ARBITRATOR BIAS AND EVIDENT PARTIALITY: THE UNITED STATES PERSPECTIVE

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Abstract

Some of the world's most renowned arbitrators have faced challenges to awards they issued based on claims of evident partiality. Those challenges are typically last-ditch efforts to vacate an unfavourable award. Similarly, challenges to confirmation of an award based on the New York Convention's public policy defence or arguments that the tribunal was not formed in accordance with the agreement of the parties typically fail. This article analyses challenges centered on arbitrator conflicts of interest or bias under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["New York Convention"] and the Federal Arbitration Act ["FAA"] pursuant to the United States of America ["US"] law. Consistent with international norms, US law emphasises the importance of arbitration as an alternative means of dispute resolution and leans strongly in favour of upholding arbitration awards when issues of arbitrator impartiality are raised. It is the rare case that results in the vacatur of an award issued in the US, or refusal to confirm an award issued elsewhere when US law confronts the issue as a secondary jurisdiction. The inquiry is always fact-intensive, and the rise in such challenges, demonstrated most recently by a challenge to an international arbitration award involving the expansion of the Panama Canal, leads to increased cost and inefficiency in the very process meant to streamline the resolution of commercial disputes.

This article discusses a recent analysis of the issue by the Eleventh Circuit Court of Appeal (part I) then turns to an overview of cases holding vacatur was not warranted pursuant to Section 10 of the FAA (part II) before discussing cases holding vacatur was warranted (part III). Next, the article looks at decisions in which US courts with

secondary jurisdiction examine bias or conflict pursuant to Article V of the New York Convention (part IV) before offering some closing remarks (part V).

I. The High Standard to Vacate an International Arbitration Award in the U.S.

It is beyond serious dispute that US courts strongly favour arbitration as a means of dispute resolution. That policy is underscored in the realm of international arbitration. Great deference is given to confirmation of arbitral awards, and review is typically "*quite circumscribed*."[1] Within that framework, attempts to vacate awards based on evident partiality of the arbitrators also face a high bar. That bar was addressed most recently by the Eleventh Circuit Court of Appeal in a case involving the expansion of the Panama Canal.[2] While each case turns on the specific facts and disclosures (or lack thereof) made by the arbitrators *and their impact*, this recent case highlights the difficulty of prevailing on such a claim, absent direct and definite evidence of an arbitrator's "*substantial or close personal relationship to a party or counsel*."[3]

In *Grupo Unidos por el Canal, S. A. et al.* v. *Autoridad del Canal de Panama*,[4] ["**Grupo Unidos**"] the Eleventh Circuit analysed Grupo Unidos' motion

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1 *See, e.g.,* Productos Roche S.A. v. Iutum Servs. Corp., No. 20-20059-Civ-Scola (S.D. Fla. Apr. 10, 2020), 2020 WL 1821385, at 2, *quoting* Four Seasons Hotel & Resorts B.V. v. Consorcio Barr, S.A., 613 F. Supp. 2d 1362 (S.D. Fla. 2009), at 1366-1367 (U.S.).

2 Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama, 78 F.4th 1252 (11th Cir. 2023) *petition for certiorari filed,* (Dec. 15, 2023) (No. 23-660) (U.S.) [*hereinafter* "Grupo Unidos 2023"].

3 Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama, No. 20-24867-Civ, 2021 WL 5834296 (S.D. Fla. Dec. 9, 2021), at 4 (U.S.) [*hereinafter* "Grupo Unidos"].

4 On December 15, 2023, Grupo Unidos filed a petition for writ of certiorari before the U.S. Supreme Court. The response is due on February 20, 2024: *see* Grupo Unidos 2023, 78 F.4th 1252 (11th Cir. 2023).

to vacate two arbitral awards issued in favour of the Panama Canal Authority related to the construction of new locks for the Canal. The arbitrations were seated in Miami, Florida, and conducted pursuant to the International Chamber of Commerce ["**ICC**"] Rules. The two arbitrations related to the excavation and use of basalt (Panama 1 Arbitration) and delays related to concrete production and earthwork (Panama 2 Arbitration). Both panels were comprised of the same arbitrators: Dr. Robert Gaitskell (appointed by the Panama Canal Authority), Claus von Wobeser (appointed by Grupo Unidos), and Chair Yves Gunter (appointed by the parties and confirmed by the ICC).

