ESSAY

ARBITRATOR DISCLOSURE: IN DEFENSE OF THE SECOND CIRCUIT APPROACH

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ABSTRACT

Among the extensive literature associated with international commercial arbitration, disclosure has recently become ripe. Arbitrators should recognize the importance of the parties' choice to resort to arbitration despite its costs. Practically, arbitrators are supposedly vigilant and proactive in disclosing any circumstances that may give rise to their potential bias. Nondisclosure blindfolds the parties to arbitrators' true independence and impartiality. Operating on the premise that a dispute should be decided by a final and binding decision, non-disclosure may have implications in the post-award stage. Further, myriad or different disclosure standards may threaten the certainty and efficiency of the arbitration process. This Essay highlights the importance of having a clear established standard of disclosure. Given the interdependence between disclosure and impartiality, the Essay will surgically treat the subject through advocating the view of the Second Circuit on "evident partiality" by comparatively analyzing an actual dispute arbitrated in New York, challenged in New York, and sought to be enforced in Brazil. The Essay proceeds with Part II providing a background of the disclosure duty in international arbitration. Part III then analyzes the Abengoa *case, the annulment proceedings in New York, and the enforcement proceedings in Brazil. Part IV advocates the Second Circuit approach of*

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evident partiality by comparing the Brazilian Supreme Court approach on disclosure. Part V concludes.

I. ARBITRATOR DISCLOSURE

Unlike its public cousin, litigation, international arbitration is a relatively small community where arbitrators get to create a large pool of relationships which may raise concerns in different jurisdictions.[1] However, arbitrators should uphold their impartiality.[2] Arguably, arbitrators' relationships should be

1. INT'L BAR ASS'N, GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION para. 1 (Oct. 23, 2014), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx [https://perma.cc/PV3V-8EKM] ("The growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues.") [hereinafter CONFLICTS OF INTEREST].

2. INT'L CTR. FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 13(1) (2014) (providing that "arbitrators acting under these rules shall be impartial and independent,") [hereinafter ICDR Arbitration Rules]. As per Canon I of the Code of Ethics for Arbitrators in Commercial Disputes, arbitrators should "consider their ability to be independent and neutral at the time of appointment". AM. BAR ASS'N, ARBITRATORS ANNOTATIONS TO THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon I (2014) [hereinafter CODE OF ETHICS].

disclosed and, in some cases, may be a basis for recusal even if the applicable law does not clearly require that.[3]

Generally, arbitrators should have a willingness to thoroughly and comprehensively investigate the circumstances that may give rise to disclosure.[4] Most arbitral institutions have adopted a general standard of "justifiable doubts" of the arbitrators' impartiality and independence. While some rules require an objective standard, others suffice with a subjective one.[5] Others, in the scope of disclosure, distinguish between the reference to "facts and circumstances" and the reference to "circumstances" alone.[6] However, there is little guidance on the application of these standards.[7] Ultimately, for arbitrators, disclosure is a relative concept that may be tested against the backdrop of numerous competing interests and goals such as speed, costs, and efficiency of the dispute resolution.

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3. *See* Laurence Shore, *Disclosure and Impartiality: An Arbitrator's Responsibility Vis-A-Vis Legal Standards*, 57 DISP. RESOL. J. 33, 34-35 (2002).

4. *See* Roger Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 PEPP. DISP. RESOL. L.J. 1, 43 (2003).

5. *See* UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION art. 11, https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf [https://perma.cc/EWM6-EVDW] (last visited Oct. 24, 2020) [hereinafter UNCITRAL RULES ON TRANSPARENCY]. Article 11 of the Arbitration Rules provides that "When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence." *Id.*

6. Article 11(3) of the ICC Rules of Arbitration provides: "[t]he prospective arbitrator shall disclose in writing to the Secretariat any *facts or circumstances* which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties." INT'L CHAMBER OF COMMERCE (ICC), ICC RULES OF ARBITRATION art. 11(3), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ [https://perma.cc/V47R-XE3P] (last visited Nov. 30, 2020) [hereinafter ICC RULES OF ARBITRATION]; Article 13(2) of the ICDR Arbitration Rules reads " . . . The arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence and any other relevant facts the arbitrator wishes to bring to the attention of the parties." ICDR Arbitration Rules, *supra* note 2, art. 13(2); Article 11 of the UNCITRAL Arbitration Rules provides that "When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any *circumstances* likely to give rise to . . . [doubts about the arbitrator's impartialty]" UNCITRAL RULES ON TRANSPARENCY, *supra* note 5, art. 11.

