

Arbitrator Conflicts of Interest in Latin American Arbitration

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Issues relating to arbitrator partiality and conflicts of interest have recently captured the attention of the international arbitration community, particularly due to several high-profile challenges to arbitrator appointments and attempted annulments of arbitration awards. While cases like U.S. Olympic gymnast Jordan Chiles' efforts to appeal a Court of Arbitration for Sport award on the reported basis that the chair of the arbitration panel that determined that the Bronze medal should be awarded to a Romanian gymnast had previously acted as counsel for Romania, and the disqualification of an arbitrator in a case against Russia for publishing a pro-Ukraine LinkedIn post, have shone a spotlight on arbitrator bias and conflict disclosures, these issues have also been a focus in cases involving Latin American parties or arbitrators.

This alert memorandum focuses on the different standards for arbitrator partiality and the various guidance provided by international organizations and international and regional arbitration institutions for the disclosure of potential conflicts of interest, as well as prescribed by law in certain Latin American jurisdictions. This alert memorandum discusses recent examples in Latin American arbitrations where disqualification of an arbitrator or vacatur/annulment of an arbitration award was sought and highlights the potential for different outcomes across different jurisdictions. In light of the different approaches that arbitration rules and courts may apply, the possibility of challenging an arbitrator's impartiality or independence presents opportunities for gamesmanship that can raise legitimate concerns for parties and arbitrators alike.

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Arbitration Institutions and Other Organizations Seek to Standardize Approaches to Conflicts of Interest

While there is no authority that applies uniformly to arbitrators' obligations to disclose potential conflicts of interest in international arbitration, international organizations and arbitration institutions generally provide guidance to arbitrators, counsel, and parties.

Perhaps most widely known and adopted of these sources are the International Bar Association ("IBA") Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), which were recently updated in May 2024, and generally provide a global framework and general set of standards to guide arbitrators, counsel, and institutions in identifying conflicts of interest and assessing the need for disclosure, among other things.¹ The IBA Guidelines have been lauded for their introduction of a user-friendly "traffic light" system, which divides a list of issues to consider when assessing potential conflicts into three categories: the Green List (for "situations where no appearance or actual conflict of interest exists from an objective point of view"), the Orange List (for circumstances that must be disclosed), and the Red List (for waivable and non-waivable conflicts).²

Many arbitral institutions have also recently adopted or updated their own guidelines on arbitrator conflicts of interest and disclosure requirements.³ For instance, in 2021, the International Chamber of Commerce ("ICC") published the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, which included a detailed list of circumstances prospective arbitrators should consider in assessing whether there could be any doubt as to their impartiality and independence, as well as information they should consider disclosing⁴ such as "any relationships with other arbitrators."⁵ In August 2024, the International Institute for Conflict Prevention and Resolution ("CPR") also published its "Guidelines for Arbitrator Disclosure,"⁶ which notably recommend that arbitrators maintain a conflicts database with detailed information about all cases they have been involved in to help with compliance of disclosure requirements.⁷

Regional arbitration institutions across Latin America have also introduced – and periodically revised – their own sets of guidance on conflicts of interest. For example, the Arbitration Center of Mexico revised its arbitration rules in 2022 to clarify that arbitrators must confirm their impartiality in addition to their independence.⁸ In January 2024, the Brazilian Arbitration Chamber ("CAM") published a revised Conflict of Interest Verification

¹ See generally IBA Guidelines on Conflicts of Interest in International Arbitration (2024), <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> ("2024 IBA Guidelines"). See also Cleary Gottlieb Alert Memorandum, *International Bar Association Publishes Revisions to Guidelines on Conflicts of Interest in International Arbitration*, Cleary Gottlieb (March 8, 2024), <https://www.clearygottlieb.com/news-and-insights/publication-listing/international-bar-association-publishes-revisions-to-guidelines-on-conflicts-of-interest-in-international-arbitration>.

² See generally 2024 IBA Guidelines, Part II.

³ See, e.g., 2021 ICC Rules, Art. 11(2); 2021 ICDR Arbitration Rules, Art. 14(1) (incorporating by reference the 2004 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon II(A)); Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM-CCBC"), Regulamento De Arbitragem Do CAM-CCBC, Artigo 9; Brazilian

Arbitration Center ("CBA"), Diretrizes do Comitê Brasileiro de Arbitragem sobre o dever de revelação do(a) árbitro(a).