After five years of arbitral proceedings, the Tribunal awarded approximately $238 million to the Panama Canal Authority. Following the issuance of the adverse partial award, Grupo Unidos asked the Tribunal to provide updated disclosures. After receipt of those disclosures, Grupo Unidos raised the Tribunal's untimely disclosures as a challenge to the ICC Court, which it denied.[5] Then, Grupo Unidos moved to vacate the awards in the Southern District of Florida based on evident partiality of the arbitrators as contrary to the public policy, pursuant to Article V(2)(b) of the New York Convention.[6] The District Court denied the motion to vacate, and confirmed the awards.[7]

On appeal, Grupo Unidos renewed its arguments that all three arbitrators were biased. In the period intervening the appeal, the Eleventh Circuit adopted the domestic vacatur standards set forth in Section 10 of the FAA for international arbitration awards in cases where the US exercises primary jurisdiction.[8] As a result, the Court addressed evident partiality as a primary

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5 *See* Grupo Unidos, 2021 WL 5834296, at 3.

6 Grupo Unidos, 2021 WL 5834296, at 4, Grupo Unidos also argued the awards violated Article V(1)(b), minimal due process; and Article V(1)(d) (panel was not in accordance with the parties' agreement); *See Id.,* at 8, the court dispensed with both arguments.

7 *Id.* at 12.

8 Chapter 1 of the FAA applies generally to domestic arbitration proceedings. Section 10(a)(2) provides for vacatur on application of a party "where there was evident partiality or corruption in the arbitrators, or either of them." Chapter 2 of the FAA incorporates the

means of vacatur pursuant to Section 10(a)(2) of the FAA, and as a public policy defence to confirmation, ultimately holding that neither basis was warranted.[9]

Primarily, the subsequent disclosures that formed the basis of the challenges consisted of the following: (1) while Gaitskell served as an arbitrator in the Panama 1 arbitration, he and another co-arbitrator appointed Gunter as president in an unrelated arbitration that provided lucrative fees to Gunter; (2) von Wobeser served as co-arbitrator with one of the Panama Canal Authority's counsel during the Panama 1 arbitration; (3) years before Panama 1, Gaitskell served as co-arbitrator with one of the Authority's counsel in an unrelated arbitration; and (4) Gaitskell served as arbitrator in a pending arbitration where one of the Authority's counsel represented a different party.[10] The Court dispensed with Gaitskell's appointment of Gunter as a basis to justify vacatur, finding no evidence of bias or influence in Panama 1 resulting from the appointment, but rather that the appointment was due to Gunter's extensive construction arbitration experience.[11] Notably, Grupo Unidos even challenged the arbitrator it nominated, von Wobeser, on arguably the weakest basis. The Court dispensed with that challenge, noting the substantial difference between acting as co-arbitrators, and acting as co-counsel representing a common client.[12] Next, the Court found that the limited overlap between Gaitskell and the counsel for the Authority on a separate case where they

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United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [*hereinafter* "New York Convention"] into the Federal Arbitration Act. Notably, Chapter 2 provides that the provisions of Chapter 1 apply to international awards to the extent they are not in conflict with Chapter 2 or the Convention. *See* 9 U.S.C. § 208. Because Chapter 2 and the Convention do not provide for vacatur standards, Section 10's vacatur provision applied to the *Grupo Unidos* matter because the U.S. was the primary jurisdiction; Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A., 66 F.4th 876, 886 (11th Cir. 2023) (U.S.), only primary jurisdiction that issued award has power to vacate it under New York Convention.

9 Grupo Unidos 2023, 78 F.4th, at 1267.

10 *Id.* at 1259.

11 *Id.* at 1263.

