Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What Panama Canal Award Ruling Means For Int'l Arbitration

By **Jerry Roth** (October 19, 2023, 6:01 PM EDT)


Jerry Roth

The Aug. 18 Grupo Unidos por el Canal SA v. Autoridad del Canal de Panamá decision by the U.S. Court of Appeals for the Eleventh Circuit is an important decision for international arbitrators and practitioners in several respects, including some unusual procedural twists and a surprising substantive conclusion that should not go unnoticed.

The ruling was issued in the context of a complex case involving an extensive construction project on the Panama Canal by Grupo Unidos, a European-Panamanian consortium. The appellate court affirmed the decision of the U.S. District Court for the Southern District of Florida, which refused to vacate an International Chamber of Commerce, or ICC, arbitral award against Grupo Unidos under Chapter 1 of the Federal Arbitration Act, and instead confirmed it under Article V of the New York Convention.

The decision rejected claims by Grupo Unidos that the arbitrators who awarded a net judgment of $238 million to the Panama Canal Authority had debilitating conflicts of interest despite their professional familiarity and unrelated arbitral assignments with one another and with the parties' counsel.

The court relied in part on the conclusion of the International Court of Arbitration of the ICC that, while some of the challenged arbitrator relationships should have been disclosed to the parties beforehand, none of them provided a basis to invalidate the award given the absence of potential or actual bias.

In rejecting the conflict challenge, the appellate decision reflected several procedural oddities, at the arbitral, district court and appeals court stages.

First, the court noted that, in the face of the tribunal's issuance of a partial award against it amounting to nearly $250 million, Grupo Unidos made a series of demands for additional information from the arbitrators about possible conflicts.

It first asked for any information that could give rise to reasonable doubts about their impartiality. It also specifically asked for descriptions of the relationships among the arbitrators in the arbitration and other related arbitration matters, as well as with party counsel in related or unrelated arbitrations. The arbitrators responded in a written decision by noting that these requests went beyond their original disclosure obligations, but they purported to comply in any event with the request and made additional disclosures.

Grupo Unidos was still not satisfied, however. It demanded still more information about the relationship

between the firm of one of the arbitrators and the parties in unrelated matters, and about the process that led to appointment of two of the arbitrators' in other arbitrations. The arbitrators again complied, providing additional information regarding their contacts and relationships.

Regardless of the merits of the challenge, it is worth noting both that the losing party in a massive, multiyear arbitration believed it was entitled to demand additional disclosures from the arbitrators post-award — information that it did apparently not request at the outset and that the arbitrators did not believe was required to be disclosed — and that the arbitrators actually complied with the serial demands rather than rejecting them out of hand.

Whether the tribunal members felt they were somehow required to comply, or did so merely as an accommodation to the losing party — to insulate the award they had issued from inevitable court challenges, to protect their own professional reputations or out of concern that their original disclosures may have been inadequate — is impossible to know.

But given that the bold move by Grupo Unidos and the unusual process that followed it did in fact turn up additional information that formed the basis for a court challenge, even if ultimately unsuccessful, one may expect to see more efforts by the losing party in international arbitrations to demand additional post-award disclosures.

In fact, a party could strategically decide not to raise legitimate concerns until after an award is issued, and only demand additional disclosures if it is unhappy with the award.

Second, Grupo Unidos filed a challenge to the partial award before the International Court of Arbitration, seeking disqualification of all three arbitrators based on the new information that was disclosed. While that challenge was still being briefed and decided, Grupo Unidos simultaneously filed a complaint for vacatur of the partial award in the Florida District Court, the jurisdiction in which the arbitration was seated.

Once the International Court of Arbitration rejected the conflict challenge, and the arbitrators issued a final award, Grupo Unidos filed another, separate action in Florida to vacate that award as well. The district court consolidated both cases and rejected the challenge. This series of actions raises interesting questions for practitioners about what remedies to seek and, as importantly, where to raise them to challenge arbitrators' impartiality or a purported failure of disclosure.

