As Arbitrator Bias Claims Rise, Disclosure Standards Evolve

By **Jennifer Permesly, Danuta Egle and Kristina Fridman** (May 3, 2024)

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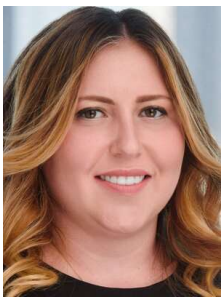

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The growth in post-award challenges based on arbitrators' alleged conflicts of interest has led to new guidance and case law on this issue.

The 2024 International Bar Association's "Guidelines on Conflicts of Interest in International Arbitration," released in February, and last year's Grupo Unidos decision from the U.S. Court of Appeals for the Eleventh Circuit both lend support to the view that professional familiarity alone does not translate to a lack of impartiality.

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.[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, the International Bar Association completed the 2024 update of its conflict of interest guidelines. First published in 2004, and subsequently revised in 2014, the IBA guidelines set forth the most widely accepted standards governing arbitrator disclosures.

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 certain "close personal relationships"; past or ongoing work for parties; certain appointments; and concurrent service on a tribunal alongside counsel or co-arbitrators.
- A "Green List" of situations that do not need to be disclosed as potential conflicts — including more distant personal relationships, such as being members of the same

professional association or social or charitable organization, or having a relationship through social media.

The line between the Orange and Green List categories has generated sustained debate, which is likely to continue.

In the 2024 revisions, the Orange List now expands potential conflicts to include (1) arbitrators appointed as experts for a party or affiliate in a matter; (2) arbitrators concurrently serving alongside counsel or co-arbitrators; (3) assistance to counsel or a law firm in mock-trial or hearing preparations on two or more occasions in the past three years; and (4) public advocacy for a position on the case via social media or online professional networking platform.

The 2024 revisions expand the Green List as well to include contacts between an arbitrator and expert resulting from the arbitrator hearing that expert testify in another matter.

Another important update in the 2024 revisions expands the nature and types of relationships that must be disclosed.

General Standard 6 now broadens 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 "[a]ny legal entity or natural person over which a party has a controlling influence."

Pursuant to General Standard 7, parties must now not only inform arbitrators of "any person or entity it believes an arbitrator should take into consideration when making disclosures in accordance with General Standard 3" but also the nature of the relationship of that person or entity to the dispute.

The new IBA guidelines also include revisions about waiver of conflicts of interest and failure to disclose conflicts.

General Standard 3(g), for example, 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. 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."

Taken together, the revised IBA guidelines appear to expand the scope of professional relationships that require disclosure but continue to view professional contacts alone as exempt from disclosure. Coupled with the provisions on waiver if disclosures are not promptly challenged, the changes to the IBA guidelines seem aimed at curbing belated challenges to both arbitrators and awards.

A recent decision suggests that U.S. courts are increasingly adopting the same approach in rejecting challenges based on professional familiarity in international arbitration and rejecting belated challenges.

"Evident Partiality" and the Grupo Unidos Decision

In the U.S., Section 10(a)(2) of the Federal Arbitration Act 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 Grupo Unidos case, for example, an International Chamber of Commerce 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.

In 2021, 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.

In August 2023, the Eleventh Circuit agreed,[3] interpreting the "evident partiality" standard to justify vacatur only if "either (1) an actual conflict 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.

In March, the U.S. Supreme Court declined to review the decision, which petitioners argued applied an incorrect interpretation of the "evident partiality" standard under the court's seminal Commonwealth Coatings Corp. v. Continental Casualty Co. decision.[4]

Takeaways

Parties thinking about how to structure their arbitrations to avoid such post-award challenges should thus consider the following takeaways.

First, under both the revised IBA guidelines and U.S. case law,[5] a party can expect to have waived its objections if it fails to act promptly once it knows — or ought to know — of a conflict.

Accordingly, parties may wish to ensure that appropriate disclosures are sought in the early stages of the arbitration, that any objections to such disclosure are made promptly, 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, which may 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.

Per the IBA guidelines, the scope of disclosure remains broad. Given the increasing scrutiny of professional contacts and interactions in the practice of international arbitration, out of an abundance of caution, many arbitrators are now disclosing even minor interactions upfront to avoid issues later. By agreeing to make full disclosures at the outset and determining the thresholds for disclosure, parties can help head off after-the-fact disputes.

Third, and more broadly, parties may wish to enlarge the pool of eligible arbitrators that they consider. Even if a challenge to an award is ultimately unsuccessful, it can delay award enforcement and increase costs. Increasing the pool of eligible arbitrators can help diversify arbitral tribunals and ultimately reduce the number of challenges.

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[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. petition denied, No. 23-660.

[4] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968).

[5] See, e.g., Andros Compania Maritima S.A. v. Marc Rich & Co., 579 F.2d 691, 699 n.11, 702 (2d Cir. 1978) (denying vacatur, emphasizing that the party who discovered the conflict "could have [discovered those facts] just as easily before or during the arbitration rather than after it lost its case"); see also Positive Software Sols., Inc. v. New Century Mortg. Corp., 476 F.3d 278, 285 (5th Cir. 2007) (en banc) (cautioning that, "awarding vacatur in situations such as this [where the party only investigated the arbitrator's background following its loss in the arbitration] would seriously jeopardize the finality of arbitration . . . . losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made").