12 *Id.* at 1263-1264.

shared a specialised area of construction law did not rise to the large number of contacts that would imply "*an inappropriately close association between arbitrator and counsel*."[13] The final challenge, sitting as arbitrator where counsel for the Authority appeared as counsel for a different party, also failed to rise to the level of bias. While the Court noted that repeated appearance may exhibit familiarity, it "*does not indicate bias*."[14]

The opinion outlines the heavy burden placed on parties to set aside an international arbitration award.[15] The Court noted that both the ICC Rules and US arbitration law require liberal disclosure of "*any dealing that might create an impression of possible bias*," and vacatur may be warranted when an arbitrator "*knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists*."[16] But the Court found the challenges asserted were based on "*mere indications of professional familiarity*" that were not "*reasonably indicative of possible bias*."[17]

> *"It is little wonder, and of little concern, that elite members of the small international arbitration community cross paths in their work. As one of the canal authority's expert witnesses testified, '[w]orld wide, there are only several dozen arbitrators who would be attractive candidates' for 'a proceeding such as the Panama 1 Arbitration.' We refuse to grant vacatur simply because these people worked together elsewhere. The record reveals no evidence of actual bias in the Panama 1 Arbitration. And as to possible bias, Grupo Unidos has established only that some of the arbitration's participants were otherwise familiar with each*

13 *Id.* at 1264.

14 *Id.*

15 The District Court described judicial review of foreign arbitration awards as "quite circumscribed" due to the "pro-enforcement bias of the [New York] Convention [that] parallels that of the [Federal Arbitration Act]." *See* Grupo Unidos, 2021 WL 5834296, at 3 (citations omitted).

16 Grupo Unidos 2023, 78 F.4th at 1263. (citations omitted).

17 *Id.* at 1262.

> *other, and familiarity due to confluent areas of expertise does not indicate bias.'"*[18] *(emphasis added)*

As fallback grounds, Grupo Unidos challenged the confirmation of the awards under Article V of the New York Convention based on the same circumstances. For the same reasons, the Court denied the challenge to confirmation of the award pursuant to Article V(1)(d) as the tribunal formation being incompatible with the parties' agreement and Articles V(2)(b) as contrary to public policy.[19]

II. Cases Finding Vacatur Was Not Warranted Pursuant to Section 10

Given the prevailing view that the evident partiality standard may be applied to international arbitration awards when the US is the primary jurisdiction, a review of domestic challenges is informative. As one Court framed the issue, evident partiality requires vacatur of an award pursuant to the FAA when:

> *"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."*[20]

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18 *Id.* at 1264-65, *quoting* University Commons-Urbana, Ltd. v. Universal Constructors Inc., 304 F.3d 1331, 1340 (11th Cir. 2002) (U.S.) [*hereinafter* "University Commons"].

19 Grupo Unidos 2021 also asserted a due process challenge pursuant to Article V(1)(b) which was denied; Grupo Unidos 2021, at 8-10.

20 Gianelli Money Purchase Plan and Trust v. ADM Investor Serv., Inc., 146 F.3d 1309, 1312 (11th Cir. 1998) (U.S.), reversing vacatur based on retention of arbitrator's law firm by respondent's president where relationship pre-existed arbitrator's employment at the law firm with one exception which was disclosed prior to appointment; *see also* University Commons, 304 F.3d 1331 at 1339. *Compare* Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 149 (1968), vacatur of award is supportable where arbitrator fails to disclose "any dealings that might create an impression of possible bias"; Monster Energy Co. v. City Beverages, *LLC,* 940 F.3d 1130, 1135-36 (9th Cir. 2019) (U.S.), "under our case law, to support vacatur of an arbitration award, the arbitrator's undisclosed interest in an entity must be substantial, *and* that entity's business dealings with a party to the arbitration must be nontrivial."; Belize Bank Ltd. v. Government of Belize, 852 F.3d 1107, 1113 (D.C.

For example, in *University Commons-Urbana, Ltd.* v. *Universal Constructors, Inc.*,[21] the Court determined that one of the arbitrators' contacts with an entity related to a party and counsel for that party were sufficient to require an evidentiary hearing on remand. Notably, the arbitrator, an experienced construction lawyer, disclosed at the outset of hearings that he knew and worked with and against counsel representing both parties. He subsequently disclosed that he met with an entity related to one of the parties in connection with an effort to obtain legal work.

