Can the IBA Guidelines be used to flesh out the arbitrator's duty of disclosure? A brief comment on the Ruling of the Lisbon Court of Appeal dated 11/02/2020

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Arbitration affords countless advantages to parties relative to courts, including more relaxed rules, adaptability to the specific case and swifter proceedings. This explains why more and more arbitration agreements are being executed and why the use of this alternative dispute resolution mechanism is burgeoning.

But this veritable "boom" of arbitral proceedings also brought certain existing doubts regarding the interpretation of existing laws to the fore. The legislator was arguably quite non-specific regarding certain matters and the answers to these doubts started to be provided by legal authors and emerging case law.

1. The ruling

The Ruling of the Lisbon Court of Appeal (*Tribunal da Relação de Lisboa*) dated 11/02/2020, handed down by Rui Torres Vouga as Judge-Rapporteur[2], is a perfect example of integration and interpretation of a rule, whose broad concepts can be fleshed out using both national and international soft law instruments.

The issue at hand in this ruling pertains to arbitral proceedings between two pharmaceutical companies, wherein the respondent sought to disqualify both the arbitrator appointed by the claimant and the arbitrator appointed for the respondent by the President of the Lisbon Court of Appeal..

The respondent relied on the arbitrator's duty of disclosure set forth in Article 13(1) of the Voluntary Arbitration Law (Law No. 63/2011, of 14 December 2011, hereinafter LAV): «Whoever is invited to act as arbitrator shall disclose any circumstances liable to raise doubts as to their impartiality and independence» (my translation).

The duty of disclosure is of paramount importance in that it ensures two cornerstones – enshrined in Articles 203 and 209(2) of the Constitution of the Portuguese Republic – of arbitration: the independence and impartiality of arbitrators.

The ruling at hand shines the spotlight on the challenge of defining the scope of the duty of disclosure imposed by Article 13 of the LAV, once there is a lack of specific legal provisions or legal criteria.

The respondent in this case claimed that both the arbitrator appointed by the claimant and the arbitrator appointed by the President of the Lisbon Court of Appeal failed to comply with their duty of disclosure when they omitted and provided false information that raises manifest doubts as to their independence and impartiality. Such concealed information pertained, in short, to how often those arbitrators had been appointed by the claimant's counsel in past arbitrations.

The Lisbon Court of Appeal review exposes diametrically opposed positions regarding the use of codes of ethics of institutions such as the International Bar Association (IBA), the Spanish Club of Arbitration (*Club Español de Arbitraje* – CEA) and the Portuguese Arbitration Association (*Associação Portuguesa de Arbitragem* – APA).

This analysis focus precisely on this debate: on the one hand, we have the position of António Menezes Cordeiro, who opposes the application of IBA's Guidelines on Conflict of Interest in International Commercial Arbitration (hereinafter, IBA Guidelines) in national arbitral proceedings[3]; and, on the other hand, we have the opposite, favorable view, which is adopted by the Lisbon Court of Appeal, considering the IBA Guidelines as the most influential instrument on the duty of disclosure.

The above national Author argues that the IBA Guidelines are just soft law, therefore lacking binding force[4]. He goes on to claim that the North American legal reality is significantly different to the Portuguese legal reality, which is why it has no place in our legal system[5].

By that token, Menezes Cordeiro argues that considering the small size of the Portuguese arbitration market, appointing an experienced arbitrator with no previous dealings or relationship with either party would be impossible[6].

Considering the three lists contained in the IBA Guidelines, which give concrete examples of circumstances that might or might not call into question the independence and impartiality of arbitrators,

Menezes Cordeiro raises, in particular, an enforcement issue regarding the orange list's criteria, which he finds to encourage the blackmail of the party who appointed the arbitrator who has a duty of disclosure: from the moment a circumstance listed on such orange list occurs, the arbitrator has a duty to disclose such circumstance, which is tantamount to the counterparty having the power to veto (or not) the appointment of the relevant arbitrator[7].

