Note from the General Editor

This is the second of two issues of the *BCDR International Arbitration Review* (the "*Review*") devoted to conflicts of interest in international arbitration. Both issues are dedicated to the memory of Francisco Orrego Vicuña, whose career and legacy were the focus of the editorial note for the first issue.

The papers published in these two issues are aimed at advancing knowledge of, and stimulating debate on the difficulties arising in, international arbitration due to conflicts of interest, and the procedures available to deal with these conflicts. These procedures include the refusal of an arbitral institution to confirm the appointment of an arbitrator deemed to be conflicted, and the removal of an arbitrator by an arbitral institution or other appointing authority, either on the successful challenge by a party, or on its own motion. In all cases, a decision not to confirm or to remove will be taken only after thorough consideration of the merits of an objection or challenge, based on prevailing standards and recognized guidelines.

The legal analysis offered by the authors on these topics is wide in scope and yet specific and scholarly in its analysis. Some of the articles approach their topic from a broad perspective, others provide narrower institutional or national perspectives. This wide-ranging approach makes this collection of articles a valuable and unique resource on the topic of conflicts of interest in international arbitration.

In the opening article in the first of the issues dedicated to conflicts of interest (issue 1 of volume 6), Bernardo M. Cremades Sanz-Pastor tackles the risks of conflicts arising from the increasingly commonplace practice of third-party funding in international arbitration. He maintains that there should be a mandatory requirement for the disclosure by funded parties of the existence of a funding arrangement, along with the identity of the funder; this, in his view, being critical to safeguarding the requirement of an impartial and independent tribunal. He compares the approach taken in various arbitration rules to third-party funding, and surveys relevant arbitral jurisprudence to illustrate the application of the differing approaches. Through multiple examples, he delineates the nuanced issues surrounding third-party funding, concluding that mandatory disclosure would safeguard the integrity of international arbitration proceedings in the wake of modern third-party funding practices.

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Challenges are not only the main mechanism to remove arbitrators for proven conflicts of interest but are also among the most significant and potentially disruptive events in international arbitration proceedings. The topic of challenges of arbitrators is explored in depth by several authors in the first issue.

In his contribution, Antonio R. Parra examines decisions at the International Centre for Settlement of Investment Disputes ("ICSID") on the disqualification of arbitrators for manifest lack of reliability for independent judgment – a disqualification standard provided in the ICSID Convention. Three main approaches can be discerned from leading ICSID cases in this respect: *Amco v. Indonesia*, *SGS v. Pakistan*, and *Blue Bank v. Venezuela*. The approaches identified in these cases have each highlighted a weakness of the disqualification procedures of the ICSID Convention, albeit in varying degrees, that they may less adequately guarantee arbitral independence than the corresponding procedures of leading international commercial arbitration systems. The contribution considers the scope for addressing the problem through amendment of the ICSID Arbitration Rules.

Andrea Carlevaris argues for the need for the communication and publication of reasoned decisions on arbitrator challenges. Using the evolving practice of the ICC International Court of Arbitration as his platform, he traces the evolution of the court's approach, from never sharing the reasons underlying the court's challenge decisions to currently providing reasons on request, arguing that publication is the next logical step. He outlines key objectives that he believes can only be achieved by the publication of challenge decisions, such as developing a jurisprudence on arbitrators' independence and impartiality, enhancing the predictability of decisions and protecting the validity and enforceability of arbitral awards. He concludes that, in order to achieve these goals, publication should not be limited to mere summaries, but should include a full account of the factual and legal background of the challenge and of the appointing authority's reasoning and conclusions.

To help practitioners decide whether and if so when to challenge an arbitrator, and to better understand how challenge outcomes differ depending on the forum, Doak Bishop, Lauren Friedman, Ed Bruera and Sarah McBrearty provide empirical data comparing the success rates of disqualification challenges in four arbitral fora. By examining decisions from ICSID, the Permanent Court of Arbitration ("PCA"), under the rules of the United Nations Commission on International Trade Law ("UNCITRAL"), and the London Court of International Arbitration ("LCIA"), they demonstrate significant differences among these institutions in the rates of successful challenges, and that challenges in the ICSID context are the least likely to be successful yet most likely to be disruptive.