The Court held that both circumstances required additional factual development and remanded the case for discovery, and an evidentiary hearing to determine whether the contact was sufficiently "*direct, definite and capable of demonstration rather than remote, uncertain and speculative*."[22] That determination turned, in part, on when the contacts occurred.[23] The Court reasoned that multiple contacts within the construction field preceding the arbitration may not be indicative of bias; concurrent contacts did raise a potential conflict sufficient to conduct further review.[24] The second issue, holding a meeting with a party that owned nearly half of one of the parties to the arbitration, required further investigation into the timing of the disclosure, particularly whether it was made so far along in the case to

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Cir. 2017) (U.S.) [*hereinafter* "Belize Bank"], confirming international award and rejecting argument that award violated public policy due to evident partiality of arbitrator where challenging party failed to "establish[ ] specific facts that indicate improper motives on the part of the arbitrator," internal citation omitted; Freeman v. Pittsburgh Glass Works, *LLC,* 709 F.3d 240, 253 (3d Cir. 2013) (U.S.), evident partiality requires showing that "a reasonable person would have to conclude that [the arbitrator] was partial to one side"; Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 64 (2d Cir. 2012) (U.S.) [*hereinafter* "Scandinavian Reinsurance"], evident partiality may be found "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration" (internal citation omitted).

21 University Commons*,* 304 F.3d 1331.

22 *Id.* at 1339, *quoting,* Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1202 (11th Cir. 1982) (U.S.) [*hereinafter* "Levine"].

23 *Id.*

24 *Id.* at 1340.

effectively preclude objection.[25] On remand, the District Court denied the motion to vacate based on an advisory jury's finding that the arbitrator was not aware of the facts comprising the potential conflicts.[26]

As the case law demonstrates, potential conflicts that may result in vacatur rest on specific, fact-intensive analysis raised in a variety of circumstances. In one case, an arbitrator's failure to disclose that he previously upheld the validity of the form liquidated damages clause in a prior arbitration did not establish bias.[27] In another, the Second Circuit reversed the Southern District of New York's vacatur of an international arbitration award where two arbitrators failed to disclose their subsequent appointments to a concurrent arbitration that raised common contract issues with an affiliated corporate party and involved testimony from a common principal witness.[28] The Court did not find any of the factors indicative of bias despite its recognition that the better practice would have been to provide timely disclosure to avoid the post-award challenges.[29]

Finally, in seeking vacatur of an International Centre for Settlement of Investment Disputes award, the Court rejected the Republic of Argentina's argument that one of the arbitrators exhibited evident partiality because she

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25 *Id.* at 1344. Also, the Court found no conflict from the disclosure at the hearing on seeing a principal witness that he recognized from a matter in which the arbitrator served as counsel and the witnesses had testified as an expert for the opposing party; *Id.* at 1345.

26 University Commons, 301 F. Supp. 2d 1297, 1299 (N.D. Ala. 2004) (U.S.). The predicate finding eliminated the need to reach the remaining issues, namely whether the alleged conflicts would be recognized by a reasonable person and whether the arbitrator failed to make the requisite disclosures; *Id.* at 1300.

27 Federal Vending, Inc. v. Steak & Ale of Florida, Inc., 71 F. Supp. 2d 1245 (S.D. Fla. 1999) (U.S.). Finding a lack of partiality, the court framed the issue as suggesting "that the arbitrator, in an earlier arbitration considered a particular issue and made a legal determination on the merits. That he might likely decide the same issue the same way in a later arbitration does not mean that he has a bias for or against either party, or that he is motivated for an improper reason to decide the issue or the case one way or the other;" *Id.* at 1250. Notably, Federal Vending was presumably aware of the arbitrator's prior ruling on the issue and had it been unfavourable, would likely have objected to the arbitrator's appointment.

28 Scandinavian Reinsurance, 668 F.3d, at 64.

29 *Id.* at 78.

was a board member of a company with investments in two of the parties.[30] There, the consortium/claimant nominated Professor Gabrielle Kaufmann-Kohler. Three years into the arbitration, the financial services company,UBS AG appointed Kaufmann-Kohler to serve on its board. Given the extensive interests of UBS AG, the arbitrator was unaware of its interest in two of the consortium member parties, but nonetheless resigned from the board upon learning of that interest. Finding no basis for vacatur, the Court cautioned:

> *"If the interest presented here could disqualify an arbitrator who did not disclose it, parties would hesitate to select arbitrators associated with financial companies that invest broadly. The risk would be too high that 'evident partiality' challenges, like Argentina's, could uproot results of decade-long arbitrations without any evidence of bias beyond a diversified portfolio."*[31] *(emphasis added)*

The Court found that the passive interest of UBS AG ($2 billion) in the consortium members was not significant, given its total portfolio of $3.6 trillion and, therefore, did not trigger a duty of disclosure.[32]

III. Cases Finding Vacatur for Evident Partiality Warranted

Commonwealth Coatings Corp. v. *Continental Cas. Co.*[33] is the landmark case on vacatur based on evident partiality of an arbitrator. In that case, the US

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30 Republic of Argentina v. AWG Group, LTD., 894 F.3d 327, 333 (D.C. Cir. 2018) (U.S.).

