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Principle of equality and arbitrators' duty to disclose: New developments by the International Commercial Chamber of the Paris Court of Appeals

2021 is already shaping up to be a year of new developments on such exciting topics as the principle of equality of the parties in the constitution of the arbitral tribunal and the arbitrators' duty to disclose.

Indeed, in five rulings handed down between the end of December 2020 and mid-February 2021, the Paris Court of Appeals has ruled on the arbitrator's duty to disclosure, either by reiterating conventional solutions or by adopting, in the case of the International Commercial Chamber of the Paris Court of Appeals (*Chambre commerciale internationale de la Cour d'appel de Paris*, also known by its acronym "CCIP-CA"), a more innovative approach.

The principle of equality of the parties in the constitution of the arbitral tribunal

In the *Vidatel* case[1], the eponym company, seeking to set aside the arbitral award, claimed that the ICC International Court of Arbitration had violated the arbitration clause agreed upon with its co-shareholders in appointing on its own initiative the five arbitrators. It also alleged a violation of the competence-competence principle.

On the other hand, one of the defendants, PT Ventures, considered that compliance with the terms of the arbitration clause would have led to a breach of equality insofar as the plaintiff – who was in conflict with its

three co-shareholders – would have found itself in a situation of inequality, compared to such co-shareholders.

The International Commercial Chamber of the Paris Court of Appeals pragmatically held that the application of the principle of equality of the parties in the constitution of the arbitral tribunal must necessarily be analyzed in a different way when the arbitration clause is concluded and when it is implemented.

In particular, it considered that the appointment procedures provided by the clause were not compatible with the principle of equality, which can be waived after the dispute has arisen. In doing so, it followed the findings of *Dutco*[2] decision which enshrined this principle under French law.

As such, when at the date of the dispute the plaintiff is acting against defendants with converging interests, it appears necessary to set aside the arbitration clause pursuant to the principle of equality.

Moreover, the International Commercial Chamber of the Paris Court of Appeals observed that in the case at hand, the ICC had proposed – in vain – to the parties to find an agreement as to the constitution of the arbitral tribunal.

In these circumstances, it considered that the ICC was legitimately entitled to play a part in the constitution of the arbitral tribunal.

Incidentally, this interpretation seems to be in line with the spirit of the new Article 12(9) of the ICC revised Rules of Arbitration, according to which:

"*Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, in exceptional circumstances the Court may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award*."

In addition, the plaintiff argued that the ICC had violated the competence-competence principle in interpreting the arbitration clause. The International Commercial Chamber of the Paris Court of Appeals dismissed this argument and held that it was a difficulty related to the constitution of the arbitral tribunal, an area in which the ICC is authorized to act.

The scope of the arbitrators' duty to disclose

As a reminder, Article 1456 of the French Code of Civil Procedure imposes on arbitrators an on-going duty to disclose that does not cease upon their appointment. They must indeed disclose any element that might affect their impartiality and/or independence throughout the arbitration proceedings.

As mentioned above, the Paris Court of Appeals has ruled on the arbitrators' duty to disclose in five separate cases.

Typically, in the *HOP !*[3], *Soletanche*[4] and *CWT*[5] decisions, the Paris Court of Appeals merely adopted a traditional approach, holding that "*the arbitrator must thus disclose to the parties any circumstance likely to*

affect his/her judgment and to give rise to reasonable doubt in the mind of the parties as to his/her qualities of impartiality and independence, which are the very essence of the arbitration function".

It also recalled that "*since the relationship of trust between the arbitrator and the parties must be continuously preserved, the parties must be informed throughout the arbitration proceedings of any relationship that could have an impact on the arbitrator's judgment and that could affect his/her independence*".

In a more original way, the International Commercial Chamber of the Paris Court of Appeals has taken a more innovative approach to the duty to disclose, which will raise in practice many questions.

In the *Vidatel* decision, it was asked to rule on two arbitrators' failure to disclose:

- It was claimed that one of the co-arbitrators had failed to disclose the ties he had with the company OI, PT Ventures' majority shareholder, on the one hand;
- It was also alleged that the President of the arbitral tribunal did not reveal that one of the partners of his law firm had been appointed as director of one of the subsidiaries of the group owned by OI.

Since several famous decisions, it is clear under French law that the arbitrator is exempted from revealing facts that are well-known at the time he/she accepts his/her appointment, this exemption being counterbalanced by the duty of curiosity which weighs on the parties at the time of such appointment.

It is up to the parties to conduct real investigations and they may not, therefore, blame an arbitrator for not revealing facts that are widely known and easily accessible.

However, this limitation no longer applies once the arbitrator has accepted his/her appointment. Once appointed, it is up to the arbitrator to reveal any circumstances likely to affect his/her independence.

In this respect, the International Commercial Chamber of the Paris Court of Appeals recalled the approach that had already been adopted in the *Dommo Energia*[6] decision, which is fully in line with the *Technimont*[7] ruling, and held that:

"*Well-known facts are understood as those covering easily available public information that the parties could not fail to consult before the commencement of the arbitration proceedings, this exemption ceases to apply once the arbitration proceedings are underway*".

In particular, the International Commercial Chamber of the Paris court of Appeals considered that the information published in the specialized journal *Global Arbitration Review* (GAR), which is widely known in the arbitration world, was easily accessible and well-known.

In so doing, it considered that paying for access to information does not prevent the facts reported therein from being classified as well-known and does not relieve the parties from their duty of curiosity.

In a particularly interesting way, the International Commercial Chamber of the Paris Court of Appeals also attempted to provide arbitrators with tools to determine the extent of their duty to disclose.

