CHAPTER II
ARTICLES

B. AN ATTACK ON THE WELL-FUNCTIONING BRAZILIAN ARBITRATION ACT

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In September 2021, draft legislation (PL 3293/2021) to amend the Brazilian Arbitration Act (Law n. 9.307/1996[3]) was introduced in the Brazilian House of Representatives (the "Proposed Amendment"). The Proposed Amendment's changes include (a) adding burdensome regulations on the activity of arbitrators, including a limitation on the number of arbitrations in which an arbitrator can participate simultaneously; (b) increasing arbitrators' duty to disclose; and (c) introducing mandatory publication of information pertaining to the arbitral proceedings. The Proposed Amendment is currently awaiting public hearings[4] to be scheduled for the discussion of contentious topics[5], but there has been increased pressure to expedite its passage.[6]

The Proposed Amendment would introduce ill-considered changes to the Arbitration Act, is contrary to international arbitration practice, weakens the institution of arbitration in Brazil, and discourages its use, especially by foreign parties and counsel. The proposed changes should concern any entity that has executed or contemplates executing an agreement in Brazil that includes arbitration seated in Brazil as a dispute resolution mechanism. The Proposed Amendment would (i) unjustifiably interfere with the parties' right to choose their arbitrators, precluding nominations of competent, independent, and impartial arbitrators; (ii) force arbitrators to disclose even the most attenuated facts or circumstances regarding their impartiality and independence, increasing the parties' due diligence costs and the ability to pursue frivolous challenges; and (iii) interfere with the parties' right to keep their disputes confidential by requiring arbitral institutions to publish on their websites arbitral awards in their entirety.

The rest of this article provides more information about the changes in the Proposed Amendment and how they would negatively affect arbitration in Brazil.

I. Regulation of Arbitrator's Activity

First, the Proposed Amendment would include in the Brazilian Arbitration Act a limitation on the number of arbitrations in which an arbitrator can participate simultaneously (Art. 13, § 8º[7]). An arbitrator would only be able to participate, in any capacity (either as sole arbitrator, party-appointed arbitrator or presiding arbitrator), in ten different arbitrations. The arbitrator would then be disqualified from taking office in an eleventh proceeding until one of his or her existing arbitrations concluded. The Proposed Amendment justifies this change by observing that some arbitrators participate in several cases at the same time and that arbitral proceedings are taking longer to conclude.

However, there is no justification in the Proposed Amendment as to why it is appropriate to limit the number of arbitrations an arbitrator can participate in, nor how the limit of ten arbitrations was chosen or why it is reasonable. This limit provides little benefit to the practice of arbitration in Brazil,[8] given that the Brazilian Arbitration Act already requires arbitrators to have the requisite capacity to handle each arbitration diligently,[9] and infringement of this requirement could lead to the arbitrator's removal.

The Proposed Amendment is also subject to different interpretations, given that it fails to address which proceedings would count for purposes of the rule, whether only domestic commercial arbitrations count or whether international commercial arbitrations and/or investor-state arbitrations count as well. There is also no suggestion as to how to keep track of these numbers, or who should be the gatekeeper of such information. It is not reasonable for the parties to incur additional due diligence costs to confirm the number of proceedings in which each arbitrator is involved, and to keep track of these number during the proceedings, as the only way to secure that a future award will not be vitiated. There is foreseeable uncertainty as to when an arbitration shall be deemed over as well. For example, it is unclear whether a final award that is subject to judicial challenge by one of the parties should be counted, even though the arbitral tribunal has already performed its office.[10]

Second, the Proposed Amendment does not permit different arbitral tribunals to have a complete or partial identity

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[3] A free translation to English of the current Arbitration Act is available at: (link).
[4] Available at: (link).
[5] As reported by the Brazilian Arbitration Committee – CBAr (the "CBAr Note"), which suggested the complete withdrawal of the Proposed Amendment. Available at: (link).
[6] A request for urgency in processing and voting on the Proposed Amendment was filed in July 2022 within the House of Representatives, but without specifying the grounds for such urgency. Available at: (link).
[7] "Article 13. § 8º The arbitrator shall not figure, simultaneously, in more than then arbitrations, either as sole arbitrator, co-arbitrator or presiding arbitrator."
[8] CBAr Note, paragraph 6.
[9] Brazilian Arbitration Act, Art. 13, § 6º: "*In performing his duty, the arbitrator shall proceed with impartiality, independence, competence, diligence and discretion.*"
[10] The common law doctrine of *functus officio* emerged in arbitration "*as a common law doctrine giving expression to the finality of arbitral awards by defining when the arbitrators' power to act is exhausted*". The Arbitration Committee of the New York City Bar Report dated April 2021 (link).