31 *Id.* at 336; *see also* Al-Harbi v. Citibank N.A., 85 F.3d 680, 683 (D.C. Cir. 1996) (U.S.) (arbitrator's failure to conduct search of former law firm's clients to determine representation of one of the parties did not require vacatur for evident partiality pursuant to 9 U.S.C. § 10(a)(2)).

32 *Id.* at 336; *see also* Ploetz for Laudine L. Ploetz, 1985 Tr. v. Morgan Stanley Smith Barney LLC, 894 F.3d 894, 898 (8th Cir. 2018) (U.S.) (no evident partiality under most lenient standard of creating "even an impression of possible bias" where chair disclosed eight prior cases in which he served as arbitrator with Morgan Stanley as party but failed to disclose a case in which he served as mediator involving Morgan Stanley); Lucent Technologies, Inc. v. Tatung Co., 379 F.3d 24, 30 (2d Cir. 2004) (U.S.) (arbitrator in three-arbitrator panel who disclosed prior service as an expert for the party appointing him in an unrelated, materially concluded action did not suggest bias nor did co-ownership of airplane with co-arbitrator a decade earlier).

33 Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968).

Supreme Court set aside an arbitration award where the arbitrator failed to disclose a close long-term financial relationship with the Respondent/contractor in a dispute with a subcontractor. The tribunal chair was an engineering consultant who periodically did business with the Respondent/contractor. The plurality opinion addressed the practical implications arising from perceived bias:

> *"It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."*[34]

Based on the determination that evident partiality may be found where arbitrators "*might reasonably be thought biased against one litigant and favorable to another*,"[35] the Court vacated the award. The concurrence framed the holding as "*where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed*."[36]

In another case, an international arbitration seated in New York involved a joint venture for distribution of petroleum coke purchased by a US company for distribution through its Turkish partner.[37] The chair was the CEO and president of a "*multi-billion dollar company with 50 offices in 30 countries*."[38] During the initial liability phase of the proceedings, the US

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34 *Id.* at 148-49.

35 *Id.* at 150.

36 *Id.* at 151-152. Three dissenting justices rejected the "formalism" of the opinion in favour of protection of "the integrity of the process with a minimum of insistence upon set formulae and rules" given that "the arbitrator was innocent of 'evident partiality' or anything approaching it." *Id.* at 154-155.

37 Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi AS, 492 F.3d 132 (2d Cir. 2007) (U.S.) [*hereinafter* "Applied Indus"].

38 *Id.* at 135.

company representative advised the Tribunal that it was being sold to Oxbow Industries, which, at that time, triggered no additional disclosures. Two years later, the chair disclosed that one of his offices had contracted to carry petroleum coke with an Oxbow affiliate, and that he asked to be walled off from learning any information regarding any of those dealings. After the issuance of an unfavourable award on liability and retention of new counsel, the Turkish company asked the chair to withdraw, which he declined to do.[39]

The Second Circuit upheld vacatur of the award. In doing so, the Court emphasised that the failure to investigate a non-trivial conflict or, alternatively, to inform the parties that no investigation would be undertaken "*is indicative of evident partiality*."[40] By foreclosing internal discussion of the relationship between his company and the purchaser, the arbitrator did not identify the existence of the prior relationship between them that generated $275,000, determined to be a non-trivial conflict.[41]

Similarly, in *New Regency Productions, Inc.* v. *Nippon Herald Films, Inc.,*[42] the Court set aside an award despite the arbitrator's lack of knowledge of a conflict, finding that he had a duty to investigate potential conflicts arising from his new employment, which failed to do. During the arbitration, the arbitrator accepted a new position with a company that was in negotiation to finance and co-produce a film developed by the Respondent production company. The Court held that the arbitrator had a duty to investigate any potential conflicts when he accepted the new employment. Further, the Court examined the source of conflict alleged and found it significant, not trivial, and sufficient to warrant vacatur.[43]

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39 *Id.*
40 *Id.* at 138.
41 *Id.* at 139.
42 New Regency Productions, Inc. v. Nippon Herald Films, Inc, 501 F.3d 1101 (9th Cir. 2007) (U.S.).
43 *Id.* at 1110.

