Your Excellency Minister **Alexandre de Moraes**,

MD. Reporter of the Action of Noncompliance of Fundamental Precept 1050.

Chartered Institute of Arbitrators - Ciarb ("**Ciarb Global**"), a foreign legal entity incorporated by Royal Charter of Elizabeth II of the United Kingdom of Great Britain and Northern Ireland, and **Associação Brasileira de Integrantes do Chartered Institute of Arbitrators - Ciarb** ("**Ciarb Brasil**"), a private law legal entity enrolled with CNPJ no. 35.558.195/0001-74, with head offices in São Paulo, SP, at Avenida Paulista, n.2001, 18th floor, cj. 1807, Bela Vista - CEP 01311-300 (jointly, "**Ciarb**"), by their lawyers (**docs. 1 and 2**), respectfully appear before you, pursuant to art. 7, § 2, of Law 9.868/1999 and art. 138 of the CPC, jointly request their admission in this lawsuit as *amicus curiae,* for the reasons set forth below.

1 Summary of the lawsuit

1. This lawsuit was filed by the political party União Brasil with the purpose of obtaining an alleged constitutional interpretation of article 14 of Law 9.307/1996, especially regarding the provision of its paragraph 1, which imposes on the arbitrator the duty "to disclose, prior to accepting the position, any fact that gives rise to justifiable doubt as to their impartiality and independence" - the duty of disclosure.

2. The Plaintiff alleges a supposed conflict of precedents that would require a decision from the Federal Supreme Court as to (1) the extent of the duty to disclose, (2) the effects of any breach of the duty to disclose, (3) the exhaustivity of the CPC rules on impediment and suspicion of judges to resolve issues related to impartiality and independence of arbitrators, (4) the use of the *International Bar Association*'s guidelines on conflicts of interest to resolve issues related to the duty to disclose, (5) the proper time to challenge the arbitrator's independence and impartiality.

3. In addition to the lawsuit being inadmissible, the Plaintiff's claim is impertinent and out of line with internationally accepted practices.

2 Ciarb's Representativeness

4. Ciarb is a global organization of lawyers, arbitrators, professors, experts and other professionals involved in the development of arbitration. It has standing to intervene as *amicus curiae in* this lawsuit, pursuant to art. 138 of the CPC.

5. Ciarb Global, founded in 1915 and incorporated in 1979 by Royal Charter of Queen Elizabeth II, is a non-profit institution based in London. It has over 17,000 members in 149 countries and operates through an international network of 42 subsidiaries, branches or national entities, including Ciarb Brazil - which was formed in 2019 and has over 100 professional members in thirteen states of the federation.

6. Ciarb Global's bye-laws (**doc. 1**) provide that its purpose is to "*promote and facilitate throughout the world the resolution of disputes through arbitration*" (item 4.1.), while Ciarb Brazil's bye-laws (**doc. 2**) states that it will conduct "*educational and other related activities, of cultural, scientific, on issues related directly or indirectly to the subject of arbitration*" (art. 3).

7. Ciarb is committed to ensuring that the arbitration legal regime in Brazil promotes a fair, efficient and effective resolution of domestic and international disputes. Its members frequently act as arbitrators and counsel in arbitrations and, over the 108 years since Ciarb's founding, they have acquired expertise in the mechanics of this system and

its ethical issues. As a result, Ciarb has issued codes of ethics and professional conduct,[1] as well as international guidelines on various aspects of the role of arbitrators and the conduction of arbitral proceedings.[2] It regularly holds courses and events focused on the issues of conflicts of interest, duty of disclosure and professional ethics in arbitration.[3]

8. Ciarb's international experience has led the organization to intervene as amicus curiae in matters before several other Constitutional Courts and High Courts. For example:

- Before the **Supreme Court of the United Kingdom,** in *Halliburton Company v. Chubb Bermuda Insurance Ltd [2020] UKSC 48*, dealing with the nature and extent of the duty of disclosure of arbitrators - a matter similar to that discussed in the present case.
- Before the **United States Supreme Court**, in *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC - 140 S. Ct. 1637 (2020)*, dealing with the subjective limits of the arbitration agreement.
- Before the **Supreme Court of Canada**, in the case of *David Heller v. Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Raiser Operations, B.V.*, dealing with the jurisdiction of Arbitral Tribunals.
- Before the **High Court of Australia**, in *Case S219/2010*, on the hypothesis of judicial review of the arbitration award.

9. In all these cases, the grounds presented by Ciarb were adopted in whole or in part, which favored the international harmonization of arbitration rules.

3 Inadmissibility of the lawsuit

10. As demonstrated by CBAr (eve. 29), the Federal Senate (eve. 48), AASP (eve. 51), IBDP (eve. 57), AGU (eve. 59) and AMCHAM (eve. 62), the present lawsuit is inadmissible - either as ADPF or ADI.

3.1 Inadmissibility of the lawsuit as ADPF

11. The ADPF was admitted as ADI for failure to comply with the requirement of subsidiarity, provided in art. 4, § 1, of Law 9.882/1999 (eve. 12). However, the lawsuit should not be admitted as ADPF either for other reasons.

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[1] Available at https://www.ciarb.org/media/4231/ciarb-code-of-professional-and-ethical-conduct-for-members.pdf.
[2] Available at https://www.ciarb.org/resources/guidelines-ethics/international-arbitration?page=1.
[3] Information is available at https://www.ciarb.org/training/ and https://ciarb-brazil.org/.

12. There was no proof that art. 14 of Law 9.307/1996 would violate a fundamental precept (arts. 1 and 3, III, of Law 9.822/1999) - even because there is no violation, as detailed by the Federal Senate (eve. 48, pages 13/15), by AASP (eve. 51, pages 6/9) and by IBDP (eve. 57, page 5).

13. Moreover, the judgments attached to the Plaintiff's application do not demonstrate the existence of controversy over the application of the fundamental precepts allegedly violated (art. 3, V, of Law 9822/1999), as detailed by AASP (eve. 51, pages 6/9) and AGU (eve. 59, page 8)

3.2 Inadmissibility of the lawsuit as ADI

14. The lawsuit is also inadmissible as ADI.

15. The constitutionality of article 14 of Law 9.307/1996 is not even being questioned. What is intended is a (unnecessary) standardization of its interpretation, in light of articles 144 to 148 of CPC - which provide for impediment and suspicion. The application is manifestly unfounded (art. 4 of Law 9.868/1999), as detailed by the Federal Senate (eve. 48, pages 13/15), by AASP (eve. 51, pages 9/10) and by IBDP (eve. 57, pages 4/5).