The cited Author further sustains that satisfying the duty of disclosure has a different impact on international and national arbitral proceedings[8]. Arbitrators are often chosen from catalogues in international arbitral proceedings because the international stakeholders do not know one another, contrary to what happens in national arbitral proceedings[9]. The author consequently concludes that the IBA Guidelines should only be used within the context of international arbitration.

Regarding the fact that the disqualified arbitrators had already been appointed by the claimant in other arbitral proceedings specifically, the Author distinguishes between arbitrator and counsel relationships. Counsel and client establish a bond that does not quickly fade away, whereas arbitrators have no such bond and the fact that they were arbitrators in other arbitral proceedings does not compromise their independence nor their impartiality[10].

Lastly, according to Menezes Cordeiro, the mere fact that the arbitrators did not reply to the respondent's questions is not enough grounds to disqualify them. According to the Author, the duty of disclosure pertains only to aspects liable to raise justifiable doubts regarding their independence and their impartiality[11]. If the arbitrators did not consider that the information at issue was liable to raise such doubts, they were under no obligation to disclose it.

The Lisbon Court of Appeal counters the arguments of António Menezes Cordeiro in the above ruling and decides in favor of the application of the IBA Guidelines, which it considers an important parameter to establish the scope of the arbitrator's duty of disclosure.

The Court starts by contesting the first argument set out above, stating that regardless of any asymmetries between the United Sates (US) and the Portuguese population, the evolution of our administrative and judicial system levels out any differences that might jeopardize the application of such US practices.

The Court further denied the impossibility of appointing an arbitrator who is both experienced and has no prior dealings with the parties, deeming this argument only valid for a market area involving major financial players, but not for the pharmaceutical market, wherein the experts are scientists rather than legal practitioners/academics.

As to the Author's misgivings about the effectiveness of the IBA Guidelines' orange list, the Court concluded that such misgivings would arise whether the arbitration took place in Portugal or in the US and, as such, it would be illogical to relativize the situations described in the orange list as possible bias factors on the basis of this argument alone.

The Lisbon Court of Appeal further disagrees that soft law rules should only apply within the context of international arbitral proceedings and finds that the purpose for which these rules were established does not vary depending on the legal system: there will always be a minimum common denominator as to the expectations and guarantees of impartiality and independence of an arbitrator.

Disagreeing with António Menezes Cordeiro, the ruling also considered that the fact that one of the arbitrators had been appointed by the claimant's counsel dozens of times in the last three years contributed to the distrust surrounding the impartiality and suitability of that arbitrator, which may have led to the emergence of a lawyer-like relationship.

As for the debate surrounding the duty of disclosure of the arbitrators who refused to answer the questions asked by the respondent, the Court explained that it was not up to the arbitrators but rather to an impartial third party to make the call regarding whether the requested information should be disclosed. In order not to give rise to suspicions of bias, the arbitrator should have voluntarily informed the parties of any circumstances included in the orange list, namely the number of times in the last three years that they had been appointed by the appointing party, allowing the party or the court to decide whether this was an element that raised justifiable doubts regarding their impartiality and independence.

2. Critical analysis

Having set out the conflicting views and positions regarding the issue at hand, I agree that the IBA Guidelines should be applied as held by the Lisbon Court of Appeal.

«If the lungs of arbitration are maintained by the independence and the impartiality of the arbitrator, then the duty of disclosure is their oxygen» (my translation)[12]. Based on this premise, the crux of the matter is not the debate about the existence of the duty of disclosure, but rather the determination of its scope and what criteria to use to know what might compromise the independence and impartiality of an arbitrator.

Legal authors distinguish between independence and impartiality, as the former can be ascertained by relying on objective criteria whereas the latter must be ascertained by relying on subjective and consequently more complex criteria[13]. This difficulty is compounded when we are dealing with indeterminate concepts that the national legislation does not clearly specify, which leaves us basically dependent on a case-by-case assessment.

It is precisely because the Portuguese legislator failed to flesh the concept that we must rely on the guidance offered by the IBA Guidelines, which are a welcome breath of fresh air amidst the non-specific references to the matter in Portuguese rules.

