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Rising Challenges in Arbitration: Post-Award Bias Allegations and the Evolving Standards of Conflict Disclosure

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Key Points

- As arbitration becomes more common and the same experienced arbitrators are chosen repeatedly, post-award challenges alleging conflicts of interest by losing parties have grown increasingly popular.
- Often the challenges are based on nothing more than routine professional contacts among panelists, or between arbitrators and one of the parties or their counsel.
- Many arbitrators are now disclosing even minor interactions up front to avoid issues later.
- By agreeing to make full disclosures up front and determining the thresholds for disclosure, parties can help head off after-the-fact disputes.

Users of arbitration know that one of the most important decisions they can make is the selection of the arbitrator. As arbitration grows more ubiquitous, more experienced arbitrators are being selected more frequently, and arbitrators and counsel are interacting more often, both in professional and social contexts.

This undeniable reality of modern-day arbitration has given rise to a growing number of post-award challenges based on allegations that bias resulted from "undisclosed" arbitrator relationships.

In the last few years, courts around the world have been asked to decide whether to enforce arbitration awards in the face of accusations by the losing party that the arbitrators failed to disclose professional relationships or interactions among themselves, the parties or counsel in the proceedings, that allegedly affected their ability to render an impartial and nonbiased award.

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While such claims often demonstrate post-award gamesmanship, the fact-intensive nature of the inquiry has provided fertile ground for disgruntled parties to try their hand at them.[1]

Setting Disclosure and Conflicts Standards

The frequency of such challenges has led arbitral institutions and guideline-setting bodies to reexamine their guidance on conflicts of interest. In February 2024, for example, the International Bar Association (IBA) completed the 2024 update of its IBA Guidelines on Conflicts of Interest in International Arbitration. First published in 2004 and subsequently revised in 2014, the IBA Guidelines set forth the most widely accepted standards governing arbitrator disclosures. Some of the recent changes may help resolve issues in this area, while others may continue to provide ground for dispute.

As revised, the IBA Guidelines establish:

- A **Red List** of waivable and nonwaivable potential conflicts that must be disclosed.
- An **Orange List** of potential conflicts that should be disclosed but will be considered waived if there is no timely objection (including "close personal relationships" between an arbitrator and a party, party affiliate, witness or expert; past or ongoing work for parties; appointment as an expert or affiliate by a party or counsel; and concurrent service on a tribunal alongside counsel or co-arbitrators).
- A **Green List** of situations that would not ordinarily require disclosure at all (including "professional contacts" with other arbitrators).

The line between the Orange and Green List categories thus continues to generate sustained debate. The Orange List now expands potential conflicts to include arbitrators' appointments (i) as experts and (ii) as arbitrators concurrently serving alongside counsel or co-arbitrators.

Moreover, the revisions broaden the scope of professional relationships that could cause a conflict by requiring arbitrators to consider a more expansive view of their law firm's (or employer's) structure and to also consider "any legal entity or natural person over which a party has a controlling influence."

General Standard 3(g), however, now makes clear that an arbitrator's failure to disclose, in and of itself, does not necessarily mean a conflict exists or that a disqualification should ensue.

Conversely, the new IBA Guidelines could help curb belated challenges to partiality. Under General Standard 4, a party is deemed to waive any potential conflict that is not raised within 30 days of when a party either becomes aware or could have become aware of the potential conflict, had a reasonable inquiry been "conducted at the outset or during proceedings."

'Evident Partiality' and the *Grupo Unidos* Decision

In the United States, Section 10(a)(2) of the Federal Arbitration Act (FAA) provides one of the few narrow bases for vacating an arbitration award "where there was evident partiality or corruption in the arbitrators." Parties have alleged "evident partiality" to bring challenges based on undisclosed relationships.

In the recent *Grupo Unidos* case, for example, an International Chamber of Commerce (ICC) arbitral tribunal seated in Miami issued a preliminary partial award against the nonprofit Grupo Unidos in a construction dispute between a consortium of European construction companies and the Panama Canal Authority following five years of hotly contested arbitration.

After alleging procedural defects in the awards against it and demanding additional post-award disclosures from the arbitrators, Grupo Unidos asked the ICC to disqualify all three arbitrators on the panel due to alleged conflicts stemming from the arbitrators' past service on unrelated tribunals with some of their co-arbitrators or with party counsel.

When the ICC International Court of Arbitration rejected those challenges, Grupo Unidos sought to vacate the award in the U.S. District Court for the Southern District of Florida, based in part on the ground of "evident partiality" under the FAA. The district court denied *vacatur*, reasoning that, because arbitrators are selected for their expertise and experience, and thus overlap frequently with other professionals in their field, none of the arbitrators' contacts at issue rose to the level of "a substantial or close personal relationship to a party or counsel"[2] sufficient to establish evident partiality.

The Eleventh Circuit agreed,[3] interpreting the "evident partiality" standard to justify *vacatur* only if "either (1) an actual conflict

[1] For example, in 2023, the Paris Court of Appeal set aside an ICC award on the basis that the tribunal chair had delivered a eulogy professing his close friendship with the prevailing party's late counsel. Lisa Bohmer, "Paris Court of Appeal Sets Aside ICC Award Based on Eulogy for Emmanuel Gaillard by the Tribunal Chair, Which Revealed a Close Personal Relationship Between the Arbitrator and the Claimant's Counsel," Inv. Arbitration Reporter, Jan. 12, 2023. Also in 2023, a Brazilian arbitrator resigned in a proceeding brought by a shareholder against a corporation after the company alleged that he had previously acted as counsel to the president of another shareholder group that brought claims against the same company. Jack Ballantyne, "Brazilian Arbitrator Resigns After Petrobras Challenge," Glob. Arbitration Rev., July 26, 2023.

[2] *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Pan.*, Civil Action No. 20-24867-Civ-Scola, 2021 WL 5834296, at *4 (S.D. Fla. Dec. 9, 2021), aff'd, 78 F.4th 1252 (11th Cir. 2023).

[3] *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Pan.*, 78 F.4th 1252 (11th Cir. 2023), cert. denied.

exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." It clarified that "[t]he alleged partiality must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative.'"

The court determined that the arbitrators' prior work on tribunals with these same co-arbitrators and/or counsel did not meet the "evident partiality" standard and amounted to nothing more than "professional familiarity."

Nevertheless, *Grupo Unidos* left open the possibility that "professional familiarity" can demonstrate evident partiality where it rises to a "close" or "substantial" relationship. Indeed, the court reaffirmed the obligation of arbitrators to disclose information "that might create an impression of possible bias" and noted that undisclosed business relationships and dealings between arbitrators, for example, warrant greater suspicion.

Even if ultimately unsuccessful, such challenges can greatly delay award enforcement and increase costs for all involved.

Takeaways

There are two takeaways for parties thinking about how to structure their arbitrations to avoid such post-award challenges.

- First, U.S. courts typically will deem a party to have waived its objection if it fails to act promptly once it knows (or ought to know) of a conflict. This is further enforced by the new IBA Guidelines. Accordingly, parties may wish to ensure that appropriate disclosures are sought in the early stages of the arbitration, and that there is an ongoing obligation on the arbitrators to update certain disclosures where relevant. Arbitrators may in turn wish to record the parties' acknowledgment of the disclosures.
- Second, parties may wish to agree to the level or scope of disclosure — that might include, for example, agreement that the IBA Guidelines will set forth the applicable disclosure standard in the arbitration and agreement on the extent to which professional contacts must be disclosed.

More broadly, parties may wish to enlarge the pool of eligible arbitrators that they consider, which can help diversify arbitral tribunals and ultimately reduce the number of challenges.

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