16. At most, the alleged indirect violation of the Constitution is discussed, which is inadmissible in ADI, as detailed by AASP (eve. 51, pages 10/11), AGU (eve. 59, pages 7/11), IBDP (eve. 57, pages 4/5) and CBAr (eve. 29, pages 7/11).

17. Furthermore, no request for interpretation in conformity with the FC can be made without demonstrating unconstitutionality, as detailed by the Federal Senate (eve. 48, pages 15/21). If it were, any device could be object of ADI, regardless of whether or not it is in conformity with the Constitution. In this case, the concentrated control of constitutionality would lose its meaning.

18. What is intended is an (impertinent) regulation of art. 14 of Law 9.307/1996 by the E. STF, which would imply an invasion of legislative competence and violation of the principle of separation of powers (art. 2 of the CF), as detailed by AGU (eve. 59, pages 11/12), by the Federal Senate (eve. 48, pages 15/21) and by AMCHAM (eve. 62, pages 8/10).

19. Finally, the Plaintiff's application was not accompanied by a copy of Law 9.307/1996 (art. 3, sole paragraph, of Law 9.868/1999), as detailed by AASP (eve. 51, page 10).

4 The adoption of internationally accepted practices in Brazilian arbitration

20. Brazil does not distinguish international arbitration from domestic arbitration - that is, Brazilian law is monist. Law 9.307/1996 applies both to purely domestic arbitration proceedings and to arbitration proceedings with elements of internationality.[4] And several internationally accepted standards have been incorporated into the Brazilian law.

4.1 International arbitration rules and standards expressly adopted by the Brazilian legislator

21. Law 9.307/1996 was designed based on international standards.[5] The text of the Brazilian law is mainly inspired by (1) the Model Law of the United Nations Commission on International Trade - UNCITRAL ("Model Law") and by (2) the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[6]

22. UNCITRAL was established by the General Assembly of the United Nations Organization - UN in order to reduce or remove disparities between domestic laws that create obstacles to the flow of international trade.[7] As highlighted by AMCHAM (eve. 62), UNCITRAL is dedicated to the reform of trade law rules in various countries for the purpose of modernizing and harmonizing laws affecting international trade. [8]

23. The Model Law, which inspired Law 9.307/1996,[9] is an example of the fulfillment of UNCITRAL's mission, recognizing " the value of arbitration as a method of settling disputes

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[4] Law 9.307/1996 differentiates only between domestic and foreign judgments, which require homologation for the purposes of execution in Brazilian territory (art. 35).

[5] Cf. ZANELATO, Thiago Del Pozzo. A internacionalidade da arbitragem à luz do direito brasileiro. São Paulo: Almedina, 2021. p. 159.

[6] CARMONA, Carlos Alberto. Arbitragem e processo: um comentário à Lei nº 9.307/96. 3.ed. São Paulo: Atlas, 2009. p. 11: "A comissão [que redigiu o anteprojeto da Lei 9.307/96] foi buscar subsídio especialmente na legislação espanhola então vigente (de 1988) e na Lei Modelo sobre Arbitragem Comercial da Uncitral, sem esquecer das disposições das Convenções de Nova Iorque (1958) e do Panamá (1975)".

[7] UNITED NATIONS, *United Nations Commission on International Trade Law*, "Origin, Mandate and Composition" (https://uncitral.un.org/en/about).

[8] Cf. UNITED NATIONS, *United Nations Commission on International Trade Law*, "About UNCITRAL" (https://uncitral.un.org/en/about).

[9] Although Brazil did not adopt the text of the Model Law verbatim, as 87 countries and 120 jurisdictions did, there is no doubt

arising in international commercial relations" and that " the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations".[10] Some of the principles of arbitration enshrined in the Model Law are, for instance, the autonomy of the arbitration clause or the severability of the arbitration agreement (art. 16.1 of the Model Law and art. 8, *caput of Law* 9.307/1996), and the Kompetenz-Kompetenz or that the arbitrator has jurisdiction over matters affecting their own jurisdiction (art. 16.1 of the Model Law and art. 8, sole paragraph, of Law 9.307/1996).

24. In what relates to this lawsuit, one of the standards harmonized by the Model Law concerns precisely the arbitrator's duty of disclosure (art. 12.1): "[the arbitrator] shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."[11] Adhering to this standard, Law 9.307/1996 (art. 14, § 1) provided that, in Brazil, "[the arbitrator has the] duty to disclose, prior to accepting the position, any fact that gives rise to justifiable doubt as to their impartiality and independence." Although the Plaintiff suggests otherwise,[12] the duty of disclosure and its corresponding standard of justifiable doubt are not innovations of the Brazilian law.

25. In turn, the New York Convention - to which Brazil is a party since 2002 -[13] is one of the most "successful" treaties in the international arena; it currently has 172 signatory states. Brazil's adhesion to the New York Convention allows arbitral awards rendered in its territory to be enforced in the other 171 countries without review of the merits, within the limits of judicial control established by the Convention itself. The limits on the obligation

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that the Brazilian arbitration rules were based on the Model Law, with minor textual changes, but without any significant material divergence.

[10] "Recognizing the value of arbitration as a method of settling disputes arising in international commercial relations. Convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations" (available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf).

[11] "[The arbitrator] shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf).

[12] Eve. 1: "[c]omo solução, a LArb criou o dever de revelação, um mecanismo próprio e particular (...)" (p. 3); "a lei de arbitragem criou um mecanismo específico e particular para aferir-se a imparcialidade e a independência do árbitro: o dever de revelação contido no artigo 14 (...)" (p. 14).

[13] Decree 4,311/2002 promulgated the New York Convention in Brazil.

of States to give effect to foreign arbitral awards include, for example, specific procedural issues (art. V.1), including as to the constitution of the arbitral tribunal, and, *ex officio*, issues of non-arbitrability or public policy (art. V.2).

26. Law 9.307/1996 incorporated the New York Convention's standards on the "formal review" of arbitral awards - which includes issues of constitution of the arbitral tribunal. These standards apply both to cases of annulment of Brazilian arbitral awards (arts. 32 to 33) and to the few cases of recognition and enforcement of foreign awards not subject to the New York Convention (arts. 34 to 40). Again, these are internationally accepted standards, not innovations in Brazilian law.

4.2 Reflexes and importance of Brazil's adaptation to international standards

27. The alignment of Brazilian law with international standards is reflected in Brazil's success in the international arbitration market. As already indicated by IBDP (eve. 57), today Brazil ranks second (behind only the United States) in the ranking of the International Chamber of Commerce - ICC on parties that most use the ICC International Court of Arbitration.[14] It also stands out in the rankings of seats of arbitration (fifth place) and nationality of arbitrators acting in ICC proceedings (fifth place).[15]

28. The departure of Brazilian law or Courts from internationally accepted standards presents a risk to Brazil's position in the arbitration market. When parties opt for arbitration in Brazil, they submit both to Law 9.307/1996 and to the jurisdiction of Brazilian courts for measures ancillary to arbitration (e.g. emergency and enforcement measures).[16] If they are not predictable or not in harmony with internationally accepted arbitration standards, Brazil may no longer be an attractive venue.

