

Kluwer Arbitration Blog

Challenging Arbitrators in Brazil: a Practical Guideline from the CEPArb-USP Digest

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The Center for Studies and Research in Arbitration from the University of São Paulo (“CEPArb-USP”) has recently made public the findings of its pioneer empirical research on challenges of arbitrators in domestic proceedings in Brazil. The initiative analyzed data from challenges in proceedings administered by the Câmara de Mediação e Arbitragem Empresarial - Brasil ([CAMARB](#)).

The outcome of the working group is documented in the *Digest of challenge proceedings in arbitration before the Câmara de Mediação e Arbitragem Empresarial - Brasil (CAMARB)* - Portuguese version available [here](#). The *Digest* encompasses a chronological analysis of ten institutional arbitrator challenge decisions rendered between 2008 and 2021. A uniform methodology was applied in the analysis of all ten cases: only the final decision was analyzed, in an objective way, meaning that the *Digest* does not contain the team’s opinions on the related matters. Confidentiality was preserved and no information on the parties or arbitrators involved were disclosed throughout the analytical process.

The initiative is unique in Brazil. As clarified by the advisors of the team of researchers in the forewords of the *Digest*, it is of foremost importance for the Brazilian arbitral community to know the standards applicable to arbitrator challenges. This community englobes not only arbitration practitioners, but also state courts, which may eventually deal with the issue in set aside proceedings. Foreign parties unfamiliar with Brazilian arbitration rules and law also benefit from the *Digest*. As a matter of fact, there is a worldwide concern on transparency regarding the outcomes of challenges related decisions. In this context, it is worth recalling previous efforts from the [LCIA challenge digest](#), discussed [here](#) and [here](#).

To provide the international arbitral community with a general view of the *Digest*, below is a sneak peek of the factual grounds for challenge in each of the ten cases. The report contains raw data that may be subject to different kind of analysis.

- Case 1 (2008): Chairman appointed by co-arbitrators was challenged based on previous academic relationship with one of the party’s counsel. The challenging party invoked the existence of an intimate friendship between them grounded on

such previous relationship. The challenge was rejected.

- Case 2 (2011): All arbitrators were challenged on the grounds of an alleged prejudgment of the case and lack of impartiality after issuing a procedural order rejecting a party's request for leave to produce certain evidence. Furthermore, one co-arbitrator was challenged based on previous work as supervisor for one of the party's counsel in an academic endeavor. The challenge was rejected.
- Case 3 (2015): All members of the tribunal were challenged by both parties after rendering a partial award which allegedly violated due process and the Brazilian law applicable to the dispute. The Board of CAMARB rejected the challenge as it considered that the violation of due process allegation is a valid ground for setting aside the award, but not for challenging an arbitrator.
- Case 4 (2014): Party-appointed arbitrator was challenged based on the existence of a professional relationship with counsel for the appointing party as well as the fact that a relative of said arbitrator had been a partner of the counsel in a law firm many years before the challenge was made. The challenge was rejected.
- Case 5 (2014): Party-appointed arbitrator was challenged by the same party who appointed them after disclosing that their law firm represented a company from the same corporate group of that party. The challenge was rejected.
- Case 6 (2015): Chairman appointed by the co-arbitrators was challenged after disclosing he had previously acted as an arbitrator in a panel presided by one of the parties' counsel. In that case, the presiding arbitrator was chosen by CAMARB. The challenge was rejected.
- Case 7 (2016): Sole arbitrator was challenged after disclosing that his former law firm, but not him personally, had acted for one of the parties to the arbitration. The challenge was rejected.
- Case 8 (2017): Party-appointed arbitrator was challenged on the grounds of an alleged commercial relationship with the law firm representing one of the parties and due to alleged lack of experience in the related matter. The challenge was accepted based on the first issue. The appointed arbitrator had constantly acted as representative in judicial hearings on behalf of the party's law firm. The decision considered that the relationship with the party's law firm gave grounds to justifiable doubts regarding the arbitrator's independence and impartiality. The reasoning expressly referred to the [IBA Guidelines on Conflict of Interests](#).
- Case 9 (2020): Party-appointed arbitrator was challenged based on their previous employment, in a company that was not a party to the arbitral proceedings. The challenging party alleged that, due to arbitrator's previous experience, they would be predisposed to accept the arguments of the opposing party on a subsidiary claim which involved interests of this third party. Said employment relationship ended more than 3 years before the appointment, but the same company was, at the time of the challenge, a client of the arbitrator's current law firm. The challenge was accepted, as it was considered that the current relationship between the company and the arbitrator's law firm could jeopardize the trust required between the parties and the arbitrator. As for the former employment relationship, the reasoning expressly referred to the possible application by analogy of the three-year period provided for in the IBA Guidelines on Conflict of Interests to discard it as a circumstance from the Orange List.
- Case 10 (2021): Party-appointed arbitrator was challenged based on an alleged intimate friendship with one of the party's counsel, their participation in academic

events with some of the counsel for the appointing party, a professional relationship with counsel and also previous professional contacts with the party itself. The challenge was accepted. The reasoning was based on that none of these facts alone would suffice to challenge an arbitrator, but their combination led to justifiable doubts as to the arbitrator's impartiality. Again, the reasoning expressly referred to the IBA Guidelines on Conflict of Interests.

The data indicates that the standard to accept a challenge is very high and suggests two major initial findings.

The first one refers to the fact that all three cases in which a challenge was accepted expressly referred to the IBA Guidelines on Conflict of Interests. That is particularly relevant because, as pointed out in the Digest's foreword, those Guidelines were not construed bearing in mind the Brazilian domestic arbitration reality but more experienced and consolidated communities such as the US and Europe. Despite that, *praxis* shows that, in the absence of any other standard, this *soft law* instrument is commonly invoked and relied upon to rule on arbitrators' challenges.

The second one is that, in these three cases, the ground for granting the challenge was the existence of a business or professional relationship between the arbitrator (or his law firm) with the counsel for one of the parties (or their law firm). A relation-based allegation was also the most frequent ground for filing a challenge.

Conclusion

Noting that different approaches analyzing the data are possible, we can only hope this *Digest* to be a starting point towards a much-appreciated consolidation of the guidelines applicable to domestic proceedings in Brazil, promoting foreseeability and transparency and, therefore, legal certainty to all its players.

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The image displays the 'Explore Practice Plus' interface. At the top, there is a navigation bar with a checkmark icon and the text 'Explore Practice Plus'. Below this, a profile for 'Gary R. Egan' is shown, including a profile picture, name, and a 'View Profile' button. The main content area features several data visualizations: a 'Relationship Indicator' section with a 'By Relationship' filter, a '7 Results Found (Based on cases within Kluwer)' section listing names like Gary R. Egan, and three circular charts representing different data sets. The bottom of the image shows the 'Kluwer Arbitration' logo on the left and the 'Wolters Kluwer' logo on the right.

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