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of members (Art. 13, § 9º[11]). That is, no two panels should share the same two or three arbitrators. The justification provided by the Proposed Amendment is that this will avoid beneficial treatment towards one party to the detriment of other parties.

The Proposed Amendment provides no explanation as to how a party would benefit from the same arbitrator sitting on unrelated cases. On the contrary, the language suggested by the Proposed Amendment is broad enough to create a conflict between completely unrelated cases, where there is no identity of parties, causes of actions, or claims. The only connection required by the Proposed Amendment is the identity of the arbitrators themselves, and, therefore, it is completely inappropriate, and unjustifiably interferes with parties' right to submit their disputes to private arbitrators of their choice or, alternatively, to an arbitrator appointed according to the rules agreed by them[12], which is paramount to their consent to arbitrate, the cornerstone of arbitration.[13]

The Brazilian Arbitration Act[14], as written, already requires that every arbitrator be independent and impartial, and to act diligently and competently, during all stages of an arbitration, irrespective of who the other members of the panel are.

II. Arbitrator's Duty to Disclose

The Proposed Amendment attempts to set a new standard for arbitrator disclosures, replacing the "justifiable doubt" standard currently employed by the Brazilian Arbitration Act[15] with a "minimal doubt" standard (Art. 14, § 1º[16]). According to this standard, any circumstance that could create "minimal doubt" about the arbitrator's impartiality and independence must be disclosed to the parties.

The Proposed Amendment does not say a word about what is "minimal" doubt, and leaves it open to interpretation. Furthermore, it places a heavy burden on the arbitrators, who might feel pressured to reveal non-material information, and on the parties, who will have to employ additional time and resources investigating additional information revealed by the arbitrators, even if immaterial. Also, the "minimal doubt" standard suggested by the Proposed Amendment might invite frivolous challenges, as well as create additional risk of vitiating a future award where there is no material risk of bias or lack of independence.

The new standard suggested by the Proposed Amendment is unnecessary,[17] and does not provide the parties with better tools than those already available, such as the IBA Guidelines on Conflicts of Interest in International Arbitration[18] ("IBA Guidelines") and other soft law instruments.

As the IBA Guidelines recognize, an arbitrator's duty to disclose does not imply automatic disqualification. Indeed, "an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing his or her duties as arbitrator.".[19] A leading commentator observes that removal of an arbitrator is only required "where there is a real, serious possibility that the arbitrator lacks independence and impartiality. Although numerical formulae are overly-simplistic, this standard of proof should require more than a 5%, 15% or 30% chance of bias, and should instead be satisfied only where there is a realistic (or 'justifiable') possibility that an arbitrator genuinely lacks impartiality or independence."[20]

The IBA Guidelines also recognize that "[d]isclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges" because "Parties have more opportunities to use challenges of arbitrators to delay arbitrations, or to deny the opposing party the arbitrator of its choice."[21] Therefore, the IBA Guidelines recognize that some circumstances don't warrant disclosure, because "[i]t is in the interest of the international arbitration community that

[11] "Article 13. § 9º There cannot be absolute or partial identity between members of two arbitral tribunals in progress, regardless of the function performed by them."

[12] "*The New York Convention and other international arbitration conventions provide emphatic recognition of the parties' autonomy to select the arbitrators who will resolve their dispute, or, alternatively, to choose a means by which this selection can be made on their behalf.*" 'Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration', in Gary B. Born, International Commercial Arbitration (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2021) pp. 1761 – 2104.

[13] "*The foundation stone of modern international arbitration is (and remains) an agreement by the parties to submit to arbitration any disputes or differences between them. Before there can be a valid arbitration, there must first be a valid agreement to arbitrate.*" Redfern, A.; Hunter, M. Redfern and Hunter on International Arbitration. – Oxford: Oxford University Press, 2009. 5th ed. Marg. No. 1.38.

[14] Brazilian Arbitration Act, Art. 13, paragraph 6º.