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[14] International Chamber of Commerce, "ICC unveils preliminary dispute resolution figures for 2021" (https://iccwbo.org/news-publications/news/icc-unveils-preliminary-dispute-resolution-figures-for-2021/).

[15] International Chamber of Commerce, "ICC Dispute Resolution 2020 Statistics" (2020statistics_icc_disputeresolution_895.pdf (icc-switzerland.ch)).

[16] Cf. Braghetta, Adriana. A importância da sede da arbitragem: visão a partir do Brasil. São Paulo: Renovar.

5 International standards applicable to arbitration in Brazil: inadequacy of the interpretations proposed in this action

29. The interpretations that the Plaintiff intends to give to the issues related to the arbitrator's duty of disclosure are unfounded. The current standards of interpretation and application of Law 9.307/1996 do not violate any constitutional provision.

5.1 Absence of controversy on the interpretation of the "non-exhaustive" hypotheses of impediment and suspicion of judges and their application to arbitrators

30. The Plaintiff's allegations on the non-exhaustive nature of the cases of suspicion and impediment provided for in the CPC and their application to arbitrators presuppose the combined interpretation of federal law provisions (article 14 of Law 9307/1996 and articles 144 and 145 of the CPC), which is not admitted in the direct control of constitutionality by the STF (see topic 3.2).

31. The judgments brought by the Plaintiff do not point to any doubt even as to the interpretation of federal law with regard to the application of the cases of suspicion and impediment of judgements provided in the CPC to arbitrators. As already demonstrated by AASP, the Plaintiff raises a false conflict (eve. 51, p. 11). First, art. 14 of Law 9.307/1996 itself determines that the CPC cases apply to arbitrators only "where applicable". Second, the Plaintiff itself recognizes that, in Brazilian practice, other standards indicating impartiality and independence apply, such as those provided in the regulations of arbitration institutions and those collected in the guidelines of the IBA or other institutions on conflicts of interest.

32. In any case, as pointed out by IBDP (eve. 57, p. 11), the resolution of issues regarding the effective impartiality and independence of arbitrators (as well as judges) depend on the weighting of specific circumstances of concrete cases[17] in light of proportionality, reasonableness and efficiency. To the extent that it is not possible to "confront or consider,

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[17] As indicated by IBDP, in several cases, the STF has ruled out the possibility of issues related to impediment and suspicion of state judge on extraordinary appeals. For example: "Não há que se falar em ofensa direta ao texto constitucional se, para sua constatação, faz-se necessária a análise dos diversos fatos em que fundamentada a decisão que rejeitou exceção de impedimento arguida pelo agravante" (AI-AgR 828.647).

in its concrete individuality, particular cases, situations or effects" in the seat of direct control of constitutionality (**STF**, Rp. 1.418),[18] such judgment is covered by the so-called "reservation of weighting in the concrete case" (IBDP, eve. 57, p. 12).

5.2 Inadequate interpretation as to the extent of the duty of disclosure of arbitrators, the concept of justifiable doubt, and the application of IBA guidelines

5.2.1 False dichotomy: the duty to disclose lies with the arbitrators

33. The Plaintiff suggests that, in Brazil, there is a divergence as to who has the duty to disclose. It argues that the lower Courts take two opposing positions: in twenty decisions, they would have declared that the duty is exclusive to the arbitrator; in another five, they would have pointed out that such duty also extends to the parties. Internationally, the duty of disclosure is primarily attributed to the arbitrators and secondarily to the parties - from whom diligence and cooperation are required.

34. In light of this, Plaintiff requests that the STF declares that the duty to disclose would be exclusive to arbitrators. However, the Plaintiff's application is based on at least three false premises.

35. First, there is no such conflict of precedents: the twenty decisions in which it was supposedly determined that the duty to disclose is exclusive to the arbitrator do not even address this issue. Although the decisions indicate that this is the arbitrator's duty, none of the twenty cases analyzed the possibility of extending this duty to the parties.

36. With respect, the survey of decisions carried out in Plaintiff's application is not reliable. There is even mention of a decision of the STJ (SE 120/EX), which the Plaintiff claims is contrary to the possibility of extending the duty to disclose to the parties, in which the passage cited in the opening is merely a literal transcription, between quotation marks, of article 14 of Law 9.307/1996 - and moreover taken out of context.

37. In turn, the five decisions that extended the duty to disclose to the parties are the only ones of the 25 decisions that dealt directly with the issue. In other words, there are no

[18] STF, Rp. 1.418/RS, Reporting Justice Néri da Silveira, j. Feb. 24, 1988.

conflicting positions. All courts that have faced the issue have decided for the extension of this duty to the parties as well, when necessary.

38. Second, the duty of disclosure is a tool for accessing information whose primary ownership is presumed to belong to the arbitrators only by the assumption that they have greater informational control over their own conflicts of interest. However, depending on the case, this assumption may not be true. The party may even have more complete information than the arbitrator. For example, the information about the potential conflict of interest may be public, easily accessible, known to the party in advance, or even unknown to the arbitrator and known only to the party. In such cases, the party does not need the arbitrator's disclosure to have access to the information. Arguing that there is no duty for the parties to investigate is inconsistent with international arbitration practice:

- The **IBA** Conflict of Interest Guidelines provide that parties have a duty to disclose facts about potential conflicts of interest and "*to fulfill their duty of disclosure, parties are required to investigate any relevant information that is reasonably available to* them."[19] .
- The **Swiss Federal Court** ruled in the 2020 case of *Wada v Sun Yang* that it expects from the parties some degree of investigation into the arbitrator, their positions and their background. In 2022, in decision *4A_520/2021*, the Court ruled that parties have a duty to inquire autonomously about arbitrators, not to rely exclusively on their disclosures.[20]
- The **International Chamber of the Paris Court of Appeals,** in 2021, in the case *PT v Vidatel,* involving a Brazilian arbitrator, determined that the parties "*must comply with the principle*

[19] IBA Guidelines 7(c)" To comply with their duty of disclosure, parties should investigate any relevant information to which they reasonably could have access. Additionally, any party to the arbitration must, at the outset and throughout the proceedings, undertake reasonably necessary efforts to ascertain and disclose available information that, under the general principle, might affect the arbitrator's impartiality and independence. "IBA (International Bar Association) Guidelines on Conflicts of Interest in International Arbitration (2014), adopted on October 23, 2014.