For at least some period, Grupo Unidos had effectively identical challenges pending before both the ICC court and the Florida district court. A decision for disqualification by the ICC could have mooted the Florida case; or, as actually happened, a decision against disqualification would not be binding on a federal court — although it would have some persuasive effect, as turned out to be the case.

Confronted with that set of possible outcomes, Grupo Unidos' tactic may have been a wise one in turning to a federal court vacatur action before the ICC court had issued a decision on the conflict issue.

Third, the parties and the district court assumed, based on binding Eleventh Circuit precedent, that the proper basis for vacatur was an action under the New York Convention. But as the appeal was pending, the appellate court sitting en banc in an unrelated case decided that, in an international arbitration seated in the U.S. or governed by U.S. arbitration law, vacatur of an award is governed instead by Chapter 1 of the FAA.[1]

This ruling brought the Eleventh Circuit in line with several other appellate courts, but it left the Grupo Unidos appeals court in a difficult position. The parties had understandably briefed the case and the district court had decided it under what now turned out to be the wrong statute.

The court found that, given the new en banc decision, and because the arbitration was seated in the U.S. between non-U.S. parties, the FAA in fact governed. It then found that while the parties' arguments were framed as arising out of the New York Convention, they were "really grounded" in the FAA; that they could be considered as FAA arguments and that the corresponding arguments for and against confirmation of the award remained governed by the convention.

With this apparent reconfiguration of the parties' arguments and the decision below, the court proceeded to analyze the issue under the FAA.

On the merits, the court expressly reaffirmed the extremely limited role U.S. courts play in reviewing international arbitral awards. It also rejected both the argument that professional relationships were sufficient indications of potential bias and unsupported speculation that the chance to obtain potentially lucrative appointments from fellow tribunal members or parties might affect an arbitrator's impartiality.

The ruling, which acknowledged the ICC court found that two of the relationships should have been disclosed, underscores for arbitrators the importance of proper pre-arbitration disclosures. But it also reinforces the different and higher standard for vacatur or nonconfirmation based on undisclosed relationships.

In short, like the ICC court, the court case adopted a kind of no harm, no foul attitude toward nondisclosure: Not every nondisclosure will provide a basis for vacatur.

Not to be overlooked in the substantive part of the decision, however, were these three key sentences:

> It is little wonder, and of little concern, that elite members of the small international arbitration community cross paths in their work. As one of the canal authority's expert witnesses testified, "worldwide, there are only several dozen arbitrators who would be attractive candidates" for "a proceeding such as the Panama 1 Arbitration." We refuse to grant vacatur simply because these people worked together elsewhere.

The comment, based on an unqualified acceptance of an expert witness's testimony, is significant for stating out loud what are often tacit assumptions: that the international arbitration community is in fact small, that an even smaller subset of its members is considered to be elite, and that the subject matter of a particularly complex case will often mean the number of attractive candidates is exceedingly limited. Some commentators have long criticized what they perceive to be the club-like nature of the international arbitration community.

But the court noted these points as simple facts that did not give rise to surprise or concern, even as it relied on them in part to dismiss claims of potential bias.

As the prevalence of international arbitration continues to grow, the decision highlights an important question. Should there be increased efforts to grow the community of international arbitrators, and ensure parties have access to a broad and diverse pool of candidates who are both of sufficient quality to be considered elite and of sufficient expertise to handle specialized and complicated matters?

Such efforts to identify qualified candidates could provide wider high-quality choices to litigants, help

avoid claims of cozy relationships indicating potential bias and serve to reinforce public trust in arbitration more generally. In short, while the Grupo Unidos court may have correctly captured the current state of affairs, its observation might well be taken as a call to further action.

Jerry Roth is an international arbitrator and mediator at FedArb.

[1] Corporación AIC, SA v. Hidroelectrica Santa Rita S.A., 2023 WL 2922297 (11th Cir. 2023).