An arbitrator's undisclosed ownership interest in the administering institution was sufficient to vacate an award for evident partiality in *Monster Energy Co.* v. *City Beverages, LLC*.[44] There, a manufacturer, Monster, filed an arbitration against its distributor based on a dispute involving the manufacturer's termination of the agreement. The arbitration was administered by Judicial Arbitration and Mediation Services ["**JAMS**"]. The initial disclosures advised that the arbitrator had a financial interest in JAMS; and given its size, it was likely that he had participated in other cases with the parties or counsel and may do so in the future.[45] The arbitrator failed to disclose that his financial interest in the administering body was an ownership interest.[46]

The Court examined evident partiality as a two-part inquiry: whether the arbitrator's ownership interest in the administering body was "*sufficiently substantial*" and, if so, whether the administering body and the manufacturer "*were engaged in nontrivial business dealings*."[47] The Court found that both elements met. First, because the arbitrator held an ownership interest in the administrator, he received profits from all the arbitrations it conducted, not just the ones he personally conducted.[48] Second, the manufacturer's form contract was provided for arbitration by JAMS in Orange County. During the five previous years, JAMS had administered 97 arbitrations for Monster that were deemed "*hardly trivial*."[49] As a result, the Court vacated the award based on the "*reasonable impression of bias*" and cautioned in favour of more fulsome disclosures.[50]

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44 Monster Energy Co. v. City Beverages, LLC., 940 F.3d 1130 (9th Cir. 2019) (U.S.).

45 *Id.* at 1133.

46 *Id.* at 1134.

47 *Id.* at 1136.

48 *Id.*

49 *Id.*

50 *Id.* at 1138; *see also* Levine, 675 F.2d at 1202 (arbitrator's failure to disclose ongoing adversarial proceeding between arbitrator's family-owned business in which he served as general counsel and respondent insurance company involving uncollected premiums held by business, trust account dispute and resulting bar investigation into arbitrator created reasonable appearance of bias to vacate award); Continental Ins. Co. v. Williams, No. 84-

IV. US as Secondary Jurisdiction: Arbitrator Bias under Article V

As in *Grupo Unidos*, parties have continued to challenge confirmation of international awards under Article V of the New York Convention on comparable grounds. In *Tafneft* v. *Ukraine*,[51] Ukraine relied on Article V(1)(d) to argue that confirmation of a $112 million award in favour of Russia following an investment treaty arbitration should be denied because the Tribunal was not formed in accordance with the parties' agreement. The argument centred on the chair's failure to disclose his appointment for unrelated matters by both parties after his appointment as chair. The arbitration agreement incorporated the United Nations Commission on International Trade Law Rules requiring disclosure of "*any circumstance likely to give rise to justifiable doubts as to [an arbitrator's] impartiality or independence*."[52]

The Court distinguished the issue from domestic arbitration, which required a showing of evident partiality in fact. Instead, the Court examined the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"], which did not address the specific situation – two arbitral appointments, one from each parties law firm.[53] The Court found the single appointment by the opposing party over the seven-year duration of the arbitration insufficient to constitute justifiable doubt as to his impartiality, particularly where the arbitrator was also appointed by the challenging party's counsel. In line with the French

2646-Civ. (S.D. Fla. 1986), 1986 WL 20915, at 5 *aff'd without opinion,* 832 F.2d 1265 (11th Cir. 1987) (U.S.) (award vacated where arbitrator failed to disclose current representation in unrelated ongoing court proceeding against respondent/insurer where arbitrator had contingency fee at risk on appeal which, if disclosed, would have allowed respondent meaningful opportunity to weigh conflict and decide whether to object).

51 Tafneft v. Ukraine, 21 F.4th 829 (D.C. Cir. 2021) (U.S.).

52 *Id.* at 838.