[20] From the original "La partie qui entend récuser un arbitre doit invoquer le motif de récusation aussitôt qu'elle en a connaissance. Cette règle jurisprudentielle vise aussi bien les motifs de récusation que la partie intéressée connaissait effectivement que ceux qu'elle aurait pu connaître en faisant preuve de l'attention voulue (ATF 129 III 445 consid. 4.2.2.1 et les références citées), étant précisé que choisir de rester dans l'ignorance peut être regardé, suivant les cas, comme une manoeuvre abusive comparable au fait de différer l'annonce d'une demande de récusation (ATF 136 III 605 consid. 3.2.2; arrêt 4A_318/2020, précité, consid. 6.1 non publié aux ATF 147 III 65). La règle en question constitue une application, au domaine de la procédure arbitrale, du principe de la bonne foi. En vertu de ce principe, le droit d'invoquer le moyen tiré de la composition irrégulière du tribunal arbitral se périme si la partie ne le fait pas valoir immédiatement, car celle-ci ne saurait le garder en réserve pour ne l'invoquer qu'en cas d'issue défavorable de la procédure arbitrale. Une demande de révision fondée sur la prétendue partialité d'un arbitre ne peut ainsi être envisagée qu'à l'égard d'un motif de récusation que le recourant ne pouvait pas découvrir durant la procédure arbitrale en faisant preuve de l'attention commandée par les circonstances" in Marco Polo del Nero v. Fédération Internationale de Football Association (FIFA), CAS 2019/A/6344, Swiss Federal Court Judgment 4A_520/2021, March 4, 2022.

of loyalty in the conduct of the proceedings",[21] which would oblige them to inform each other. This understanding was confirmed by the Court of Cassation. In a subsequent decision in *Delta Dragon v. BYD*, in May 2021, the Court stated that "*the arbitrator's disclosure obligation must be evaluated in light of the notoriety of the facts or situations involving the arbitrator...only readily accessible public information, which the parties could not fail to notice before the commencement of the arbitration, is likely to be considered notorious situations that may affect the extent of the arbitrator's disclosure obligation.*" Since the inauguration of the International Chamber of the Paris Court of Appeals, two other decisions have been rendered on this issue (No. 19/07575, February 25, 2020, *Dommo Energia*; and No. 18/16695, February 16, 2021, *Grenwich Enterprises Ltd*). In all cases brought before the Court of Cassation, the French Supreme Court for non-constitutional matters, the premises of the International Chamber were upheld. [22]

39. Third, public information or information easily accessible to the party may create a duty for the party to inform itself out of good faith and cooperation, depending on the case. The Brazilian Judiciary, in line with international guidelines, has evaluated this issue in a balanced manner. When analyzing concrete cases, it extends the arbitrators' duty of disclosure to the parties with reasonableness. In judicial practice, therefore, both positions - that the duty of disclosure is exclusive to the arbitrators or that it may be shared with the parties - are possible and legitimate, depending on the particularities of the case.

40. Thus, the duty of disclosure is not exclusive to arbitrators and involves the cooperation and good faith of the parties. The analysis of the extent of this duty should be conducted with caution, considering the specificities of each case. An abstract *a priori* interpretation of the ownership of the duty of disclosure, which disregards the participation of the parties and the complexity of each concrete case, is inadequate and incompatible with due process of law and international practice.

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[21] From the original: "A cet égard, il convient de rappeler qu'en application de l'alinéa 3 de l'article 1464 du code de procédure civile, les parties sont tenues de satisfaire au principe de célérité et de loyauté dans la conduite de la procédure, en vertu duquel notamment en cas de doute sur l'incidence d'une circonstance dont elles ont pu avoir connaissance sur l'indépendance d'un arbitre, elles doivent l'en aviser ou en aviser l'institution chargée de l'arbitrage pour recueillir des observations complémentaires, sans attendre l'issue de l'arbitrage pour s'en prévaloir, selon que cette issue lui est favorable ou non. A défaut, ces parties sont présumées avoir considéré que cette circonstance n'était pas de nature à créer dans leur esprit un doute raisonnable quant à l'indépendance de l'arbitre" in PT Ventures SGPS S.A. v. Vidatel Ltd, Mercury - Serviços de Telecomunicacões S.A. and Geni SA, ICC Case No. 21404/ASM/JPA (C-21757/ASM), Judgment of the Paris Court of Appeals, 26 January 2021

[22] As detailed in LexisNexis "French Court of Cassation renders landmark decision on appointment and duty of disclosure of arbitrators in multi-party arbitrations seated in France (Vidatel v PT Ventures)" published on November 29, 2022. Available at https://www.lexisnexis.co.uk/legal/news/french-court-of-cassation-renders-landmark-decision-on-appointment-duty-of-disclosure-of-arbitrators

5.2.2 The concept of justifiable doubt is objective

41. The Plaintiff's application claims that there was an interpretative divergence among Brazilian courts regarding the concept of 'justifiable doubt'. The ADPF listed fourteen decisions divided into two groups: in the first, with eleven decisions, the courts allegedly stated that justifiable doubt would be determined in the eyes of the parties while, in the second, with three decisions, in the eyes of the arbitrators. The Plaintiff's application aligns itself with the alleged positioning of the first group, saying that the concept of justifiable doubt would comprise "*any circumstance*" that the parties consider compromising[23] . In the end, it requests that the STF declare that "justifiable doubt" is any doubt that the parties have.

42. Again, the Plaintiff's application rests both on false factual premises in the listing of decisions and on misconceptions, especially that of justifiable doubt.

43. As for the listing of conflicting decisions, the eleven decisions of the first group did not state that justifiable doubt is "any circumstance that, in the eyes of the parties, may compromise the impartiality and independence of the prospective arbitrator," as stated in the application. On the contrary, they have positions contrary to what Plaintiff argues and in line with international practices, as in the following examples of cases cited in the initial:

- **TJPR** - Case no. 0005808- 38.2018.8.16.0194 (Doc. 04-A of the initial): the decision establishes that the duty of disclosure is objectively assessed from the point of view of a reasonable third party, not the parties. It uses as a reference the International Bar Association Guidelines, containing several limitations on what is considered "justifiable doubt". It concludes that "*the assessment of the facts capable of giving rise to justifiable doubt must be made in consideration of the arbitrator and the specific circumstances of the particular case*," the opposite standard to that suggested in the Plaintiff's application.
- **TJSP** - Case no. 1056400- 47.2019.8.26.0100 (Doc. 04-C of the initial) and 0004881-68.2006.8.26.0597 (Doc. 04-B of the initial): Decide that information of a personal or professional nature should be disclosed only if it has the potential to generate justified doubt in the parties, not any kind of doubt. The concept of "justified doubt" requires a degree of doubt greater than mere superficial uncertainty.

