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Published on 18 May 2020

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Arbitrators' duty to disclose and independence: First clarifications by the International Commercial Chamber of the Paris Court of Appeals

On February 25, 2020, the International Commercial Chamber of the Paris Court of Appeals (*Chambre commerciale internationale de la Cour d'appel de Paris*, also known by the acronym "*CCIP-CA*") ruled for the first time on the independence and impartiality of arbitrators and more generally on the scope of their duty to disclose.

In this decision, the International Commercial Chamber adopted a pragmatic view which showed its willingness to take a casuistic approach.

In this case, several Brazilian companies had entered into a joint operating agreement for oil exploration and production. Due to a disagreement between them, one of the companies, Dommo Energia SA, was prevented from selling its stake to a third party.

In this context, Dommo Energia SA initiated arbitration proceedings before the London Court of International Arbitration (LCIA), choosing Paris as the seat of arbitration.

In the course of the proceedings, one of the defendants retained a new legal counsel to conduct its defense,

even though an interim award had already been issued. The arrival of this new legal counsel forced one of the arbitrators to update his declaration of independence.

On several occasions, the plaintiff requested that the declaration of independence of this arbitrator be updated and asked for clarifications. Notably, on January 2, 2019, the arbitrator stated that he had ties with a law firm, some clients of which were also shareholders of one of the defendants, and specified that he had also been a lawyer between April 2012 and July 2015 with a partner Saudi law firm.

Under these circumstances, Dommo Energia SA decided to challenge this arbitrator before the LCIA. As this challenge was dismissed, it initiated proceedings before the Paris Court of Appeals to obtain the annulment of the interim award on the ground that the arbitral tribunal had been improperly constituted.

In this context, it argued that the arbitrator's failure to disclose the link with a law firm that had amongst its clients the shareholders of one of the defendants was sufficient for a "reasonable observer" to cast doubt on the independence and impartiality of the arbitrator.

The defendants raised the public knowledge exception (*exception de notoriété*, the exception according to which an arbitrator's duty to disclose does not apply in relation to information that is public knowledge) and argued that the ties between the arbitrator and the shareholders were insignificant, indirect and old.

In its decision, the International Commercial Chamber provided clarification on how to determine if a fact is public knowledge (1) and on the relationship between the undisclosed fact and the lack of independence and impartiality (2).

1. Regarding the public knowledge exception (*exception de notoriété*)

While the defendant claimed that the existence of the ties was a well-known fact as a simple consultation of the arbitrator's website made it possible to become aware of this information, the International Commercial Chamber decided to proceed with a factual analysis and concluded that the information was only accessible after a careful review of the website and clicks on many hyperlinks.

The first development provided by this decision is that the fact that an information is public knowledge cannot be established if "*access to the information requires several successive operations which are akin to investigative measures*".

The International Commercial Chamber thus confirmed existing case law that lays down requirements concerning the public availability and the accessibility of the information.

The second development provided by this decision lies in the confirmation that only easily accessible public information, which the parties could not fail to consult before the start of the arbitration proceedings, is likely to characterize the fact that a situation is public knowledge.

Here again, this position is consistent with existing case law according to which an exception may be made to

the arbitrator's duty to disclose if, before the commencement of the arbitration proceedings, the undisclosed fact was public knowledge because it was accessible by the public and known. On the other hand, after the commencement of the proceedings the parties do not have a duty of investigation and it is up to the arbitrators to disclose all facts that may affect their independence and impartiality.

2. An undisclosed fact does not automatically result in a lack of independence and impartiality

The third development concerns the dissociation between the annulment of the award and the undisclosed fact.

The International Commercial Chamber held that the arbitrator's incomplete declaration does not automatically result in the annulment of the award and that it only happens if the undisclosed element is "*of such a nature as to give rise to a reasonable doubt in the minds of the parties as to the impartiality and independence of the arbitrator,* [and this] *assessment has to be made on objective grounds and taking into account the specific circumstances of the case*".

By ruling so, it confirmed applicable case law that makes a distinction between non-disclosure and lack of independence.

On the basis of Article 1456 §2 of the French Civil Code applicable to international arbitration, the International Commercial Chamber adopted an objective approach of the facts to be disclosed, based on proof of a direct or indirect link, material or intellectual, between the shareholders of the defendant and the arbitrator.

As such, judges control the existence of material or intellectual links, either through the law firms concerned or by establishing the existence of a stream of business between the shareholders and the arbitrator.

The International Commercial Chamber specified that the mere fact that the arbitrator served as counsel in a partner law firm of the firm where the defendant's lawyer work was insufficient to establish a link or a stream of business with the defendant's shareholders. It also noted that the arbitrator's use of the email address with the domain name of said firm was also insufficient to characterize the existence of a link. The Court finally stated that these elements were insufficient to give rise to a current conflict of interest between the arbitrator and the relevant law firm.

In short, the International Commercial Chamber considered that the annulment of awards cannot be systematic even if the duty to disclosure must be as broad as possible. It thus adopted a convincing solution.

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