⁴ See ICC International Court of Arbitration, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, ¶ 27 (Jan. 1, 2021), <https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf> ("ICC Note").

⁵ ICC Note, ¶ 27.

⁶ See CPR, Guidelines for Arbitrator Disclosure (Aug. 2024), <https://static.cpradr.org/docs/Guidelines%20for%20Arbitrator%20Disclosure.pdf> ("CPR Guidelines").

⁷ See CPR Guidelines, at 4-5.

⁸ Compare 2022 Reglas de Arbitraje del Centro de Arbitraje de Mexico, Artículo 13, with 2009 Reglas de Arbitraje del Centro de Arbitraje de México, Artículo 13.

Questionnaire, which notably requires arbitrator candidates to assess conflicts by referring to the IBA Guidelines, as well as broadens the scope of circumstances to consider in assessing conflicts.⁹

Underscoring the importance of these issues, several Latin American countries have also recently modified their arbitration laws to reflect the importance of arbitrator independence and impartiality. The Peruvian government, for example, issued a decree in 2020 prohibiting former counsel or experts of any of the parties from being appointed as arbitrators in proceedings involving state-affiliated entities.¹⁰ The Brazilian Congress is also currently considering a bill that would require arbitrators to disclose any circumstances that may suggest the “slightest” doubt as to their independence and impartiality, as opposed to merely those giving rise to “justified” doubt,¹¹ and the Brazilian Supreme Court has come under pressure recently to modify Brazil’s arbitration law to include more stringent disclosure rules.¹²

Notwithstanding these efforts to provide greater guidance on what conduct amounts to arbitrator bias and the concomitant attempts to standardize disclosures for conflicts of interest, there is still significant uncertainty and inconsistent expectations across Latin America and in the United States (where many Latin American parties select as their

arbitration seat, or seek to enforce an award). As a result, challenges to arbitrators and the awards that they issue based on impartiality and non-disclosure are increasingly common, with occasionally different end results, as further described below.

Challenges to Arbitrators in Latin American Arbitrations: Increased Scrutiny of Actual or Perceived Bias

While the IBA Guidelines provide that an arbitrator’s failure to disclose “does not necessarily mean that . . . a disqualification should ensue,”¹³ parties to an arbitration can and often do make challenges to an arbitrator’s impartiality and independence on the basis of such disclosures. Such challenges can result in the disqualification of an arbitrator (Section 1), or annulment/vacatur or a refusal to enforce a partial (Section 2), or final award (Section 3), depending on the stage of the proceedings when the purported conflict is raised. Across Latin America, there have been several recent examples of both successful and unsuccessful challenges to an arbitrator based on impartiality.

1. Challenging An Arbitrator During The Arbitration Proceeding

Parties have sought to disqualify arbitrators on the basis of alleged bias during arbitration proceedings

⁹ *Market Arbitration Chamber publishes four new resolutions that provide for arbitrations*, Demarest (Jan. 24, 2024), <https://www.demarest.com.br/en/camara-do-mercado-divulga-quatro-novas-resolucoes-sobre-processos-arbitrais/>.

¹⁰ Rafael T. Boza, *Protectionist Amendments to Peru’s Arbitration Law Disguised as Transparency*, Kluwer Arbitration Blog (May 4, 2020), <https://arbitrationblog.kluwerarbitration.com/2020/05/04/protectionist-amendments-to-perus-arbitration-law-disguised-as-transparency/>.

¹¹ *Arbitrator’s Duty of Disclosure and the “Minimum Doubt” of PL No. 3,293/2021*, Ziade Advocacia (Sept. 5, 2023), <https://www.ziadeadvocacia.com.br/en/arbitrators-duty-of-disclosure-and-the-minimum-doubt-of-pl-no-3293-2021/>. The bill would also, *inter alia*, limit the number of cases an arbitrator can concurrently adjudicate and bar two arbitrators from sitting on more than one panel at the same time.