[23] As per footnote 54 of the initials.

- **TJSP** - Case no. 1008312- 12.2018.8.26.0100 (Doc. 04-D of the initial): The passage in the Plaintiff's application is from an excerpt from a work by Francisco José Cahali only quoted in the TJSP judgment to decide that, in that specific case, there was no justifiable doubt because it is objectively assessable, and not from any doubt that the party has.

44. Therefore, the eleven decisions that, according to the application, would argue that the concept of "justifiable doubt" would correspond to any doubt of the parties, in fact, state the opposite. The Plaintiff's application does not cite a single Brazilian decision in which a court has defined that "justifiable doubt" would comprise *any* doubt of the parties. On the contrary, the divergence among lower courts has been artificially fabricated to try (unsuccessfully) to justify the lawsuit.

45. In both domestic and international arbitration, an objective criterion is required to identify the type of doubt that leads to the duty to disclose. This criterion depends on the eye of an exempt third party, not just the parties or the arbitrator. Thus, legal certainty is guaranteed. But the Plaintiff's application says that the party subjectively defines what is "justified doubt" on a case-by-case basis. In the reasoning of Plaintiff's application, any doubt of the parties becomes a "*justifiable doubt*", thus fulfilling the requirement of article 14 of Law 9.307/1996 and article 12 of the UNCITRAL Model Law. This, however, creates a circular logic where the words and the requirement lose their meaning. "*Justifiable doubt*" will no longer represent a specific condition that must be met for the party to question the arbitrator's conduct and will simply represent a reflection of the party's uncertainties, however superficial. Qualifying the doubt as *justifiable* indicates that something more is required than simply "*any and all doubt*" as the Plaintiff requests.

46. Therefore, as per the leading international case (UNCITRAL decision of January 11, 1995)[24] on the duty of disclosure enshrined in the Model Law (see item 4.1 above), issued

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[24] van den Berg, A.J. and Kluwer Law International (1997). Challenge decision of 11 January 1995 in *Yearbook Commercial Arbitration 1997. Vol. XXII*. Kluwer Law International, p. 234, para. 24 "Put another way, one could say that under the UNCITRAL Arbitration Rules doubts are justifiable or serious if they raise an apprehension of bias which is, to the objective observer, reasonable. Actual partiality need not be proven. Neither is involved in this case. Instead, it is necessary to prove the reasonableness of the complainant's fear or apprehension of bias - its justifiable character. I did not note that the lawyers for both parties differed significantly from this approach. Where they differed significantly was in the actual assessment." from the original "Put another way, one might say that under the UNCITRAL Arbitration Rules doubts are justifiable or serious if they give rise to an apprehension of bias that is, to the objective observer, reasonable. Actual bias or partiality need not

one year before Law 9.307/1996 came into force, doubts as to the independence or impartiality of an arbitrator are justifiable if they create an **apprehension of bias in the eyes of an objective and reasonable observer, not of the parties or the arbitrator**.

47. The term "*justifiable doubt*" is internationally harmonized. It is cited, to mention only a few countries, in section 1036 of the **German Code of Civil Procedure**,[25] in art. 24(1)(a) of the **English Arbitration Act,**[26] in art. 10.1. of the **Arbitration Rules of the London Court of International Arbitration - LCIA**,[27] in art. 1428 of the **Mexican Federal Commercial Code**,[28] in section 12 of the **Indian Arbitration and Conciliation Act,**[29] and in item 2(1) of the IBA Guidelines on conflicts of interest, sharing the same meaning as the Brazilian one: "*doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a probability that the arbitrator may be influenced by factors other than the merits of the case presented by the parties when making his decision*". It is not just any doubt, much less is it gaugable solely from the subjective perception of one of the parties.

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be established. Nor is it involved here. Rather it is the reasonableness of the fear or apprehension of bias on the part of the claimant - its justifiable character - that is required to be established. I did not detect that counsel on either side differed markedly from this approach. Where they parted company in a major way was in the actual assessment."

[25] Section 1036 of the German Code of Civil Procedure: Zivilprozessordnung. § 1036 Ablehnung eines Schiedsrichters (2) Ein Schiedsrichter kann nur abgelehnt werden, wenn Umstände vorliegen, die berechtigte **Zweifel** an seiner Unparteilichkeit oder Unabhängigkeit aufkommen lassen, oder wenn er die zwischen den Parteien vereinbarten Voraussetzungen nicht erfüllt. Eine Partei kann einen Schiedsrichter, den sie bestellt oder an dessen Bestellung sie mitgewirkt hat, nur aus Gründen ablehnen, die ihr erst nach der Bestellung bekannt geworden sind.

[26] Art. 24(1)(a) of the English Arbitration Act: 24. Power of court to remove arbitrator. (1)A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds- (a)that circumstances exist that give rise to **justifiable doubts** as to his impartiality.

[27] Art. 10.1 of the Arbitration Rules of the London Court of International Arbitration - LCIA: 10.1 The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: (i) that arbitrator gives written notice to the LCIA Court of his or her intent to resign as arbitrator, to be copied to all parties and all other members of the Arbitral Tribunal (if any); (ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act; or (iii) circumstances exist that give rise to **justifiable doubts** as to that arbitrator's impartiality or independence.

[28] Art. 1428 of the Federal Commercial Code of Mexico: Artículo 1428.- La persona a quien se comunique su posible nombramiento como árbitro deberá revelar todas las circunstancias que puedan dar lugar a **dudas justificadas** acerca de su imparcialidad o independencia. El árbitro, desde el momento de su nombramiento y durante todas las actuaciones arbitrales, revelará sin demora tales circunstancias a las partes, a menos que ya se hubiera hecho de su conocimiento.

[29] Section 12 of the Indian Arbitration and Conciliation Act: 1[(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to **justifiable doubts** as to his independence or impartiality.

48. Arbitratos have never been required to disclose **all** of their personal circumstances, just as not **every** doubt of the parties requires disclosure. The broad standard advocated for in the Plaintiff's application has never been adopted in Brazil or in any jurisdiction monitored by Ciarb, as it is disproportionate, unnecessary and compromises the efficiency of arbitration.

5.2.3 The arbitrator's duty to disclose and the IBA Guidelines: scope, function and application

49. The arbitrator's duty of disclosure, the exercise of which is regulated by Brazilian law, is complemented in practice by the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration or other similar guidelines. The Plaintiff claims that some courts have imposed the application of these guidelines, while others would apply only Law 9.307/1996. To prove this, the Plaintiff presents two decisions, one from the TJRJ and another from the TJPR that it says are antagonistic. This is not the case.

50. First, only two judgments are insufficient to demonstrate alleged jurisprudential divergence on the interpretation of the law.

