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# DISCLOSURE AND CONFLICTS OF INTEREST – A RECAP OF A PRAGMATIC PANEL

*by Julie N. Bloch*

## I. INTRODUCTION

The Institute for Transnational Arbitration (ITA) and the Latin American Association of Arbitration (ALARB) co-hosted the first-ever virtual Americas Workshop from December 2, 2020, to December 4, 2020. The Workshop, titled *Arbitrators: Immunity, Conflicts and New Challenges*, was co-chaired by Julie Bédard of Skadden, Arps, Slate, Meagher & Flom LLP (New York & São Paulo) and María Inés Corrá of M.&M. Bomchil (Buenos Aires). The three-day conference included five panels, each focusing on various aspects of arbitrators' role and responsibility regarding the duty of disclosure, conflicts of interest, liability, and immunity. The conference also covered diversity in international arbitration and discussed how the arbitration community should promote diversity for both arbitrators and counsel.

I have chosen to discuss in more detail one specific panel titled *Disclosure and Conflicts of Interest*, due to its practical relevance for arbitrators and practitioners alike.

## II. THE KEYNOTE

The duty of disclosure has garnered particular attention lately, as exemplified by the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement[1] and the revisions of various arbitral institutional rules to mandate the disclosure of a third-party funding agreement. In fact, the ICC recently unveiled its revised 2021

[1] *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, https://icsid.worldbank.org/sites/default/files/Draft_Code_Conduct_Adjudicators_ISDS.pdf (hereinafter *Draft Code*).

Rules of Arbitration,[1] with Article 11(7)[2] now requiring parties to disclose a third-party funder's existence and identity.

The mandated disclosure of third-party funding is but one example highlighting an attempt to promote transparency in international arbitration and avoid conflicts of interest between the arbitrators and the parties in a proceeding.

In her keynote address preceding the *Disclosure and Conflicts of Interest* panel, Professor Catherine A. Rogers (Penn State Law School, University Park, and Queen Mary University, London) focused precisely on these conflicts of interest between arbitrators and parties, equating arbitrator conflicts to "moving targets." Prof. Rogers noted that arbitrator conflicts are constantly evolving (hence the "moving" part), but the definitions meant to clarify what is or is not a conflict are circular and incoherent. Considering this, Prof. Rogers posited the question of: how exactly can we—the international arbitration community—hit this "moving target"?

Prof. Rogers explained that part of the problem is a lack of clarity in terms of what is to be expected from an "independent" and "impartial" arbitrator. She pointed to a proliferation of sources all trying to define impartiality, including the first draft of the Code of Conduct for Adjudicators in Investor-State Dispute Settlement mentioned above.[3] These definitions, however, all miss the mark, according to Prof. Rogers, because absolute impartiality does not exist. Prof. Rogers went on to clarify that absolute impartiality is not only impossible but is also undesirable. A party cannot ignore or deny evaluating the particular education, experience, or even political perspectives of a potential arbitrator prior to his or her nomination. Prof. Rogers underscores that parties choose a potential arbitrator because of these particular perspectives; however, the use of binary terms to define impartiality and

[1] ICC Rules of Arbitration (2021), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_17 [hereinafter ICC Rules of Arbitration].

[2] ICC Rules of Arbitration, art. 11(7) ("In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.").

[3] *See supra* note 1.

independence completely ignores this fact or the inevitable truth that bias is indeed inherent to all humans.

For her the question is therefore not whether there is bias (the answer is quite obviously, yes), but rather which kinds of bias are appropriate when analyzing arbitrator conflicts—a question that is much more nuanced. Deciding which kinds of bias are appropriate and qualify as arbitrator conflicts is further complicated by the emergence of relatively new types of conflicts, such as "double hatting" and "issue conflicts".

Prof. Rogers observed that these "moving targets" are also "shared targets" as we work towards reducing unsuccessful arbitrator challenges, even the ones made in good faith. A better understanding of these "moving targets" can be achieved through various mechanisms, all aiming to increase transparency. The focus should be on allowing parties to be better informed when selecting the "right" arbitrator for a particular dispute. One such mechanism can be found at the institutional level, with arbitral institutions embracing their role as de facto regulators of arbitrator challenges. Indeed, arbitral institutions, as well as private and commercial sources, could all help resolve the formalistic impartiality problems and lack of strict regulation that Prof. Rogers criticizes. Prof. Rogers concluded her keynote address by explaining how the reinforcement of these "shared targets" will increase legitimacy in international arbitration, both actual and perceived.

## III. THE PANEL

Following this dynamic keynote address, the *Disclosure and Conflicts of Interest* panel began, moderated by Sandra González of Ferrere (Montevideo) and featuring Claudia Salomon of Latham & Watkins LLP (New York), Eduardo Damião Gonçalves of Mattos Filho (São Pablo), and Professor Guido Santiago Tawil (Independent Arbitrator, Buenos Aires).

Prof. Tawil started sharing a few remarks on the current state of international arbitration regarding conflict standards and transparency. For Prof. Tawil, the root of the problem is figuring out what exactly should be disclosed to attain the required standard of transparency. A certain balance must be achieved between what is and

is not reasonable for disclosure obligations. Without such balance, excessive disclosures will inevitably give rise to unfounded and frivolous challenges, turning disclosure into what Prof. Tawil qualifies as "scrutiny." He posited that this balance, and thus the mandated standard of transparency, can be achieved by focusing on the disclosure of issue conflicts. The disclosure of issue conflicts can, in turn, be achieved by following the current IBA Guidelines and applying an objective standard (i.e., whether a reasonable person with knowledge of the relevant facts and circumstances would have justifiable doubts as to an arbitrator's impartiality).[4] Prof. Tawil comments that the UK Supreme Court recently applied this same objective standard in *Halliburton Company v. Chubb Bermuda Insurance Ltd.*[5] Under English law, the Court held that determining whether there is apparent or perceived bias depends on whether a "fair-minded and informed observer" would conclude that there is a "real possibility" of bias.[6]

Prof. Tawil argued that the arbitration community needs to approach matters of disclosure and transparency with realistic and practical solutions. There seems to be a disconnect between the current written requirements and codes of conduct, which are fine in theory but are wholly disconnected from international arbitration realities today.