¹² Arthur Guimaraes, *União Brasil pede que STF defina critérios sobre dever de revelação do árbitro*, JOTA (March 30, 2023), <https://www.jota.info/stf/do->

[supremo/uniao-brasil-pede-que-stf-defina-criterios-sobre-dever-de-revelacao-do-arbitro](https://www.jota.info/stf/do-supremo/uniao-brasil-pede-que-stf-defina-criterios-sobre-dever-de-revelacao-do-arbitro). In March 2023, a Brazilian political party challenged the Brazil Arbitration Act (“BAA”) before the Supremo Tribunal Federal (“STF”), arguing that the applicable provisions of Brazil’s arbitration law did not properly regulate an arbitrator’s duty to disclose. Petition of O União Brasil (March 22, 2023), <https://www.conjur.com.br/wp-content/uploads/2023/09/uniao-brasil-contesta-stf-aplicacao.pdf>. In particular, the party asked the STF to establish binding standards for all arbitrations seated in Brazil and an unqualified duty to disclose any information that parties request, as well as to provide that a failure to disclose is a sufficient ground for removal of an arbitrator (even in the absence of actual bias). *Id.*

¹³ 2024 IBA Guidelines, General Standard 3(g). In particular, the IBA Guidelines provide for an objective test, requiring withdrawal or permitting disqualification when circumstances “give rise to justifiable doubts as to the arbitrator’s impartiality or independence” “from the point of view of a reasonable third person.” See 2024 IBA Guidelines, General Standard 2(b).

by invoking the controlling institutional rules. For example, in 2021, Grupos Unidos por el Canal (“Grupos Unidos”) – a Belgian, Italian, and Spanish consortium – requested that the ICC disqualify all three arbitrators in a case involving the Panama Canal Authority. Grupos Unidos accused the arbitrators of failing to disclose a network of professional relationships, including that one of the arbitrators sat on multiple panels with a fourth arbitrator who had rejected Grupos Unidos’s claims in a previous arbitration arising under the same contracts.¹⁴ While the ICC found that some of the arbitrators had failed to make timely disclosures in accordance with the ICC Note to Parties and Arbitral Tribunals, it ruled that this did not undermine their impartiality and declined to disqualify the panel.¹⁵

In June 2023, Brazilian state-controlled oil and gas firm Petrobras sought to disqualify an arbitrator from adjudicating a shareholder claim against it in an arbitration administered by the Market Arbitration Chamber of the São Paulo Stock Exchange.¹⁶ Petrobras alleged that the arbitrator had an undisclosed conflict of interest because a partner at the arbitrator’s former law firm had previously acted as counsel to the president of a shareholder group pursuing litigation against Petrobras in the Brazilian courts. Even though the panel was reportedly close to issuing a final award, the arbitrator resigned over the allegations instead of necessitating a ruling from the administering institution.

2. Challenging A Partial Award

Parties have also used purported conflicts of interest to attempt to disqualify arbitrators or challenge their rulings following the issuance of a partial award. In

August 2021, Brazilian agribusiness group J&F Investimentos (“J&F”) sought to set aside a partial award against it in a multibillion-dollar São Paulo-seated ICC arbitration.¹⁷ The tribunal had issued a partial award ordering J&F to comply with a sales agreement and reserving damages for a final award. J&F alleged a conflict of interest after the partial award was issued, contending that a conflict was created where the arbitrator’s former law firm shared an office space in Rio de Janeiro and São Paulo with lawyers who would go on to work at the opposing counsel’s law firm.¹⁸ Despite denying any bias, the challenged arbitrator resigned in a letter to the ICC before a final award on damages was issued.¹⁹ A year later, a São Paulo court upheld the partial award in the dispute, finding that there was no proof that the arbitrator had failed in his duty to disclose potential conflicts of interest.²⁰

3. Challenging A Final Award

Latin American parties have also challenged final awards in vacatur and enforcement proceedings with varying degrees of success as courts continue to grapple with what type of conduct may give rise to the drastic remedy of setting aside or failing to enforce an award.

In the United States, the federal Courts of Appeals encompassing two of the most important arbitration seats in the United States for international arbitration in Latin America – New York and Miami – have in recent cases been unwilling to vacate arbitration awards based on the “evident partiality” standard under the Federal Arbitration Act (“FAA”), albeit under slightly different standards.²¹

¹⁴ Allison Ross and Sebastian Perry, *ICC stands by Panama Canal arbitrators*, Global Arbitration Review (“GAR”) (Feb. 19, 2021), <https://globalarbitrationreview.com/icc-stands-panama-canal-arbitrators>.

