with the duty of disclosure, by itself, does not indicate that the arbitrator is biased or lacks independence. The decision in the ESHO case confirms this understanding and represents an important statement by Brazilian Courts.

Conclusion

The issue of impartiality, as with any other potential grounds for annulment of an award, does not exempt the party from demonstrating harm or damages, which, for obvious reasons, does not arise or is not configured by the mere fact of defeat. If the formal irregularity of the act was not capable of generating loss, if it was not the determining cause of any loss, or if the irregularity could be circumvented, if the act could produce legal effects, even if defective, in all these cases there are no grounds for the recognition of the annulment. This is the application, in the context of any judicial proceeding, of the aphorism *pas de nulité sans grief* – which, within the scope of the Brazilian positive law norms, is embodied by the rules in articles 276 to 283 of the Code of Civil Procedure. Under this perspective, the annulment of an arbitration award would require the effective demonstration of the arbitrator's partiality and not only the demonstration of a fact that, in theory, could demonstrate it.

In this regard, I also believe that the court's decision was correct in seeking, in the hypotheses foreseen in the lists of practical application of the IBA Guidelines, guidance for the analysis of the arbitrator's claim of impartiality. Despite the nature of such rules and the criticisms they receive, there is no doubt that they are rules that allow us to delimit or make concrete the abstract situations related to the partiality of the arbitrators, allowing us to verify an objectivity that is not extracted from the Brazilian rules (whether legal or object of institutional regulations or codes of ethics).

By describing situations and making precise the interpretation of rules on arbitrators' partiality, there is no doubt the court decision deserves to be received and commented on with good eyes, always in favor of the development of Brazilian national arbitration.

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