53 The applicable Int'l Bar Assoc. [IBA], *IBA Guidelines on Conflicts of Interest in International Arbitration* (Oct. 23, 2014) [*hereinafter* "IBA Guidelines"], contained on the "Orange List" pt. II, art. 3.1.3, triggers a disclosure requirement when "[t]he arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties" including counsel. *Id.* at 839.

and UK courts, the Court dismissed the basis of the challenge as "*an apparently common practice*."[54]

Similarly, a challenge to confirmation on public policy grounds was rejected when the Government of Belize argued that an arbitrator failed to disclose that his chambers previously did work for the opposing party bank against Belize.[55] The case involved the enforcement of a guarantee by Belize in favour of the Bank of Belize Limited, pursuant to the terms of a settlement agreement. The arbitration was seated in London, pursuant to the Rules of the London Court of International Arbitration ["**LCIA**"].[56] The LCIA nominated the arbitrator for Belize due to its early non-participation in the proceedings. Belize then challenged the arbitrator some five years later, contending that another member of his Chambers had represented a party adverse to the Government.[57]

When Belize failed to pay, the bank sought confirmation of the award in the US. The District Court granted confirmation, and the appellate court affirmed, rejecting imputation of conflicts among chambers' members:

> *"We believe an allegation that an arbitral tribunal member is a member of the same chambers as another barrister who, in proceedings unrelated in fact and time, represented a conflicting interest, is insufficient to meet that burden, let alone to*

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54 *Id.* at 839-40 ("Indeed, other courts have found no ethical breach. The Court of Appeal of Paris concluded that 'a single appointment in the course of the seven years that the arbitration lasted, which did not characterize a history of business between this arbitrator and this law firm, [did not have] the potential to raise a reasonable doubt about the independence and impartiality of Mr Orrego Vicuña.' The United Kingdom's High Court of Justice 'd[id] not consider that it can at all be said that a single appointment in the course of the seven years the arbitration lasted would or might provide the basis for a reasonable apprehension about the independence or impartiality of Professor Vicuña; and still less that they were likely to give rise to justifiable doubts so as to trigger the duty of disclosure.' Nonetheless, we emphasize the narrowness of our holding—Vicuña was not required to disclose his appointment because it did not raise 'justifiable doubts' regarding his impartiality.") (internal citations omitted).

55 Belize Bank, 852 F.3d at 1114.

56 *Id.* at 1108.

57 *Id.* at 1109.

> *demonstrate that enforcement would violate the United States' 'most basic notions of morality and justice' as required to set aside an award under the New York Convention. First, 'barristers are all self-employed … precisely in order to maintain the position where they can appear against or in front of one another.' … Because the chambers model is designed to protect a barrister's independence—a fact acknowledged by English courts, … and scholars, … we are aware of no ethical rule that would require conflict imputation in these circumstances."*[58] (emphasis added)

The Court further reasoned that the appearance of neutrality must be analysed from the parties' perspective. Given Belize's historical dealings with the British justice system and its prior involvement in a case where the same Chambers opposed it without objection, the Court confirmed the award.[59]

V. Conclusion

While Circuits may vary in how they articulate it, as one Court aptly summarised the issue, "[*t]he First, Second, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits have adopted the reasonably construed bias standard, albeit not under that name*."[60] An arbitrator's duty to investigate potential conflicts is consistent with approaches of IBA, American Arbitration Association, and American Bar Association ethics for arbitrators in commercial disputes.[61]

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58 *Id.* at 1113 (internal citations omitted).

59 *Id.* at 1114.

60 HSM Constr. Servs., Inc. v. MDC Systems, Inc., 239 Fed.Appx. 748, 753 (3d Cir. 2007) (U.S.).

61 *See, e.g.,* IBA Guidelines, General Standard 7(d) ("An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries."). Notably, the IBA Guidelines place a similar duty on the parties; *id.,* General Standard 7(c); *see also* American Arbitration Association [AAA], *Code of Ethics for Arbitrators in Commercial Disputes* (Mar. 1, 2004), Canon II ("An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality."); Canon II(B) (b) ("Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any

While institutions and international guidelines require arbitrators to conduct an investigation to determine whether conflicts exist, US courts have been hesitant to directly impose such a duty.[62] Clearly, a duty to disclose what is known exists. However, at most, arbitrators have a duty to disclose that they have not conducted such an investigation.[63] As the foregoing discussion demonstrates, when faced with a challenge involving the failure to make a disclosure, the critical issue remains focused on the significance of the underlying contact – whether the non-disclosed information is trivial or meaningful.