The IBA first created the Rules of Ethics for International Arbitrator, and later the Guidelines on Conflicts of Interest in International Arbitration, to which I have been alluding, in an attempt to establish more objective parameters, align concepts at the international level and to avoid the vulnerability of the arbitral award.

These guidelines aim to help interpret and clarify the concepts of independence and impartiality and make arbitration more secure, affording a few criteria for the arbitrator and the parties to check that those principles are abided by[14].

These guidelines require that the arbitrators disclose any suspicious information and investigate any potential conflict of interest. Such suspicion must take account of circumstances that would be objectionable from the parties' perspective[15]. Upon being chosen, the arbitrator must therefore disclose all facts, which he knows or should know, may raise a «reasonable doubt as to his independence or impartiality»[16].

Over the last few years, these Guidelines have had a decisive influence on how the international arbitration community thinks and acts and contributed to fairer arbitral proceedings. Soft law obviously

does not completely remove discretion, but the criteria adopted by the IBA Guidelines undoubtedly contribute to solve the question effectively in that they afford arbitrators concrete assessment parameters[17].

I agree with Agostinho Pereira Miranda and Pedro Sousa Uva that the Guidelines should be used as a starting point in the initial process of appointing the arbitrators. They will first offer guidance to arbitrators as to whether they should accept or reject the invitation. And then they will help the parties understand whether the arbitrator stands the test for disqualification[18].

Except for a few denialist positions, the truth is that the IBA Guidelines are largely accepted both nationally and internationally. The Report on the Reception of the IBA Arbitration Soft Law Products states that the IBA Guidelines seem to have gained global acceptance in Portugal: in the reported arbitrations in which conflicts of interest arose, 64% of the cases referred to these guidelines[19].

Judicial courts have also referred to the IBA Guidelines to establish the scope of the arbitrator's duty of disclosure and ensuing disqualification of the arbitrator. The ruling analyzed in this article is a good example of this reality[20].

Unless the parties agree otherwise, I think that this trend application of soft law rules must not be set aside. New legal issues emerge daily and require the Law constantly to evolve and change. This complex reality means that sometimes we are unable to find strictly legal solutions and must refer to other instruments to find solutions for the specific cases. It is precisely on these terms that I consider the IBA Guidelines to be an important tool for guiding and interpreting the arbitrator's duty of disclosure, insofar as they allow to mitigate the doubts that arise with regard to the scope of this duty and the criteria that should be used in fulfilling it.

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[1] A special thanks to Sofia Palanowski and Maria de São José Borges Bogalho for their support when writing this article (note on title).

[2] Ruling of the *Tribunal da Relação de Lisboa* (Lisbon Court of Appeal) dated 11/02/2020, issued within case No. 1577/18.0YRLSB-1, available at www.dgsi.pt.

[3] António Menezes Cordeiro, *Tratado da Arbitragem: Comentário à Lei 63/2001, de 14 de dezembro*, 1st ed., Almedina, 2015, pp. 41 and 156.

[4] António Menezes Cordeiro, *Tratado da Arbitragem: Comentário à Lei 63/2001, de 14 de dezembro*, 1st ed., Almedina, 2015, p. 153.

[5] António Menezes Cordeiro, *Tratado da Arbitragem: Comentário à Lei 63/2001, de 14 de dezembro*, 1st ed., Almedina, 2015, p. 156.

[6] António Menezes Cordeiro, *Tratado da Arbitragem: Comentário à Lei 63/2001, de 14 de dezembro*, 1st ed., Almedina, 2015, p. 157.

[7] António Menezes Cordeiro, *Tratado da Arbitragem: Comentário à Lei 63/2001, de 14 de dezembro*, 1st ed., Almedina, 2015, p. 157.

[8] António Menezes Cordeiro, *Tratado da Arbitragem: Comentário à Lei 63/2001, de 14 de dezembro*, 1st ed., Almedina, 2015, p. 157.

[9] António Menezes Cordeiro, *Tratado da Arbitragem: Comentário à Lei 63/2001, de 14 de dezembro*, 1st ed., Almedina, 2015, p. 159.