51. Second, the *ratio decidendi of* these two judgments is different from the Plaintiff's allegation:

- **TJRJ** - Case no. 0434147- 23.2016.8.19.0001: does not automatically apply the IBA Guidelines. On the contrary, it applies Law 9.307/1996 and only uses the IBA Guidelines as an interpretative vector for the decision, evaluating, in the concrete case, if it would be a case of impediment according to Law 9.307/1996.
- **TJPR** - Case no. 0005808- 38.2018.8.16.0194: does not address the applicability of the IBA Guidelines. The excerpt used in the Plaintiff's application is from a CONJUR article transcribed in full by the judgment and whose mention of the IBA guidelines is an irrelevant *obiter dictum.* The TJPR did not even get to decide whether there was a failure in the duty to disclose or what the relevance of the IBA rules was because it concluded, preliminarily, that the arbitrator's request to challenge had been untimely.

52. That is, the divergence of understanding between courts, which is the main factual premise of Plaintiff's application, does not exist here either. The TJRJ applied the IBA Guidelines as *soft law*. The TJPR's decision does not even deal with the IBA guidelines and,

even in the excerpt copied from Conjur, it only repeats that the Guidelines are *soft law,* in line with the TJRJ's position.

53. Third, because the Plaintiff is confused about the operation of *soft law*. In Brazil, the parties are only bound by two types of rules: (i) the statutory ones, arising from the *lex arbitri,* especially Law 9.307/1996 and the CPC, by reference to art. 14 of Law 9.307/1996; and (ii) the contractual ones, arising from the agreement between the parties, namely the arbitration clause, the terms of reference and the Arbitration Rules of the institution elected by the parties. The IBA Guidelines are of common reference in arbitrations, national or otherwise, and reflect good market practices, including a list system that provides for non-exhaustive cases of conflict of interests, but do not override the law, or the parties' agreement, both of which are of mandatory application.

54. However, this finding does not prevent Courts from using them for guidance in interpreting the actual applicable legal or conventional provisions. The IBA Guidelines are *soft law* and do not purport to replace the applicable law. Their strength lies not in their binding force on the parties or arbitrators, but in their persuasive character[30]. Such persuasive sources are common both in the argumentation and in the decision, as when Courts refer to statements of the Federal Council of Justice or doctrinal works. Courts are also not *legally bound to* such statements or academic works, but take them into consideration to the extent that they provide persuasive grounds for the interpretation of the applicable law.

55. The IBA Guidelines are a highly persuasive instrument because they are neutral, specifically designed to guide participants in arbitral proceedings in a complementary - not substitutive - manner to national laws and regulations. Therefore, they enrich the infrastructure of guidelines for the resolution of conflict of interest cases.

56. In other words, they are such a sophisticated manual of best practice that they have become widespread in the arbitration market. According to the International

[30] KAUFMANN-KOHLER, Gabrielle, Soft law in international arbitration: Codification and normativity, Journal of International Dispute Settlement, v. 1, n. 2, p. 283-299, 2010.

Arbitration Survey (2015) run by Queen Mary University of London, in which hundreds of arbitrators and lawyers were interviewed, 90% of them said they were familiar with the IBA Guidelines on Conflicts of Interest[31] .

57. The IBA Guidelines have already been referred to by the highest courts of various jurisdictions as statements of good practice for conflicts of interest in arbitration, as in Case No. 16088/JFR/CA decided by the **Supreme Court of Colombia in** 2021[32] ; in Marcus Oil v Gail, decided by the **Supreme Court of India in** 2017[33] ; in Case 4A_386/2015, decided by the **Swiss Federal Court** in 2016[34] ; and in Halliburton v Chubb decided by the **Supreme Court of the United Kingdom** in 2020[35] . **India's Arbitration and Conciliation Act** has even expressly incorporated the IBA Guidelines.

58. As a result of the wide use of the IBA Guidelines, several national normative acts regulating arbitration with the Brazilian State provide for the use of internationally accepted guidelines, for example:

- **Federal Decree No. 10,025 of 2019,** art. 12(iii) - Arbitrators will not have with the parties "*situations of conflict of interest provided by law or recognized in **internationally accepted guidelines***."
- **AGU Normative Ordinance n. 42 of 2022**, art. 2(v): Arbitrators must not "*incur conflict of interest situations recognized in **internationally accepted guidelines***"
- **State Decree (RS) n. 55.996 of 2021,** art. 12(iii): Arbitrators may not have "*conflict of interest situations provided for in their own regulations or recognized in **internationally accepted guidelines***".
- **Municipal Decree (SP) No. 59,963 of 2020**, art. 14(iii): Arbitrators must not have "*conflict of interest situations provided for in legislation or recognized in **internationally accepted guidelines***."
- **State (SC) Decree No. 2.241 of 2022**, art.10(v): Arbitrators must not have "*conflict of interest situations provided for in their own regulations or recognized in **internationally accepted guidelines.***"

[31] 2015 International Arbitration Survey by te Queen Mary University of London. Available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf
[32] *Tampico Beverages Inc. v. Productos Naturales de la Sabans S.Z. Alqueria*, ICC Case No.16088/JFR/CA, Judgment of the Supreme Court of Colombia, 12 July 2017, para.
[33] Hrd Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd Judgment of August 31, 2017, https://indiankanoon.org/doc/35443395
[34] X.________ v. Y.________, 4A_386/2015, Swiss Federal Court, September 7, 2016.
[35] Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48. Recall that the UKSC's decision took into account and was aligned with Ciarb's submission as *amicus curiae* in that case.

59. Therefore, participants in arbitral proceedings have a legitimate expectation from the outset of the proceedings, given the ubiquity of the IBA Guidelines, that the conduct of the arbitral tribunal, parties and their representatives will be understood in the context of those Guidelines. They are not binding, but they cannot be ignored.

60. In short, the IBA Guidelines on conflicts of interest are an important guidance instrument that complements, but does not replace, national law or the agreement between the parties. Therefore, the Plaintiff's application has no basis in reality: the IBA Guidelines are not imposed on the parties, precisely because they are not binding rules. Plaintiff's application says that "*the judges are, by their own account, applying the IBA rules as if they were a norm belonging to the Brazilian legal system (...) there is an illegal derogation of art. 14 of the Arbitration Law*", but does not show a single case in which this has happened. Being *soft law*, like the statements of the Federal Council of Justice, the IBA Guidelines do not have the potential or pretension to substitute the law or the consensus between the parties.