7. Matthew David Disco, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113, 137 (1993) (advocating for a "reasonable person" standard to consider the relationship that may give rise to bias which should reflect the specialized skill of the quasi-judicial actor).

If inconsistent standards of disclosure are immutable markings of international arbitration, one would be left with dismay and unpredictability.[8] The reality is more promising than that. Arbitration is often conducted in the international setting. National courts may work together in promoting efficient proceedings by adopting consistent approaches toward disclosure in order to meet the parties' expectations. While prudence cautions against unbridled nondisclosure of relationships, it is a rare arbitration that operates without hindsight revealing some existing relationships that may not have been disclosed,[9] an omission by arbitrators more out of habit than necessity.

This habit is derived from the wide discretion of arbitrators in disclosing the circumstances that may raise some partiality concerns with the involved parties.[10] The excessive disclosure discretion may create inconsistencies as to some cases where arbitrators may be hesitant to disclose. For instance, an arbitrator may have previously provided legal services to the opposing party. In addition, an arbitrator in a current case may have acted as a counsel in a previous case before another arbitrator who acts now as a counsel in the current case. These instances are clear examples of this hesitancy. Reasonable minds can differ on what constitutes substantial relationship, and accordingly, what relationship may warrant arbitrator's partiality. Arbitrators' sense of substantial relationships may likely differ from that of counsels' to a certain extent. For counsels, disclosure has a substantial impact on the neutrality of the decision-making process, which should not entail any surprises in order to better serve their clients. An effective disclosure standard can, moreover, be had without compromising the expectations of each side.

International arbitration is characterized by malleability that provides the process with effective vehicles, especially when

8. Merrick T. Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What Is Sufficient to Vacate Award*, 81 ST. JOHN'S L. REV. 203, 251 (2007) (discussing the impact of the disclosure standards on the cost and efficiency of arbitration).

9. Canon I (C) of the AAA/ABA Code of Ethics requires arbitrators to "avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality." CODE OF ETHICS, *supra* note 2, Canon I (C).

10. ICDR Arbitration Rules, *supra* note 2, art. 13(2).

differing legal cultures meet. Despite the flexibility of international arbitration, some practices have become almost standards; albeit disclosure is not one of them. Arbitrator's disclosure is not characterized by a single procedural format. Normally, arbitrator's disclosure decision receives proper deference except in egregious situations where the non-disclosure may be a ground for annulling or refusing to enforce the award.[11] In fact, an arbitrator's decision to disclose information may inadvertently result in a subsequent challenge to the arbitral award. However, non-disclosure in some instances should be tolerable and should not stigmatize the arbitral award of any vociferous fallouts. A perplexing example is the arbitrator's good faith or negligent failure to discover unknown conflict, or the lack of sufficient information to vindicate the viability of the conflict.

The scope of disclosure and the apparent conflicts that this situation may create could be resolved by a circumspect perusal of the role of arbitrators and the ultimate goal of the arbitration process. In order to properly understand the perplexities of the disclosure requirement, there should be a rapport between disclosure and the impartiality and independence of arbitrators. As is widely recognized, disclosure should enhance the arbitrator's impartiality. Nevertheless, broad disclosure may have fallouts, particularly in the arbitrators' challenge proceedings and the enforcement of the arbitral award. Broad disclosure may open the door for trivial challenging grounds which may delay the proceedings. It could also create secondary questions that may assume unexpected concerns on the impartial role of arbitrators. Chief among these questions is whether the arbitrator's impartial role assumes *actual* impartiality or a mere appearance of impartiality. The answer to that question should explain the disclosure standard that should be applied and its impact upon the proceeding.[12] Disclosure, therefore, may be used as a tool of efficiency in the arbitration process and, in the meantime, may

11. Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 72-73 (2005).

12. For instance, the IBA Guidelines on Conflicts of Interest categorize the information that should be disclosed and their impact upon the proceedings through red, orange and green lists which serve to eliminate the arbitrator's discretion as to which information should/should not be disclosed. *See* CONFLICTS OF INTEREST, *supra* note 1.

not truly reflect the actual partiality of an arbitrator in the decision-making process.