¹⁵ Allison Ross and Sebastian Perry, *ICC stands by Panama Canal arbitrators*, GAR (Feb. 19, 2021), <https://globalarbitrationreview.com/icc-stands-panama-canal-arbitrators>.

¹⁶ Jack Ballantyne, *Brazilian arbitrator resigns after Petrobras challenge*, GAR (Jul. 26, 2023), <https://globalarbitrationreview.com/article/brazilian-arbitrator-resigns-after-petrobras-challenge>.

¹⁷ Cosmo Sanderson, *Arbitrator resigns from Brazilian pulp case*, GAR (Aug. 23, 2021),

<https://globalarbitrationreview.com/arbitrator-resigns-brazilian-pulp-case>.

¹⁸ Cosmo Sanderson, *Arbitrator resigns from Brazilian pulp case*, GAR (Aug. 23, 2021),

<https://globalarbitrationreview.com/arbitrator-resigns-brazilian-pulp-case>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Cleary Gottlieb Alert Memorandum, *Five International Arbitration Trends and Topics for 2024*, Cleary Gottlieb (Jan. 4, 2024), <https://www.clearygottlieb.com/news-and-insights/publication-listing/five-international-arbitration-trends-and-topics-for-2024>.

In *Andes Petroleum Ecuador Ltd. v. Occidental Expl. and Prod. Co.*, the Second Circuit in 2024 declined to set aside a \$392 million award in favour of Andes Petroleum Ecuador based on an arbitrator's failure to disclose an appointment to a separate tribunal alongside one party's counsel, finding that vacatur required "actual bias," where "a reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one side."²² In *Grupos Unidos por el Canal, S.A. v. Autoridad del Canal de Panama*, the Eleventh Circuit applied the "appearance of bias" test that requires that the circumstances be sufficient to raise a reasonable doubt regarding the arbitrator's bias, and as a result declined to set aside a \$285 million ICC award issued by the same tribunal that the ICC Court had refused to disqualify during the arbitration proceedings, applying a slightly different standard.²³ Although the challenging party in both cases requested review by the U.S. Supreme Court, the Supreme Court declined to hear the cases.²⁴ As a result, the Circuit split on how to apply the FAA's evident partiality standard as a grounds for vacatur remains.

Some courts in Latin America appear to be more inclined to vacate awards on the basis of an arbitrator's failure to disclose a potential conflict. For example, in *M. R. do B. R. S/A v. S. S. G. S.A.*, the São Paulo Court of Appeals vacated an award because one of the co-arbitrators had failed to disclose that he had previously been employed for a decade by the party who nominated him. The court

found that the fact that the party seeking vacatur knew of the relationship between the arbitrator and the other party since the start of arbitral proceedings did not preclude it from later contesting the arbitrator's partiality.²⁵ More recently, in *Devoto v. Wagner*, a Chilean court vacated an award issued under the auspices of the Arbitration and Mediation Centre of the Santiago Chamber of Commerce because the metadata of the award listed one of the claimant's counsel as the author, thereby calling into question the arbitrator's claim that he was the author of the decision.²⁶

The difference in how U.S. and Latin American jurisdictions approach potential arbitrator conflicts can also result in the same arbitral award being set aside in one jurisdiction but not in the other. In an ICC arbitration brought by Abengoa concerning the sale of a Brazilian sugar cane business, a New York-seated tribunal awarded more than US \$100 million in damages to the claimant.²⁷ The respondents sought unsuccessfully to vacate the award in New York federal court, alleging that the chair of the tribunal had failed to disclose that colleagues from his law firm were providing legal advice in a number of matters involving Abengoa.²⁸ The district court found that the arbitrator lacked knowledge of such conflict at the time that the award was issued and the Second Circuit affirmed, explaining that "to the extent that the lead arbitrator was careless, that carelessness [did] not rise to the level of wilful blindness."²⁹ Even though the challenge at the seat was unsuccessful, the Brazilian Superior Court of

²² *Andes Petroleum Ecuador Ltd. v. Occidental Expl. and Prod. Co.*, 21-3039-CV, 2023 WL 4004686 (2d Cir. June 15, 2023), *cert dismissed sub nom. Occidental Expl. v. Andes Petroleum Ecuador Ltd.*, 144 S. Ct. 1134 (2024).