Mr. Gonçalves expanded on this argument by explaining that a potential arbitrator will be judged five years from now on something he or she did today, but under the standards in force five years from now. For him, the arbitration community should avoid drafting and enacting more and more rules. Trying to have theoretical rules keep up with the practical realities of modern international arbitration will only lead to an endless (and fruitless) struggle. Instead, Mr. Gonçalves advocates for flexibility based on the evolution of conflicts of interest and disclosure obligations.

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[4] Int'l Bar Assoc., *Guidelines on Conflicts of Interest in International Arbitration*, https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (2014).

[5] Halliburton Co. v. Chubb Bermuda Insurance Ltd. (formerly known as Ace Bermuda Insurance Ltd.), [2020] UKSC 48.

[6] *Id.* at ¶ 39; *see also* ¶¶ 54-55.

Ms. Salomon, on the other hand, suggested that the parties should drive the need or expectations for increased transparency. She further explained that parties often get caught up in the definitions of independence and impartiality, which leads to parties becoming overly preoccupied with what exactly must be disclosed. Our expectation and understanding of disclosure obligations should not be so rigid. As Ms. Salomon observed, the ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration includes an enumerated list of what should be disclosed; however, this list is open-ended ("including but not limited to").[7] There is thus some guidance as to what should be disclosed without attempting to identify every possible conflict of interest scenario.

Ms. Salomon recommended—and Prof. Tawil and Mr. Gonçalves agree—that the arbitral community should avoid endlessly debating the specifics of a particular definition and instead focus on providing clarity on disclosure obligations. Once a disclosure is made, determining whether that specific disclosure is a basis for a challenge depends on the facts and circumstances of the case at hand.

For Mr. Gonçalves, a parallel can be drawn between the above discussion and the famous phrase of Justice Potter Stewart in *Jacobellis v. Ohio*: "I know it when I see it."[8] In other words, when there is a true lack of independence or impartiality, arbitration practitioners will be able to see it and take the necessary steps to remedy the situation.

The panel discussion then turned to identifying tools or measures that are of particular value when addressing independence and impartiality, particularly impartiality. In Ms. Salomon's view, the revised 2021 ICC Rules of Arbitration offers a new and important tool. Under Article 17(2), arbitrators may now "take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation, *including the exclusion of new party representatives from*

[7] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2021), ¶. 27, https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf.

[8] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

*participating in whole or in part in the arbitral proceedings*."[9] Article 17(2) addresses a situation that may not have been considered in the past: a party bringing in new counsel as a guerilla tactic. The new counsel is brought in with the express intention of creating a conflict with an arbitrator, resulting in a disclosure, challenge, and eventual resignation. Article 17(2) of the revised ICC Arbitration Rules therefore grants arbitrators the power to appropriately respond to such conflict issues, if they arise.

Mr. Gonçalves believes that confidentiality has been overrated in international arbitration proceedings. He elaborates that this was addressed by the ICC under the leadership of Alexis Mourre with the introduction of three new measures: 1) the publication of awards; 2) the publication of the composition of newly constituted ICC tribunals and the counsel who will partake in these new cases; and 3) the ability to obtain the reasoning behind a challenge decision if requested by the parties. According to Mr. Gonçalves, these three measures will help eliminate the "veil of secrecy" surrounding conflict issues.

Though Prof. Tawil agreed with both Ms. Salomon and Mr. Gonçalves regarding the importance of these tools in promoting transparency, he warned against the risk of overpublicizing and jeopardizing the private nature of international arbitration proceedings. This brought up an interesting point of discussion: how do we efficiently use these disclosure tools to address impartiality while simultaneously avoiding the perils of over disclosure?

Prof. Tawil noted that some of these disclosure services go beyond what is necessary to assess potential conflicts, for example, by inquiring on an arbitrator's position on document production. Prof. Tawil believes that arbitrators cannot and should not comment on such types of questions because arbitrators (like judges) should not speak about their decisions other than through their judgments.

Ms. Salomon further added that the arbitral community must trust that the user of these disclosure tools will be able to properly assess the gathered information based on what it provides. In her opinion, the institutions as the *de facto* regulators

[9] ICC Rules of Arbitration, art. 17(2) (emphasis added).

should provide participants with sufficient information to better understand specific arbitrators, while respecting the level of confidentiality set by the parties.

The panel concluded with a discussion on self-regulation. More specifically, whether self-regulation by arbitrators is preferred over more formal standards, such as a global code of conduct or a regulatory body with the ability to sanction arbitrator conduct. Both Prof. Tawil and Mr. Gonçalves are in favor of self-regulation and find strict and formal standards undesirable. Both agree that these formal standards detract from the very basis of arbitration, removing the flexibility that differentiates it from court proceedings.

In Ms. Salomon's view, it is once again up to the parties to decide if more formal standards are needed. As such, only time will tell if there is to be increased demand for additional guidelines or codes of conduct addressing conflicts and disclosure obligations.

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