A. The Second Circuit Approach

The value of the arbitral awards lies generally in the limited grounds for their review. Unlike the New York Convention that does not refer to arbitrator's impartiality or bias,[13] the Federal Arbitration Act ("FAA") provides for an evident partiality of an arbitrator as a basis for vacating an award,[14] a standard that generated nebulous applications by different courts.

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13. Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards reads:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

UNITED NATIONS COMM'N ON INT'L TRADE LAW, NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS art. V (1958).

14. Federal Arbitration Act, 9 U.S.C.A. § 10(a)(2) ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . where there was evident partiality or corruption in the arbitrators . . . .").

The Supreme Court in *Commonwealth Coatings* adopted the "evident partiality" standard.[15] Absent clear guidance on how to apply this standard, the Second Circuit adopted its own interpretation of what is meant by evident partiality[16] by criticizing both the appearance of bias and the actual bias standards[17] and

15. *See* Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 151 (1968). Writing for the majority, Justice Black argued that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges . . . ." *Id.* at 149. Justice Black concluded that arbitrators must "disclose to the parties any dealings that might create an impression of possible bias . . . ." *Id.* Arbitrators must not only "be unbiased but also must avoid even the appearance of bias." *Id.* at 150. Justice White in his concurring opinion pointed out that "the Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." *Id.* at 150 (White, J., concurring). He has held arbitrators to a different standard than judges because arbitrators are "men of affairs, not apart from but of the marketplace[.]" *Id.* Justice White added that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." *Id.* He referred to the regular activities of the arbitrators in the arbitration community where parties should not be encouraged to search for the insignificant undisclosed relationships as a pretext to avoid unfavorable decisions. *Id.* at 151. Justice Fortas refuted the presumption of appearance of partiality if the non-disclosure was not premeditated and was disclaimed by the complaining party. *Id.* at 152 (Fortas, J., dissenting). As a result of that decision, different standards have been developed by different Circuits to apply this test including i) "reasonable person standard," Consol. Coal Co. v. Local 1643, United Mine Workers of Am., 48 F.3d 125, 129 (4th Cir. 1995) (internal citations and quotations omitted) ("To demonstrate evident partiality under the FAA, the party seeking vacation has the burden of proving 'that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration.' . . . This reasonable person standard requires a showing of something more than the 'appearance of bias,' but not the 'insurmountable' standard of 'proof of actual bias.'"); ii) "reasonable impression of bias," Woods v. Saturn Distribution Corp., 78 F.3d 424, 427 (9th Cir. 1996) ("A reasonable impression of bias sufficiently establishes evident partiality because the integrity of the process by which arbitrators are chosen is at issue in nondisclosure cases.") and iii) "appearance of bias" Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1200 (11th Cir. 1982) ("it is appropriate to vacate an arbitration award where the neutral arbitrator has the appearance of bias although there is no evidence of corruption, fraud, or partiality.") This difference has extended to other jurisdictions such as Brazil which will be discussed later in this essay. *See infra* Parts III.B & IV.

16. Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 (2d Cir. 1984); *see also,* Collin Koenig, *If We Could, Then So Can You: The Seventh Circuit Resurrects Its Judge Versus Arbitrator Analogy to Reinstate A Repeat Arbitrator Note,* 2012 J. DISP. RESOL. 265, 269 (2012).

17. The Second Circuit defined evident partiality by "requiring a showing of something more than the mere 'appearance of bias' to vacate an arbitration award," yet not necessarily as impossible as "proof of actual bias." *Morelite*, 748 F.3d at 83-84.

adopting a "reasonable person" standard to conclude that an arbitrator is evidently partial to one party.[18]

Accordingly, the Second Circuit appears to adopt an objective standard of a "reasonable person," considering all the circumstances, to vacate an arbitral award.[19] Moreover, a showing of more than a mere overlap between the prior relationship and the underlying dispute is required to disqualify the arbitrator who is alleged to be predisposed to one party.[20] Certain factors also affect the Second Circuit's determination of the evident partiality. Chief among these are 1) the extent of the arbitrator's personal interest in the proceedings, 2) the relationship between the arbitrator and the party, and 3) the proximity in time between the relationship and the arbitration proceeding.[21] Arbitrator's overlap of service is therefore "not unusual . . . it is common for the same arbitrators to end up serving together frequently."[22] Moreover, although the failure to investigate may be an indication of evident partiality, it is not necessarily sufficient for vacating the arbitral award.[23]

As such, under modern procedural formulae, disclosure standards are distinguishable from one jurisdiction to another and even between different courts in the same jurisdiction. This difference may add a measure of unpredictability for the annulment or the enforcement of the arbitral award. The *Abengoa* case is a clear manifestation of this unpredictability.