Annette Magnusson and Christoffer Coello Hedberg provide a survey of the challenge decisions of the Stockholm Chamber of Commerce ("SCC"). The

authors give an overview of SCC practice in challenges to arbitrators from 2010 to 2019 and summarize a selection of decisions rendered by the SCC Board in 2019. They propose some general guidelines for approaching perceived or actual conflicts of interest, noting, for example, that the time frames set out in the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") serve as a reference but are not necessarily decisive, and that a relationship between a party and one of the partners of the law firm representing that party will often, though not always, also be ascribed to the other partners in that firm.

Jacomijn van Haersolte-van Hof, Francis Greenway and Anna Cho provide a review of the LCIA approach to challenges to arbitrators. They find that successful challenges were made in only 0.3 per cent of LCIA cases during 1996-2017, and that challenges based on procedural objections were more prevalent than challenges based on deliberate violations of the arbitration agreement or allegations based on the arbitrator's conduct.

For a treatment of the topic of conflicts of interest from a national perspective, David Arias and Sofia Jalles explore the provisions on conflicts of interest in the Code of Best Practices in Arbitration published in 2019 by the Spanish Arbitration Club. They analyze how the main provisions on conflicts of interest of the Code diverge from or mirror existing standards and guidelines. Specifically, they compare the provisions on impartiality, independence, and disclosure under the Code with those of the BCDR rules, the ICC rules and its Notes to the Parties, the LCIA rules, the IBA Guidelines, and the American Arbitration Association ("AAA") code of ethics. They conclude that while the recommendations of the Code of Best Practices constitute soft law, their dissemination will enrich the discussion on best practices regarding conflicts of interest.

Three articles in the first issue argue the need for uniform definitions in conflicts of interest.

Stefano Azzali introduces "the fallacy of definition" in the context of conflicts of interest. He argues that neutrality, independence and impartiality are principles that are too important to be subject to the alternative definitions proposed by individual professionals; definitions that are sometimes strict, sometimes loose, depending on the role the practitioner plays either as counsel or arbitrator. He argues also that the fluid borders between the terms neutrality, impartiality and independence result in their meaning and interpretation being in a state of constant evolution, depending on the country and even the region where they are applied. He highlights how the lack of coherence in the individual application and interpretation of these terms helps neither the practice of arbitration nor the reputation of the individuals involved in arbitrator challenges.

Francisco González de Cossío argues that the lack of objectivity in defining the term "issue conflicts" may result in an overly and unnecessarily prohibitive approach to this topic. He argues that what makes issue conflicts fundamentally objectionable to most is a real concern for impartiality. In support of this thesis, he addresses two areas where issue conflicts most typically arise, namely academic writing and "double hatting" (the practitioner acting both as an arbitrator and as counsel in investment disputes). He posits, however, that these objections are often hypocritical as many parties in the investment arbitration field actively select arbitrators precisely because they believe them to be biased in their favor.

In the third article on the need for uniform definition of conflicts-of-interest terms, Lord Goldsmith, Natalie Reid and Maxim Osadchiy query the significance of the range of definitions for terms such as "arbitrator bias," in light of the need for exact phrasing and consistent application and whether the lack of precision and consistency in their application constitutes a threat to international arbitration. They examine key aspects of the legal framework governing arbitrator challenge applications in four leading arbitral jurisdictions: the United States, England and Wales, France and Singapore. They conclude that, even though the lack of uniformity in national standards regarding arbitrator bias in the jurisdictions surveyed is perhaps less acute than is commonly perceived, there would be benefit in greater uniformity. Through a survey of arbitrator bias standards in those jurisdictions, they find that there is a universal requirement for arbitrators to disclose facts and circumstances which may affect their independence and impartiality, but that there are enough differences in the approaches of national courts to create potentially significant ramifications for the conduct of arbitrators and the enforcement of arbitral awards.

The interaction between conflicts of interest and corruption is addressed by L. Yves Fortier and Laurence Marquis. They examine how conflicts of interest can overlap with corruption, and chart the development of the international anti-corruption campaign illustrated by the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the 2003 United Nations Convention against Corruption, and the "Toolkit for Arbitrators" published by the Competence Centre for Arbitration and Crime, in collaboration with the University of Basel and the Basel Institute on Governance. They also address challenges facing arbitrators in this context, including the applicable standard of proof for corruption, discuss to what extent there must be a causal link between the bribe and the contract which is the object of the claim, and examine the extent to which arbitrators have an obligation to investigate *sua sponte* the existence of corruption, even when corruption is not alleged by one of the parties.