[15] The current Art. 14, § 1º, of the Brazilian Arbitration Act reads as follows: "*Prior to accepting the service, an individual appointed to serve as arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.*"

[16] "Art. 14, § 1º The nominated arbitrator shall disclose, before accepting the nomination and during the entire proceeding, the number of arbitrations in which he or she is involved as an arbitrator, either as sole arbitrator, co-arbitrator, or presiding arbitration, as well as any fact that may suggest a minimal doubt as to his or her impartiality and independence."

[17] CBAr Note, paragraph 10.

[18] International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration, 2015. Available at: (link).

[19] IBA Guidelines, Part I: General Standards Regarding Impartiality, Independence and Disclosure, Art. 3.

[20] 'Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration', in Gary B. Born, International Commercial Arbitration (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2021) pp. 1761 – 2104.

[21] IBA Guidelines, Introduction, para. 1.

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arbitration proceedings are not hindered by ill-founded challenges against arbitrators."[22] In sum, the rationale for imposing a duty of disclosure on arbitrators is not for them to investigate and disclose any de minimis circumstance.

III. Mandatory Publication

The Proposed Amendment requires arbitral institutions to publish on their website (a) at the beginning of any arbitration, a statement identifying the members of each arbitral tribunal, and the amount in dispute in each case (Art. 5º-A[23]); and (b) at the end of any arbitration, a full copy of the award rendered by the arbitrators, except for any parts of the award that the parties reasonably request be redacted (Art. 5º-B[24]).

The justifications for these requirements are, in case of (a) above, that the publication of the composition of each arbitral tribunal will disincentivize the filing of annulment actions; and, as regards (b) above, that an 'arbitral jurisprudence' will greatly benefit the arbitration system. However, neither justification is supported by evidence of any kind. As regards (a), there is no explanation about how the publication of the composition of arbitral tribunals and value of the claims will disincentivize parties from filing annulment actions after an award is rendered.

In relation to (b), contrary to what the Proposed Amendment suggests, it is virtually undisputed that parties have autonomy to agree upon the confidentiality of their arbitral proceedings, and "there appears to be little legitimate reason for unrestricted publication of awards, even at the conclusion of arbitral proceedings: this may entail the publication of commercial confidences and may, albeit only indirectly and occasionally, affect the prior conduct of the arbitral proceedings."[25]

The better approach is that of many arbitral institutions which publish parts of arbitral awards but do not require mandatory publication. For example, the ICC publishes awards, orders, and dissenting/concurring opinions, only if the parties agree. The relevant factor is that any party can object to the publication of ICC awards at any time, without any justification.[26] The ICC provision thus respects consent as the foundation stone of arbitration[27] unlike the Proposed Amendment, which makes mandatory the publication of awards in full and requires justification from the parties to redact any part.[28]

IV. Conclusion

Therefore, for the reasons set out above, the Brazilian Arbitration Act is better equipped with its current text than with the changes suggested in the Proposed Amendment. Also, the approval of ill-considered amendments to the Brazilian Arbitration Act advocates against the reputation of Brazil as a trustworthy arbitration seat and hinders the further development of arbitration in the country.

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[22] IBA Guidelines, Introduction, paras. 2-3.
[23] "Art. 5º-A. After commencement of the arbitration, pursuant to Art. 19 of this Law, the arbitral institution administering the proceedings shall publish in its website the composition of the arbitral tribunal and the value of the claims."
[24] "Art. 5º-B. At the end of the arbitration, pursuant to Art. 33 of this Law, the arbitral institution administering the proceedings shall publish in its website the full copy of the award, and the parties may, justifiably, request that specific parts or information contained in the award remain confidential."
[25] 'Chapter 20: Confidentiality in International Arbitration', in Gary B. Born , International Commercial Arbitration (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2021) pp. 3001 – 3062.
[26] "*At any time before publication, any party may object to publication or require that any award and related documents be in all or part anonymised (removal of names and any contextual data that may lead to identification of individuals, parties or disputes) or pseudonymized (replacement of any name by one or more artificial identifiers or pseudonyms), in which case they will not be published or will be anonymised or pseudonymised.*" ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, p. 10, para. 59.
[27] Redfern, A.; Hunter, M. Redfern and Hunter on International Arbitration. – Oxford: Oxford University Press, 2009. 5th ed. Marg. No. 1.38.
[28] Proposed Amendment, Art. 5º-B.

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