B. Abengoa Case

Claimant, ASA Bioenergy Holding, a company owned by Abengoa Group, and Respondent, Adriano Ometto, entered into

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18. *Id.* at 83 (citing Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009, 104 S. Ct. 529, 78 L. Ed. 2d 711 (1983)).

19. Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007).

20. *Morelite*, 748 F.2d at 83.

21. *See* Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 74 (2d Cir. 2012) (citing Three S. Del., Inc. v. DataQuick Info. Sys. Inc., 492 F.3d 520, 530 (4th Cir. 2007)).

22. *Id.* at 74.

23. *See Applied Indus. Materials*, 492 F.3d at 138 ("[t]he mere failure to investigate is not, by itself, sufficient to vacate an arbitration award. But, when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality.").

a stock purchase agreement ("2007 SPA"), whereby the latter would sell the former the controlling interest of Grupo Dedini Agro ("GDA") and, consequently, the ownership of sugar and ethanol plants located in São Paulo, Brazil.[24] Soon after the sale, Abengoa commenced two arbitrations before the International Chamber of Commerce ("ICC") against Ometto in New York alleging that the seller had manipulated and omitted information during the negotiations and auditing of the company.[25] The two ICC arbitrations were jointly heard before a three member tribunal.[26]

Shortly after issuing the award, Ometto discovered that the tribunal's Chair, Mr. David Rivkin, failed to disclose three elements that gave rise to doubts as to the Chair's impartiality, namely a) the Chair's law firm had received significant legal fees from Abengoa during the course of arbitration; b) Debevoise & Plimpton LLP ("Debevoise") had represented a company regarding its acquisition of an interest in an Abengoa affiliate and advised DOE as to whether to consent to such investment; and c) Debevoise had represented another company in its acquisition of an Abengoa subsidiary.[27] The Chair admitted that he failed to conduct a proper conflicts check but denied any knowledge of his firm's relationship with Abengoa at the time of the award.[28]

1. Annulment Proceedings in New York

Upon issuing the arbitral award, Ometto filed an annulment action before the US District Court for the Southern District of New York ("SDNY") based on the conflict of interests that was readily discoverable during arbitration regardless of the Chair's knowledge of its existence, because his admission of non-disclosure demonstrated his partiality. [29] On January 7, 2013,

24. *See* Brazil No. 49 of 2017, ASA Bioenergy Holding AG et al. v. Adriano Giannetti Dedini Ometto et al., Superior Tribunal de Justiça, SEC 9.412 – US, 43 Y.B Comm. Arb. 426, 426 (ICC Int'l Ct. Arb.).

25. These two arbitrations were conducted according to the ICC Rules: Case 16.176/JRF/CA, Tribunal ordered Respondents to pay US$13 million, and Case 16.513/JRF/CA, Respondents were ordered to pay US$ 114 million. *Id.* at 427-28.

26. *Id.* at 427.

27. *Id.* at 428.

28. *Id.*

29. *See* Ometto v. ASA Bioenergy Holding A.G., No. 12 CIV 1328 JSR, 2013 WL 174259, at *1-2 (S.D.N.Y. Jan. 9, 2013), *aff'd*, 549 Fed.Appx 41 (2d Cir. 2014).

SDNY denied the annulment petition.[30] Evident partiality is sufficient to vacate an award "when a reasonable person, considering all of the circumstances, would have to conclude that an arbitrator was partial to one side."[31] The Court found that Rivkin was in fact completely unaware of the conflicts alleged by Ometto and his recklessness in conducting the conflict check at first was not tantamount to "evident partiality."[32] The Court thus refused to impute constructive knowledge from the Debevoise partnerships to Rivkin.[33] The Second Circuit, on January 7, 2014, upheld SDNY's decision, concluding that Rivkin's carelessness did not rise to the level of willful blindness because he had no reason to believe that a nontrivial conflict might exist, and thus had no further duty to investigate.[34]