5.3 Inadequate interpretation as to the effects of any failure to comply with the duty of disclosure

61. Plaintiff's contention that any failure in the duty of disclosure automatically gives rise to a challenge to the arbitrator for the underlying undisclosed fact, or to the nullity of the award rendered by the arbitrator, is also meritless. For the purposes of setting aside an arbitral award, in the instant case, it must be proven that the underlying undisclosed fact in fact impaired the impartiality or independence of the arbitrator. In order to accept the challenge, it is necessary to demonstrate an effective risk to the arbitrator's impartiality.

62. According to specialized doctrine, it makes no sense to speak of an automatic validity of the challenge or automatic nullity of the award when there is a failure of the duty to disclose. The duty to disclose has a different function from the duty of impartiality and independence of the arbitrators. The latter has the function of preserving due process of law, while the former serves as a means to secure that end. The duty to disclose:

- "[is intended to] allow the parties to ascertain whether the facts mentioned could interfere with their act of judging and constitute a justifiable and reasonable doubt influencing their independence and impartiality (...)."[36]
- "is an instrument, a means, and not an end in itself."[37]
- "is intended to strengthen the parties' confidence in the tribunal, enable the exercise of the right of appointment, and continues throughout the proceedings until the end of the arbitrators' assignment. (...) It is the materiality of the undisclosed conflict that guides the determination of evident partiality, not the failure in the duty to disclose or investigate *per se*. This approach fosters the importance of the obligation to be independent not the obligation to disclose. **There is no 'ipso facto violation of the principle of independence when the duty to disclose is violated.**'"[38]

63. There are several courts and scholars who, in this sense, understand that non-disclosure alone is not a sufficient ground for the annulment of an arbitral award.

64. Internationally, the IBA conflict of interest guidelines clarify that "the failure of an arbitrator to disclose certain facts or circumstances which, in the eyes of the parties, might give rise to doubts as to his impartiality or independence, does not automatically result in the conclusion that a conflict of interest exists, or that his disqualification should occur.[39]

65. In this sense, in 2019, the **German Federal Court of Justice** (*Bundesgerichtshof*) has already confirmed the understanding that the failure to disclose is not, by itself, a basis for the determination of reliance or partiality-one must assess whether the undisclosed fact (or alleged conflict of interest) in fact satisfies the applicable standard of impartiality and independence in that jurisdiction.[40] In 2020, the **High Court of Justice of England and**

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[36] LEMES, Selma Ferreira. "O Dever de Revelação e a Jurisprudência Brasileira". In: WALD, Arnoldo. LEMES, Selma Ferreira. 25 years of the Arbitration Law (1996-2021): history, legislation, doctrine and jurisprudence. São Paulo: Thomson Reuteurs Brasil 2021, p. 375.

[37] LEMES, Selma Ferreira. "Arbitrator, conflict of interests and the investiture contract". In: CARMONA, Carlos Alberto; LEMES, Selma Ferreira; MARTINS, Pedro Batista. 20 years of the Arbitration Law: homage to Petrônio R. Muniz. São Paulo: Atlas, 2017, p. 277

[38] BEIMEL, Ilka Hanna. Independence and Impartiality in International Commercial Arbitration. International Commerce and Arbitration series, vol. 29. The Hague: Eleven, p. 141-142.

[39] Disponível em: https://www.ibanet.org/MediaHandler?id=EB37DA96-F98E-4746-A019-61841CE4054C.

[40] BGH, 31 Jan. 2019, I ZB 46/18, NZM 2020, 334-336, 336. As Ilka Beimel explains, this decision dealt with the non-disclosure of an *expert,* but German courts equally apply to arbitrators these standards of analysis as to whether a failure to comply with the duty of disclosure satisfies the criterion for determining (in)reliance and (im)bias (OLG Frankfurt a.M., 24 Jan. 2019, 26 SchH 2/18, BeckRS 2019, 848; OLG München, 10 Jul. 2013, 34 SchH 8/12, NJOZ 2014, 1779-1782). Cf. BEIMEL, Ilka Hanna. Independence and Impartiality in International Commercial Arbitration. International Commerce and Arbitration series, vol. 29. The Hague: Eleven, p. 141.

Wales also distinguished the standards of analysis of compliance with the duty of disclosure from those of the duty of partiality and independence in *PAO Tatneft v. Ukraine*,[41] holding:

- "that the standards for disclosure on the one hand and actually establishing (apparent) bias on the other, whether under the UNCITRAL Rules or English law, are not identical and that the obligation of disclosure extends in both cases to matters which may not ultimately prove to be sufficient to establish justifiable doubts as to the arbitrator's impartiality. However, a failure of disclosure may then be a factor in the latter exercise." [42]

66. Along these lines, in *Halliburton v. Chubb*, decided by the **UK Supreme Court in** 2020 with Ciarb as an intervener,[43] the understanding that non-disclosure alone does not automatically disqualify an arbitrator or render an award null and void was confirmed. In that case, the fact that an arbitrator had failed to disclose prior appointments by subsidiaries of one of the parties was one factor considered in deciding whether to set aside the award they had issued, but not the only one. The Supreme Court made it clear that it agreed with the reasoning in *Pao Tatneft v. Ukraine*, expressly citing the text of the paragraph transcribed above. In its own words, it held that "the failure to disclose may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias."[44] The understanding is that the determination of partiality (for possible disqualification of an arbitrator or annulment of an award) depends on an analysis of the circumstances according to its own criteria, distinct from those applicable to the duty of disclosure, which is accessory to it.

[41] PAO Tatneft v Ukraine [2019] EWHC 3740 (Ch).
[42] PAO Tatneft v Ukraine [2019] EWHC 3740 (Ch), para 57.
[43] Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48. The report of the decision stated: "Because the appeal raises questions of law of general importance in the field of arbitration this court allowed and received written and oral representations from the International Court of Arbitration of the International Chamber of Commerce ("ICC") and the London Court of International Arbitration ("LCIA") and written submissions from the Chartered Institute of Arbitrators ("CIArb"), the London Maritime Arbitrators Association ("LMAA") and the Grain and Feed Trade Association ("GAFTA*). The court is very grateful to the interveners for their contribution to the clarification of the wider issues raised by this appeal. In free translation: "As the appeal raises issues of law of general importance in the field of arbitration, this court has allowed and received written and oral representations from the International Court of Arbitration of the International Chamber of Commerce ("ICC") and the London Court of International Arbitration ("LCIA"), and written submissions from the Chartered Institute of Arbitrators ("CIArb"), the London Maritime Arbitrators Association ("LMAA") and the Grain and Feed Trade Association ("GAFTA"). The tribunal is most grateful to the interveners for their contribution to the clarification of the broader issues raised by this appeal."
[44] Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48, para. 118.