In this companion publication, issue 2 of volume 7 on conflicts of interest, Crina Baltag uses the decision of the Chair of the ICSID Administrative Council in the Respondent's Proposal to Disqualify Prof. Guido Santiago Tawil, in *VM Solar Jerez GmbH and others v. Kingdom of Spain*, as a springboard to further examine the dual issues of multiple appointments and previously stated opinions, particularly in dissenting opinions. She concludes that the right of the parties to select arbitrators is one of the most valuable characteristics of international arbitration, and that cognitive misperception alone should not trump this right, but that this should be balanced against the resulting lack of diversity that stems from repeat appointments.

The question of the suitability of systematic appointments of given individuals by investors or respondent state parties in investment arbitration is tackled by John Beechey and Niccolò Landi. They examine the significance of quantitative systematic appointments in disqualification decisions and conclude that, in and of itself, this is not sufficient reason for disqualification. The issue of intellectual loyalty as a reason for repeat appointments is also considered, and the authors acknowledge that while there might be empirical evidence showing that dissenting opinions are more often produced by arbitrators appointed by the losing party in the arbitration, systematic or repeat appointments alone are unlikely to be decisive in the determination of a proposal for disqualification. The authors further look at whether certain institutional factors influence repeat appointments arguing that the right to select arbitrators plays a key role in elevating a group of select individuals over the rest, and that the internationalized nature of investment arbitration encourages parties repeatedly to select individuals with certain traits, both factors resulting in repeat appointments. They close by expressing the view that repeat appointments can instill confidence in the arbitral process.

The restrictions on multiple arbitral appointments under English law are elucidated by Christopher Hancock and Daniel Bovensiepen. They consider appointments in multiple arbitrations with a common party and the same or overlapping subject matters, as well as multiple appointments by the same party or law firm. Their discussion is based on the provisions of section 24 of the 1996 English Arbitration Act and the recent decision of the UK Supreme Court in *Halliburton Co v. Chubb Bermuda Insurance Ltd*. The authors conclude that section 24 of the 1996 Arbitration Act is arguably not fully fit for the purpose of addressing the issues associated with multiple arbitral appointments. Further, they find that *Halliburton* was highly specific to its own facts, thus unlikely to provide much guidance as to the right result in other cases. It seems that much room is still left for future development of English law in this area.

An institution-specific examination of the effects of disclosure in challenges against arbitrators under the 2011 Arbitration Rules of the Cairo Regional Centre

for International Commercial Arbitration (CRCICA) is offered by Ismail Selim and Malak Lotfi. They base their treatise on four case studies dealing with the two ends of the disclosure spectrum, namely, detailed disclosure at one end and complete lack of disclosure at the other. They conclude that fulfilling the disclosure obligation has considerable weight but is not in itself sufficient to prevent an arbitrator's recusal, while a failure to disclose cannot always be interpreted, under the CRCICA Arbitration Rules 2011, as signifying an arbitrator's partiality or dependence.

Adrian Winstanley addresses the question of who is best placed to determine challenges of arbitrators. He considers that there ought to be universal and uniform standards by which conflicts of interest in arbitration are judged, as well as impartial authorities that may judge whether those standards have been met. Citing the differing positions of arbitration institutions on whether they ought to participate in the regulation of the ethical conduct of arbitrators and counsel, including in the imposition of sanctions for breach of duties, he observes that none among the ICC, the PCA or the Asian International Arbitration Centre has published stand-alone codes of ethics for either counsel or arbitrators. He cites a similar inconsistency of approach across jurisdictions as to what test should be applied in determining the challenge of an arbitrator, with some favoring a subjective test, but most favoring an objective test of a reasonable and informed third person concluding there is a real possibility or likelihood of bias. He asserts that while courts define the tests applied in determining if established standards of independence and impartiality are breached, it is for the appointing authorities and the institutions to apply those tests. He believes that published decisions on the challenges of arbitrators can serve as an invaluable guidance in this regard.

Alexis Mourre explores the legal significance of the requirement for confirmation of appointment by the arbitral institution of a party's nominee as arbitrator. Acknowledging that many institutional rules do not establish with clarity the exact meaning of the terms "nomination" and "confirmation," or provide an explanation as to the different nature of an appointment and a confirmation, or as to the difference between an institutional assessment of an objection to confirmation and of a challenge, he asks what level of discretion the institution enjoys in deciding whether to reject a party's nomination. He opines that areas that warrant institutional intervention in the selection of the arbitrator include circumstances on the Red List of the IBA Guidelines, failure to disclose facts known to the institution, the awareness of serious breaches of the arbitrators' ethical or professional duties in other cases, which are unknown to the parties, and questions of arbitrator availability. He concludes that institutions enjoy, at the stage of confirmation, more discretion in rejecting an arbitrator than when considering a challenge once the tribunal is in place.