2. Confirmation Proceedings in Brazil

Claimants sought recognition of both arbitral awards before the Brazilian Superior Court of Justice ("STJ"). According to the Brazilian Arbitration Act ("BAA"), the STJ may refuse confirmation of arbitral awards that violate the fundamental principles of Brazilian law.[35] Ometto opposed the confirmation proceedings because, among other issues, the Chair failed to comply with his duty of disclosure for being a senior partner at a law firm that had represented Claimants in other cases and received great sums of money from them, and a proportional part of this money surely ended up in the account of the Chair after distributing the profits.[36] In contrast, Claimants contended that the Chair was unaware of the representation of his partners to any of the companies of Abengoa Group and that his law firm, in the

30. *Id.* at 3-4.

31. *Id.* at 3.

32. *Id.*

33. *Id.* at 3-4.

34. Ometto v. ASA Bioenergy Holding A.G., 549 Fed.Appx 41 (2d Cir. 2014) *cert. denied*, 573 U.S. 947 (2014). It is worth mentioning that the Supreme Court refused to hear the matter, even though the Ninth Circuit applies a different test of evident partiality to annul arbitral awards in similar situations. *See* Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1139 (9th Cir. 2019).

35. Brazil No. 49 of 2017, ASA Bioenergy Holding AG et al. v. Adriano Giannetti Dedini Ometto et al., Superior Tribunal de Justiça, SEC 9.412 – US, 43 Y.B Comm. Arb. 426, 429 (ICC Int'l Ct. Arb.).

36. *Id.* para. 4-5.

said cases, had acted on behalf of adversaries of the group as well as the US Department of Energy.[37]

By a majority of eight to one, the STJ denied the confirmation of the arbitral award due to the arbitrator's failure to disclose circumstances that were reasonably capable of casting doubts over his impartiality and independence,[38] noting that the arbitrator's conduct violated the national public policy.[39] The fact that a governmental body was the law firm's client does not negate the creditor-debtor relationship between Abengoa and Chair's law firm since the party had the obligation to pay Abengoa, not the US Department of Energy.[40] Even if the Chair was unaware of this relationship, it is sufficient to put his independence *objectively* in doubt.[41]

Unlike the majority, Justice Felix Fischer, the rapporteur, found no harm to the Brazilian public order and that the STJ lacked competence to rule over the partiality claim because this issue has already been decided by SDNY.[42] Further, the Chair's impartiality issue was questioned before the tribunal itself by a challenge request after the rendering of the arbitral award, but the request was not granted by the ICC Court of Arbitration because it lacked jurisdiction to amend or supplement the final award.[43] Moreover, the Court found no material evidence refuting Rivkin's sworn assertion that he was unaware of the alleged conflicts.[44]

III. DEFENDING THE SECOND CIRCUIT APPROACH

The issue before the New York and Brazilian courts was whether the attorney's fees retained by a law firm, where the arbitrator is a partner, from a company of the same group of one of the parties before that arbitrator, amounts to a violation of this arbitrator's impartiality. The following table compares both

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 430.
43. *Id.*
44. *Id.*

proceedings in New York and Brazil, including the outcome of each proceeding and the basis for that outcome:

Issue	Brazilian STJ's Approach[45]	Second Circuit Approach[46]
Nature of Proceedings	Recognition of Award	Annulment of Award
Outcome	Deny Recognition	Dismiss Annulment
Basis of Outcome	Sufficiency of Nondisclosure to Impact Chair's Impartiality	Insufficient Evident Partiality
Approach to Arbitration	Pro-Enforcement Policy of Arbitral Awards	Pro-Arbitration Policy with "severely limited" review of arbitral awards
Standard of Disclosure	Arbitrator's failure to disclose *any* circumstances that are *reasonably capable* of casting a doubt over his impartiality and independence	Arbitrator's failure to disclose is sufficient for a reasonable person, considering all the circumstances, to *have* to conclude that an arbitrator *was partial* to one side
Application	- A receipt of Chair's law firm of considerable money by one of the parties during arbitration constitutes an objective ground of Chair's partiality. - Chairman's failure to disclose that circumstances objectively compromises his impartiality under Brazilian law and prevents the confirmation of the respective awards.	**District Court**: - Chair's recklessness in not disclosing is not tantamount to "evident partiality" nor sufficient evidence of "bias." **Second Circuit**: - Chair had no reason to believe that a nontrivial conflict might exist, and thus had no further duty to investigate. - Rivkin's carelessness does not rise to the level of willful blindness.