67. In Brazil, the CBAr, as they indicated in their application to intervene (eve. 29, p. 23), also pronounced itself on the issue when it issued in September 2022 the Technical Note entitled: "The possible failure of the arbitrator in the exercise of the duty of disclosure does not necessarily imply a violation of the duty of impartiality to give rise to the annulment of the arbitration award".[45]

68. As made clear above, the duty of disclosure is related but not identical to the duty of impartiality and independence. They are duties with different functions and their analyses follow different standards. When there is a failure in the duty of disclosure, the non-disclosure may indeed be considered as one of the factors for the disqualification of the arbitrator or the annulment of the award, but it will depend on the specific analysis of the other circumstances of the case and the nature, relevance and seriousness of the undisclosed fact. In summary, there is no automatic relationship between failure to disclose and the actual disqualification of the arbitrator or nullity of the award rendered by the arbitrator.

5.4 Inadequacy of the interpretation regarding the preclusion in the face of the waiver of the conflict of interest claim

69. The Plaintiff states that the lack of independence and (or) partiality of the arbitrator will always constitute a matter of public policy, not subject to preclusion, and may be challenged at any time and at any level of jurisdiction, including before the Judiciary. It bases the alleged judicial divergence on forty decisions: thirty-two in which the courts would have said that the right to challenge the arbitrator had lapsed, while eight others would have decided that no preclusion applies to this matter.

70. The systematic interpretation of articles 14 and 20, *caput*, of Law 9.307/1996, makes evident the occurrence of preclusion and proves that the premise of the Plaintiff's application is false. Article 14 establishes the obligation of the arbitrators to disclose circumstances that give rise to justifiable doubts as to their impartiality and

[45] Available at: cbar-nota-tecnica-de dever-de-revelacao-20220920-final-fal.pdf.

independence, while article 20, *caput,* determines that the party that intends to challenge the arbitrator's impediment "*shall do so on the first opportunity it has to manifest itself*".

71. Before moving on to the international position on the subject, it is obvious: the preclusion of the right to claim the judge's impediment is constitutional. In civil proceedings, the party has fifteen days from the knowledge of the fact that generates the suspicion to make the allegation, according to article 146 of the Code of Civil Procedure. Therefore, it is not a matter that offends the Constitution and cannot be the object of ADI or ADPF.

72. If the party knows of a conflict of interest and chooses not to challenge it at the appropriate time, there is implicit acceptance of the situation. Both international and Brazilian practice limit public policy considerations to fundamental principles of justice and equity. Article 31 of the **English Arbitration Act** provides that the party must inform the arbitral tribunal immediately of the challenge. Similarly, section 9(2) of the **Nigerian Arbitration Act** provides a fifteen day period for the parties to file objections to the constitution of the arbitral tribunal.

73. In 2021, the **Cour de Cassation de Paris,** the highest court of the French judiciary for non-constitutional matters, issued a landmark decision on the time limits for challenging the arbitrator. In *CNAN & IBC v. CTI & Pharaon, it* established that a party's failure to raise the irregularity in a timely manner results in the loss of the right to challenge the arbitrator, pursuant to the duties of good faith and fair dealing. However, the court made the proviso that the party's right shall not be forfeited if the specific facts of the case point to an actual "*Violation of International Public Order*". In other words, the high court held that a violation of public policy does not occur *de jure,* but depends on specific factual circumstances.

74. Granting the Plaintiff's requests would diverge from this understanding and allow any party to refrain, even knowingly and without cause, from filing a timely challenge and to invoke the same facts that supposedly would have justified the challenge only after the judgment is rendered. This possibility would be contrary to the duties of good faith and fairness.

75. The position of the *Court of Cassation* is based on the same premise of appreciation for procedural loyalty that this Court has espoused on other occasions. Even in allegations of absolute nullity in criminal proceedings, this Court has not annulled the acts because the party has not followed an objective standard of procedural behavior, saving nullities for the future. In HC 105.041, this Court noted that "*it is clear that this is an absolute nullity, but it is also clear that there was no allegation in due time. What this practice raises is the possibility of keeping nullities to be argued, which results in a lack of respect for procedural fairness*". The present ADPF seeks the legitimization of a pattern of behavior exactly opposite to that demanded by the STF.

76. With regard to the assessment of the offense against public policy, the evaluation is circumstantial. Decisions in one direction or the other are possible, depending on the context. Therefore, there is no unconstitutionality in the current practice of the Judiciary.

77. In summary, the allegation of conflict of interest must be made at the appropriate procedural moment and the determination of conflict of interest will depend on the concrete case. Any divergence among courts as to the existence of offense to public policy is not a sign that the courts are starting from different legal premises, but rather that they are deciding different cases according to the peculiarities of each one of them.

78. For example, case no. 1055194- 66.2017.8.26.0100, cited in the Plaintiff's application as a decision in which no preclusion was recognized because it was a matter of public policy, was actually decided based on the facts. The very passage in application is clear: "*The argument that the issue has been excluded does not stand up, since it has* ***not been*** *convincingly* ***demonstrated that the appellee was already aware that Mr. Walter Polido was a suspect from the beginning of the arbitration procedure****.* Therefore, the difference does not concern the interpretation of Law 9.307/1996, or the constitutionality of its articles 14 and 20, but the specific facts of the case: it was recognized that the party was not aware at the time of the relevant facts. Despite the limited exceptions set out above, the general rule remains: the party's right precludes if it, knowing the facts, does nothing.

6 Request for relief

79. For all of the above, Ciarb Global and CIarb Brazil respectfully request:

a) Their admission as *amici curiae* in this lawsuit;

b) That the STF does not admit the lawsuit, with the dismissal of the case without resolution of the merits;

c) On the merits, the denial of all the requests made in the Plaintiff's application.

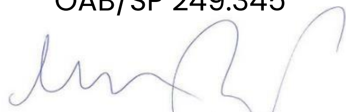
80. Ciarb Global and CIarb Brazil also request that all notifications perataining to this lawsuit are made in the name of Eduardo Talamini (OAB/PR 19.920), otherwise they will be null under art. 272, para. 5, CPC.

From Sao Paulo to Brasilia,

On June 28, 2023.

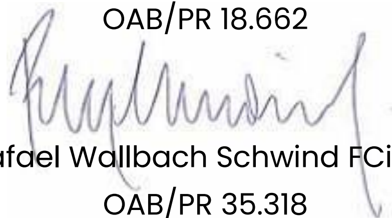
Napoleão Casado Filho FCiarb
OAB/SP 249.345

Marçal Justen Filho
OAB/PR 7.468

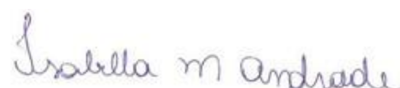


Cesar Pereira C.Arb FCiarb
OAB/PR 18.662

Eduardo Talamini
OAB/PR 19.920



Rafael Wallbach Schwind FCiarb
OAB/PR 35.318



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