²³ *Grupo Unidos por el Canal, S.A.*, 78 F.4th 1252, 1265-66 (11th Cir. 2023); Jerry Roth, *What Panama Canal Award Ruling Means for Int'l Arbitration*, Law360 (Oct. 19, 2023),

<https://www.law360.com/articles/1730476/what-panama-canal-award-ruling-means-for-int-l-arbitration>.

²⁴ *Occidental Expl. v. Andes Petroleum Ecuador Ltd.*, 144 S. Ct. 1134 (2024); *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama*, 144 S. Ct. 1096 (2024).

²⁵ Julia Thedy, Fernando Freire Lula, *Is the Arbitrator's Failure to Disclose a Sufficient Ground to Set Aside an Arbitral Award? – A Brazilian Perspective*, Kluwer Arbitration Blog (Sept. 21, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/09/21/i>

<s-the-arbitrators-failure-to-disclose-a-sufficient-ground-to-set-aside-an-arbitral-award-a-brazilian-perspective/>.

²⁶ *Devoto v. Wagner*, CAM Santiago Case No. 4738, 2021 Sentencia de La Corte de Apelaciones de Santiago, <https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=35413>.

²⁷ María Eduarda Lemgruber, *Recognition of Foreign Arbitral Awards; The Abengoa Decision One Year On*, Kluwer Arbitration Blog (May 3, 2018), <https://arbitrationblog.kluwerarbitration.com/2018/05/03/r-ecognition-foreign-arbitral-awards-brazil-abengoa-decision-one-year/>.

²⁸ *Ometto v. ASA Bioenergy Holding A.G.*, 12 CIV 1328 JSR, 2013 WL 174259 at *2 (S.D.N.Y. Jan. 9, 2013), *affd* 549 F. App'x 41 (2d Cir. 2014).

²⁹ *Ometto v. ASA Bioenergy Holding A.G.*, 549 F. App'x 41, 42 (2d Cir. 2014).

Justice refused to recognize the award, reasoning that there were sufficient indicia of bias that violated Brazilian public policy.³⁰

Implications for Future Cases

Despite increasing calls for a universal standard for arbitrator disclosures,³¹ and the additional guidance and prohibitions provided by arbitration institutions and national law, there remains significant uncertainty about what may constitute arbitrator bias and when arbitrators must disclose such conflicts of interest, as well as the standards that courts will apply in considering challenges to an arbitrators' partiality after the fact. As a result, while the issue of conflicts of interest remains a hot topic in the arbitration community, arbitrators in different jurisdictions and hailing from different legal traditions often employ disparate approaches to disclosures, which can lead to a mismatch in expectations, particularly in cases where the tribunal is constituted with arbitrators from different countries across Latin America and the United States.

The possibility of disqualifying an arbitrator during the pendency of an arbitration and the fact that arbitrator impartiality or bias can serve as a basis to challenge the enforcement of an arbitration award presents opportunities for gamesmanship, both during and following the arbitration proceeding, and can also lead to legitimate concerns. Regardless, seeking disqualification during an arbitration or otherwise pursuing remedies in post-award enforcement proceedings has its own challenges, and uncertainties, particularly in light of the different approaches that arbitration institutions and courts may apply.

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³⁰ Maria Eduarda Lemgruber, *Recognition of Foreign Arbitral Awards; The Abengoa Decision One Year On*, Kluwer Arbitration Blog (May 3, 2018), <https://arbitrationblog.kluwerarbitration.com/2018/05/03/recognition-foreign-arbitral-awards-brazil-abengoa-decision-one-year/>; Guilherme Montebugnoli Zilio *et al.*, *Recognition Foreign Arbitral Awards in Brazil Since the Abengoa Case*, Jus Mundi (June 2023),

<https://jusmundi.com/en/document/publication/en-recognition-of-foreign-arbitral-awards-in-brazil-since-the-abengoa-case>.

³¹ Tom Jones, *Mourre calls for universal standard of disclosure*, GAR (Feb. 20, 2023), <https://globalarbitrationreview.com/article/mourre-calls-universal-standard-of-disclosure>.