45. *See generally* Brazil No. 49 of 2017, ASA Bioenergy Holding AG et al. v. Adriano Giannetti Dedini Ometto et al., Superior Tribunal de Justiça, SEC 9.412 – US, 43 Y.B Comm. Arb. 426 (ICC Int'l Ct. Arb.).

46. *See generally* Ometto v. ASA Bioenergy Holding A.G., 549 Fed.Appx 41 (2d Cir. 2014).

Despite the STJ's pro-arbitration policy, its ruling creates significant burdens on arbitrators. In the trade-off between impartiality and efficiency of the process, the STJ weighed the impartiality in its analysis regardless of the linkage between the non-disclosed information's impact upon the arbitral award. The STJ, it seems, applied a subjective standard where a mere appearance of bias was enough to refuse the recognition of the award, unlike the Second Circuit's objective standard where an arbitrator must disclose the information that would cause a reasonable person to conclude that there was bias.

A. Arbitration Process

Arbitrators have the authority to decide the law and merits of the dispute unfettered from any appellate review mechanism. An apparent rather than evident partiality standard would threaten the arbitrators' office with speculative challenges requests based on any undisclosed relationship. An evident partiality standard serves the objectives of arbitration.[47] In the interests of expedition and efficiency, arbitration should be certain in terms of process and outcome. To justify vacating an award, partiality must be based upon direct and definite, rather than remote or uncertain demonstrations or mere speculations of bias. Otherwise, it may deteriorate the purpose for which arbitration was principally created by depriving arbitrators of their discretionary authority to decide the dispute absent real partiality. Some undisclosed relationships may be too trivial to warrant vacating an award.

From an arbitrator's perspective, there is a distinction between an arbitrator's failure to disclose a relationship with one of the parties that could be construed as possible bias and an "actual bias" where an arbitrator is in fact biased. A mere representation of a law firm to corporate affiliates of a party is not, in fact, a real bias even if it may create an appearance of bias. An arbitrator's actual bias affects the legitimacy of the outcome. In an apparent bias test, there would not be any distinction between substantial or unsubstantial undisclosed relationships. In an evident partiality test, there is room for making that distinction

47. Evident means "clear to the understanding; manifest; obvious; conclusive." *Evident*, BLACK'S LAW DICTIONARY (6th ed. 1990).

by vacating the award on only substantial undisclosed relationships. Evident partiality, hence, better serves the efficiency of the arbitral process because even if the circumstances may convey an appearance of partiality, this may not necessarily lead to a conclusion of partiality.

From parties' perspective, parties should have access to all information that may *reasonably* affect the arbitrator's partiality to evaluate the potential bias. The Brazilian approach upends the policy of arbitration. Rather than having an issue of whether a conflict is severe enough to indicate that partiality played a role in the arbitrator's decision, the issue would be whether the parties have had access to the relevant information in aiding their decision to challenge the arbitrator based on partiality. Unlike the Second Circuit approach, the Brazilian approach would increase the judicial interference in arbitration, which goes against the arbitrator's philosophy of lessening the judicial interference in the process.[48] The shift will lead the courts to review the nuances of relationships between arbitrators and parties rather than reviewing the proceedings for evident bias. The Second Circuit approach would decrease the level of judicial interference in the arbitration proceedings, which promotes the autonomous and stand-alone arbitration regime. Courts' review would be limited only to decide, by compelling evidence, the impact, not just the existence, of the prior relationships between arbitrators and the parties.

B. Arbitrator's Financial Interest

Arbitration is a party-made process. Unlike judges, arbitrators normally have financial interests in the dispute: their fees. Due to the consensual and private nature of arbitration, every arbitrator has a financial interest in arbitrating subsequent matters for a party and cultivating repeat customers for their services. That does not lead to favoritism of one party over

48. For instance, the Third Circuit expressed this view and presented some of the limited cases of the judicial interference such as "'where the arbitrator clearly went beyond the scope of the submission', or where 'the authority to make award cannot be found or legitimately assumed from the terms of the arbitration agreement', or if the arbitrator made a determination not required for the resolution of the dispute." Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1126 (3d Cir. 1969) (internal citations omitted).