David Brynmor Thomas and Ruth Keating consider three approaches to counsel's conflicts of interest: rigid regulation, a more middle of the road approach, or doing nothing beyond relying on the *status quo*. Rejecting the first option, the authors regard the second and third as potentially workable. They point to the positive aspects of taking a middle of the road approach to regulating counsel's conflicts of interest and specifically mention the IBA Guidelines as a good example of the role such guidelines can play. They also emphasize the "overreaching principles" and "meaningful shared values" that continue to be developed by tribunals under the *status quo*. The authors conclude that the ability to choose one's counsel is of central importance and must be maintained, but with that right, the parties and their counsel have a corresponding responsibility to provide early and continuing transparency.

The extent to which guidelines as to what constitute conflicts of interest are helpful is addressed by Eduardo Zuleta and María Marulanda. They examine two main reasons for adopting such guidelines, namely the need for uniform treatment of conflicts-of-interest issues and the need for certainty and predictability in standards for independence and impartiality, submitting that the IBA Guidelines, which are the focus of their paper, were an attempt precisely to address these issues. The authors analyze some of the main criticisms of the IBA Guidelines, while also spelling out their use and usefulness. They conclude that guidelines help develop a uniform culture of disclosures, promote transparency, level the playing field, and potentially reduce the frequency of unfounded challenges, cautioning, however, that a proliferation of guidelines may hinder the continued development of uniform standards and practices in terms of disclosures and challenges.

Ethical concerns in investor-state dispute settlement ("ISDS") are addressed by Colin M. Brown and Niki Koumadoraki. They posit six factors that demonstrate the differences in the adjudicatory function in ISDS, as compared to commercial arbitration, and that call for heightened requirements for independence and impartiality. They further identify four key problematic ethical considerations in ISDS, namely a party's choice of adjudicator, repeat appointments, double hatting, and conflicts of interest, which they conclude can only be properly addressed by the introduction of a permanent body with full-time adjudicators.

Alejandro A. Escobar discusses conflicts of interest based on close personal friendship and enmity within the context of the IBA Guidelines. While acknowledging that the IBA Guidelines have a general criterion for disqualification based on a reasonable-objective-doubts standard, he emphasizes that cultural background plays an important role in the application of this general rule. He provides examples of varying interpretations of friendship and enmity in different contexts and concludes that even in the case of close personal friendship

or enmity, arbitration institutions should be cognizant of possible cultural factors in evaluating any potential objection or challenge situation.

The balance between a party's fundamental right to appoint a co-arbitrator and the impartiality required of that arbitrator is discussed by Eduardo Silva Romero. He frames his discussion within the concept of the "pro-active" arbitrator, whom he defines as a person who repeatedly tries to influence the decision-making process of other members of the tribunal, raising doubts as to the purity of this arbitrator's motives. The behavior of such arbitrators can have an obvious negative aspect clearly aimed at helping the party who appointed her or him, and can raise problems from an impartiality perspective. He proposes two potential solutions to these issues, namely doing away with party appointments, which he admits is untenable, and the more pragmatic approach of adopting guidelines on the behavior of co-arbitrators for which he proposes some specific practices.

Arbitrators have a duty to disclose potential conflicts of interest and must inform the parties of any circumstances that emerge during the proceedings that could give rise to justifiable doubts about their impartiality or independence. This obligation is ongoing for the entire duration of the arbitration. Notwithstanding this overriding principle, the devil is in the detail, as arbitrators and party representatives struggle with issues such as the scope of their disclosure obligations and the parameters that separate valid challenges from unfounded challenges that can hamper the arbitration proceedings. Further, there is a heightened need for uniformity in the applicable standards for determining what constitute conflicts of interest and, by extension, for sufficient disclosure. The goal of the *Review* is that the scholarly work in the two issues may serve as a catalyst for more clarity and uniformity in the standards applied to conflicts of interest in international arbitration, and that they will assist practitioners, institutions and other interested parties in dealing with these important questions.

Nassib G. Ziadé