To limit challenges to an award and advance arbitration as a means of dispute resolution, a minimum standard should mandate that arbitrators investigate potential conflicts or advise the parties that they will not do so.

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interests or relationships described in paragraph A."); Canon II(C) (c) ("The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.") [*hereinafter*, "The Code of Ethics for Arbitrators in Commercial Disputes"]. These obligations are incorporated in the International Centre for Dispute Resolution [ICDR], *Rules of the International Centre for Dispute Resolution*, art. 14 (Jan. 1, 2022) ("Impartiality and Independence of Arbitrator (1) Arbitrators acting under these Rules shall be impartial and independent and shall act in accordance with these Rules, the terms of the Notice of Appointment provided by the Administrator, and with The Code of Ethics for Arbitrators in Commercial Disputes.").

62 *See* Kathryn A. Windsor, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes,* 6 SETON HALL CIRCUIT REV. 191, 214-17 (2009) (analysing the lack of a uniform judicial standard and calling for the imposition of an affirmative duty on the arbitrator to investigate potential conflicts).

63 *See,* Applied Indus., 492 F.3d at 138; *compare* Ometto v. ASA Bioenergy Holding A.G., No. 12 Civ. 1328, 2013 WL 174259, at 4 (S.D.N.Y. Jan. 9, 2013) (U.S.) [*hereinafter* "Ometto"] (declining to vacate two ICC arbitration awards nearing $110 million where the chair's law firm was retained, after his appointment, in three matters impacting one of the parties despite fact that chair's "lack of awareness was largely the product of his own administrative carelessness in the manner he undertook a conflicts check at the advent of the arbitration") *aff'd*, Ometto") *aff'd*, 549 Fed.Appx. 41, at 42 (2d Cir. 2014) (U.S.) (affirming district court finding arbitrator had no duty to investigate where he "had no reason to believe a nontrivial conflict might exist" and his "carelessness does not rise to the level of wilful blindness"). However, recognition of the award was subsequently denied in Brazil.

In practice, most arbitrators likely do so. However, given the varied rules that may apply, counsel can rely on the flexibility inherent in the arbitration process itself to address this issue and limit potential challenges to an arbitration award. Transaction counsel can draft arbitration clauses that require arbitrators to investigate potential conflicts of interest and provide those disclosures upon nomination. Many institutions already require such a practice. Barring or supplementing that, upon receipt of arbitrator disclosures, arbitration counsel can inquire as to whether the tribunal investigated potential conflicts and will commit to doing so during the pendency of the case. Once armed with that information, counsel can determine whether to request further investigation or proceed with the arbitrator without objection. Simply requesting sufficient detail as to the scope of investigation and disclosures from the arbitrators at the outset of the proceeding can substantially minimise any potential enforcement or confirmation issues that may arise with respect to a subsequent award.

This discussion should provide some comfort that arbitration awards are typically upheld in the US despite challenges claiming arbitrator bias. However, there are circumstances where vacatur is warranted, or confirmation is denied based on evidentiarily supported claims that are "*direct, definite and capable of demonstration*."[64] While this discussion focuses on the application of US law, international norms are generally consistent.[65] The assertion of evident partiality claims to derail high dollar awards may foreshadow increased usage that would benefit from more concrete institutional guardrails. For example, the IBA Guidelines require disclosures for a three-year period, preceding an appointment with a continuing duty to disclose subsequent conflicts.[66] The international community may benefit from a wider adoption of similar limitations. Given the lack of meaningful movement in that direction and the reality that bias turns on such fact-specific situations, counsel can take steps at the outset of

64 University Commons, 304 F.3d at 1339.

65 *See, e.g.*, *supra* note 61.

66 IBA Guidelines, Orange List (Aug. 2015).

proceedings to affirmatively determine the scope of investigation undertaken by the nominated arbitrators. Ultimately, assessment of later disclosed or discovered contacts as a basis for vacatur turns on whether the contact can be reasonably construed to rise to the level of bias under the facts and circumstances of the particular case.