another because an arbitrator benefits if either party requests her services in the future. The evident partiality approach would promote that legitimate expectation of future financial interests which in turn would encourage arbitrators to perform a better job in attracting more appointments in the future. Given the arbitrators' general and obvious economic interest in repeat businesses, potential partiality is an irredeemable consequence of the structure of private arbitration. This general economic interest should not be the sole basis for an arbitrator's partiality unless this partiality is supported by other evidence, not mere speculation that suggests the arbitrator's bias.[49]

C. Arbitrator's Expertise

Most capable arbitrators are often experts in specialized industries and may have had past dealings or relationships with any of the parties. Arbitrators are routinely appointed in specific disputes in multiple arbitrations, and it would be difficult to reconcile a presumption that concurrent appointments or past relations with one party must always be disclosed. The relatively small community of arbitration would inevitably create prior business relationships between the different players at stake. It follows that arbitrators should not be *per se* disqualified because of a business relationship with a party or a mere omission of disclosing that relationship. Accidental non-disclosure would not lead an objective observer to conclude that there is a real possibility of bias.[50] In application, the apparent partiality may lead to ironic results in particular industry disputes. The issue should not be the existence of these relationships but the extent of their impact upon the arbitrator's impartiality. A balance,

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49. Some arbitrators are displeased with the "tendency to overburden arbitration with excessive punctiliousness about impartiality." Shore, *supra* note 3, at 10. (citing Arthur Marriott, *Conflicts of Interest*, 19 ASA BULL. 246, 248-49 (2001)).

50. The English Court, in *Halliburton v. Chubb,* has adopted a similar approach to the Second Circuit approach where it shifted the bar for disclosure from "[giving] rise to *apparent bias*" to "[giving] rise to a *real possibility of bias*" in *circumstances where a fair-minded and informed observer* "would" or "might" conclude that the situation would *give rise to a real possibility of bias* (an objective test). In applying this test, the Court found that the arbitrator's failure to disclose the overlapping appointments was accidental and that he was highly respected and experienced and hence there was no apparent bias. *See* Halliburton Co. v. Chubb Bermuda Ins. Ltd. [2018] EWCA Civ 817 (appeal taken from Eng.).

therefore, should be struck between the competing goals of expertise and impartiality. The Second Circuit standard of evident partiality strikes that balance between these competing interests by requiring more evidence to prove partiality. This approach juxtaposes with the arbitration practice that is premised on repeat players.[51]

D. Law Firms' Structure

Some economic considerations related to the internal structure of law firms may undermine the Brazilian approach.[52] First, there is no direct connection between having an ownership interest in a law firm and the arbitrator's bias. Second, the involvement of a law firm with one of the parties in previous matters should not *sua sponte* create an impression of bias for an arbitrator who is a partner in that firm. Arbitrators' revenues, even as repeat players, are a small fraction of the total revenues of the law firm. In addition, arbitrators, in many cases, may not have access to the overall profit of the firm to determine the exact contribution of that party to the firm's profit. If an arbitrator owns an equity interest in a law firm that has previously provided services to one of the parties to arbitration, there should not be a *per se* impression of bias that supports *vacatur* of the award.

Furthermore, the Brazilian approach would expand arbitrators' disclosure requirements beyond existing rules to include *any* equity interest in law firms. It would shift the arbitrators' selection calculus by pushing the parties to choose arbitrators who are not affiliated with any law firm regardless of their expertise in the particular industry underlying the dispute. Arbitrator selection is inevitably based on the knowledge and the expertise in a particular field, and excessive disclosure may undercut this benefit. In the meantime, knowledgeable and experienced arbitrators would have been extensively exposed in their areas of expertise, which makes their involvement in prior relationships that may raise concerns about conflicts of interest

51. *See infra* Part IV.5.

52. *See generally* S. S. Samuelson, *The Organizational Structure of Law Firms: Lessons from Management Theory*, 51 OHIO STATE L.J. 645, 646 (1990) (analyzing the structure of law firms and suggesting new structures for rationalizing these firms to survive and flourish in the troubled industry).

and hence their impartiality and independence, more likely. Both interests may appear to conflict.