[10] António Menezes Cordeiro, *Tratado da Arbitragem: Comentário à Lei 63/2001, de 14 de dezembro*, 1st ed., Almedina, 2015, pp. 159 and 161.

[11] António Menezes Cordeiro, *Tratado da Arbitragem: Comentário à Lei 63/2001, de 14 de dezembro*, 1st ed., Almedina, 2015, pp. 153, 157 and 167.

[12] Selma Maria Ferreira Lemes, *A independência e a imparcialidade do árbitro e o dever de revelação*, p. 22 (quoting Thomas Clay, "L'independence et l'impartialité de lárbitre et les règles du process equitable", *in L'impartialité du juge et de l'arbitre*,Bruxelas, Bruylant, 2006, p. 235).

[13] Selma Maria Ferreira Lemes, *A independência e a imparcialidade do árbitro e o dever de revelação*, p. 23 (citing Selma Maria Ferreira Lemes, *Árbitro. Princípios da independência e da imparcialidade*, São Paulo, 2001, p. 53); Agostinho Pereira Miranda, *Investir em Virtude: o dever de revelação do árbitro*, p. 11: «independence relates to a factual situation, the *position* of the arbitrator, whereas impartiality is a *frame of mind*, an intellectual stance. Independence is therefore viewed as regarding the relationship between the arbitrator and the parties, whereas impartiality would establish the relationship between the arbitrator and the disputed issues.» (my translation); Agostinho Pereira Miranda, "Dever de revelação e direito de recusa de árbitro – considerações a propósito dos artigos 13.º e 14.º da Lei da Arbitragem Voluntária", *in Revista da Ordem dos Advogados*, year 73, oct/dec 2013, p. 1267.

[14] Agostinho Pereira Miranda and Pedro Sousa Uva, *As Diretrizes da IBA sobre Conflitos de Interesse na Arbitragem Internacional: 10 anos depois*, pp. 23 e 24.

[15] Agostinho Pereira Miranda, *Investir em Virtude: o dever de revelação do árbitro,* pp. 14 and 15. This Author states that it is advisable that «the arbitrator reveals his relationships with the parties, lawyers and co-arbitrators if he thinks that they may somehow, in the eyes of the parties, raise well-founded doubts about his impartiality and independence» (my translation). See also Agostinho Pereira Miranda and Pedro Sousa Uva, *As Diretrizes da IBA sobre Conflitos de Interesse na Arbitragem Internacional: 10 anos depois*, p. 24 (quoting Agostinho Pereira Miranda, "*Dever de revelação e direito de recusa de árbitro – considerações a propósito dos artigos 13.º e 14.º da Lei da Arbitragem Voluntária*", *in Revista da Ordem dos Advogados*, year 73, oct/dec 2013, p. 1276).

[16] Selma Maria Ferreira Lemes, *A independência e a imparcialidade do árbitro e o dever de revelação*, p. 22.

[17] Ricardo Dalmaso Marques, "*Breves Apontamentos sobre a extensão do dever de revelação do árbitro*", *in Doutrina Nacional*, No. 31, pp. 72 and 73.

[18] Agostinho Pereira Miranda and Pedro Sousa Uva, *As Diretrizes da IBA sobre Conflitos de Interesse na Arbitragem Internacional: 10 anos depois*, p. 26.

[19] *Report on the Reception of the IBA Arbitration Soft Law Products*, September 2016, para. 118.

[20] See, among others, the Ruling of the *Tribunal da Relação do Porto* (Porto Court of Appeal) dated 03/06/2014, issued within case No. 583/12.2TVPRT.P1; the Ruling of the *Tribunal da Relação de Lisboa* (Lisbon Court of Appeal) dated 24/03/2015, issued within case No. 1361/14.0YRLSB.L1-1; and the Ruling of the *Tribunal da Relação de Lisboa* (Lisbon Court of Appeal) dated 22/01/2019, issued within case No. 1574/18.5YRLSB.L1-7; all available at www.dgsi.pt.

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