Arguably, excessive disclosure may support the legitimate concerns of arbitrators' impartiality. However, it can also pose significant threats to the requisite level of arbitrator expertise. Arbitrators may be unable to serve as arbitrators because of their previously increasing involvement in the field. This approach would complicate the arbitrator selection and challenge process, undermine the efficiency and finality goals of arbitration, and incentivize dissatisfied disputants to engage in relentless efforts to disrupt both pending and final arbitrations. It leaves unclear answers to many questions, including the extent of ownership equity that an arbitrator should reveal in the law firm; the scope of disclosing the law firm's overall profit and the period of time required to compare the overall profit to the arbitrator's profit; the nature of the arbitrator's prior services in a law firm and whether this may contradict the confidentiality of disclosure with other attorney-client relationships in the law firm; and what threshold of prior payments to the law firm or arbitrator require disclosure.

E. Arbitrators' Market

Assuming, *arguendo*, that an arbitrator holds an ownership interest in a law firm, the application of the Brazilian approach will likewise relinquish the arbitrator's work as a repeat player unless there is a disclosure of this ownership interest. Moreover, adopting this approach could prompt years of inexorable battles over the extent of disclosure required by arbitrators. The result will be elongated disputes that both parties have already spent tremendous amounts of time and money to resolve. To avoid the inevitable uncertainty that would exist in this situation, parties may prefer, as mentioned above,[53] choosing solo arbitrators who are not affiliated with any law firm, and may be less likely to have expertise, but that are equally likely to retain a business of potential repeat players.

Further, arbitrators have a real interest in providing high quality arbitration services for future appointment

53. *See supra* Part III.D.

considerations. Arbitrators affiliated with firms also have an interest in maintaining the firm's clients and making decisions favorable to parties who frequently engage in arbitrations. This is an inevitable result of the structure of the arbitration industry. Prior existing relationships are therefore inevitable consequences of practicing in the arbitration field. Relying upon the mere existence of undisclosed relationships, rather than their impact on the decision-making, would decrease the appointments of experienced and well-connected arbitrators. The chilling effect of this standard would harm the arbitration community and, as a result, the quality of the decision-making process and the process' outcome.

Accordingly, the Brazilian approach would create an imbalance in the market of arbitrators between experienced and new arbitrators. This approach would require the experienced arbitrators to spend more time investigating the prior activities not only in an arbitrator's personal capacity but also for the firm's activities to identify any circumstances that may give rise to any apparent bias. Unlike experienced arbitrators, new arbitrators would not exert any such effort due to their relatively new practices. The Second Circuit approach generally strikes the balance between the competing interests. First, arbitrators would be able to freely decide the dispute without the chilling effect of apparent potential bias for something they are not aware of, especially in a case that requires their expertise. Second, this approach should preserve global confidence in the impartiality of the arbitration process as well as the policy considerations regarding New York's reputation as a center and preferred *seat* for international arbitration. The Second Circuit approach thus appears to lean toward a far more flexible and less prescriptive approach which opts for higher quality arbitration standards.

The Second Circuit approach also promotes certainty and stability because it provides clear guidance on the disclosure requirement and the basis for failing that obligation, which would avoid significant costs on the parties and frivolous challenging or annulment proceedings.[54] It also enhances the public confidence

54. *See* Transit Casualty Co. v. Trenwick Reinsurance Co., 659 F. Supp 1346 (S.D.N.Y. 1987), *aff'd without opinion*, 841 F.2d 1117 (2d Cir. 1988) (holding that the

in arbitration and maintains its legitimacy by creating the perception that its decision-makers as impartial until it is proved otherwise. This approach also promotes the consistency in the community of international arbitration because the standard of apparent impartiality may be differently interpreted from one jurisdiction to another, whereas evident partiality would leave less room for these differences and should create mutual application of the same standard based on objective criteria. The flexibility of the Second Circuit approach would raise the bar of the partiality standard to best practices among practitioners.

V. CONCLUSION

Arbitrator's impartiality is central to the vitality of international commercial arbitration. However, courts have broad autonomy to fashion the applicable standard to this principle. Arbitrators should enjoy discretion to conduct the disclosure as the case requires, unfettered from the threats of partiality by the disputants. As argued above, the Second Circuit approach is more effective and practical than the Brazilian approach and promotes better policy and legal implications in the arbitration regime. A regime built around the present Second Circuit formula of evident partiality seems both admirably serviceable and efficiently functionable.

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arbitrator's lack of awareness of the fact that the company he owns stock held equity interest in one of the parties to arbitration is not basis for vacating the arbitral award).