Given the vagueness of Article 1456 of the French Code of Civil Procedure regarding the scope of the duty to disclose[8], the judges held that it was relevant to refer to the recommendations established by the ICC and, in particular, those contained in the 2016 "*Guidance Note for the disclosure of conflicts* by *arbitrators*"[9] which provides concrete examples.

In this respect, while the reference to the notes published by the ICC proves to be practical and pragmatic as it allows to give concrete tools, it also leads to balance the application of this solution to other cases insofar as these notes are not, by principle, intended to apply to arbitration proceedings initiated under the aegis of other institutions or ad hoc arbitration proceedings.

In particular, the International Commercial Chamber of the Paris Court of Appeals held that:

"*Apart from these cases characterizing causes deemed to be objective, the arbitrator is exempted from making disclosure, except when he/she is to reveal the circumstances which, although not mentioned in this list, may be of such a nature as to create, in the mind of the parties, a reasonable doubt as to his/her independence, i.e., a doubt which may arise in the mind of a person in the same position and having access to the same elements of information which are reasonably accessible.*

In order to be characterized, this reasonable doubt must arise from a potential conflict of interests of the arbitrator, which may be either direct because it relates to a relationship with a party, or indirect because it relates to a relationship of an arbitrator with a third party which has an interest in the arbitration. In this respect, when the potential conflict of interests is indirect, the assessment of reasonable doubt will depend namely on the intensity and proximity of the relationship between the arbitrator, the interested third party and one of the parties to the arbitration proceedings" par. 118 and 119).

In ruling so, the International Commercial Chamber of the Paris Court of Appeals relied on the "reasonable doubt" criterion introduced by the *Neoelectra*[10] decision but diverts it to use it not as a criterion justifying the annulment of the award but as an element justifying the triggering of the duty to disclose.

In these circumstances, the judges held that the parties' lack of curiosity revealed that "*these circumstances were not such as to create, in his mind, as in that of a party in the same position who had access to the same reasonably accessible information, a reasonable doubt as to the arbitrator's independence*" (par. 129).

One can only wonder about the relevance of this development of the International Commercial Chamber of the Paris Court of Appeals, which is ultimately tantamount to reversing the burden of the obligation to provide information: it is no longer up to the arbitrators to reveal information, but it is up to the parties to actively search for any information likely to cast doubt on the independence of the arbitrators.

Indeed, in the end, the International Commercial Chamber of the Paris Court of Appeals criticized the plaintiff

for not having – on the basis of the principles of promptness and procedural fairness – immediately notified the ICC.

One can only be surprised by this solution which seems contradictory since the obligation to disclose well-known facts must be fully effective again as from the constitution of the arbitral tribunal and the facts which were well-known but not disclosed should have been reported to the ICC…

Finally, what happens if the fact is disclosed during the proceedings or after the award has been rendered?

In the first case, the parties may, in principle, challenge the arbitrator.

This being said, when the disclosure occurs at a too late stage of the proceedings, one can only wonder about the effectiveness of the right to challenge insofar as the parties may hesitate to exercise such right not to delay the issuance of the award.

By way of illustration, in the *Hop!* and *Soletanche* decisions, the Paris Court of Appeals considered that, insofar as the parties had learned of the existence of the fact during the proceedings and had either expressly discussed it and waived their right to challenge the arbitrator, or had refrained from exercising such right, they could no longer make such a challenge during the action for annulment of the award.

Once the award has been rendered, the parties have, in principle, the possibility of filing an action for annulment.

In this context, in the *Grenwich Enterprises Ltd.*[11] decision the International Commercial Chamber of the Paris court of Appeals considered that the plaintiff's claims regarding the lack of independence and impartiality of the arbitrator – which were based on facts that occurred after the close of the proceedings and were only revealed once the arbitral award had been issued – were admissible in the context of the action for annulment.

However, the International Commercial Chamber of the Paris Court of Appeals dismissed the application for annulment on the grounds that:

- On the one hand, the lack of independence must be based on an objective approach "*consisting in characterizing precise and verifiable factors external to the arbitrator that are likely to affect his/her freedom of judgment, such as personal, professional and/or economic ties with one of the parties*". This was not established in this particular case;
- On the other hand, impartiality "*presupposes the absence of prejudices or biases likely to affect the arbitrator's judgment, which may result from multiple factors such as the arbitrator's nationality, social, cultural or legal environment*".

It also specifies that "*however, in order to be taken into account, these elements must create, in the mind of the parties, a reasonable doubt as to the arbitrator's impartiality, so that the assessment of this defect must be*

based on an objective approach".

As such, "*while such a doubt may arise from the award itself, it is still necessary, since the content of the reasons for the arbitration award is beyond the control of the judge being asked to set aside the award, that this doubt be based on specific elements relating to the structure of the award or its very terms, which would suggest that the arbitrator's attitude was biased or, at least, would be of such a nature as to give the impression that it was biased*."

These recent rulings demonstrate that the issues of arbitrators' duty to disclose and reasonable doubt are exciting topics that will definitively lead to further developments in future decisions.

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[1] CCIP-CA, January 26, 2021 – No. 19/10666.

[2] Commercial Chamber of the *Cour de Cassation* (French Supreme Court), January 7, 1992 – n° 89-18.708; 89-18.726.

[3] Paris Court of Appeals, January 19, 2021 – No. 18/04465.

[4] Paris Court of Appeals, December 15, 2020 – No. 18/14864.

[5] Paris Court of Appeals, January 12, 2021 – No. 17/07290.

[6] CCIP-CA, February 25, 2020 – No. 19/07575.

[7] Paris Court of Appeals, February 12, 2009, No. 07/22164; Paris Court of Appeals, April 12, 2016, No. 14/14884; 1st Civil chamber of the *Cour de Cassation*, December 19, 2018

[8] Article 1456 par. 2 of the French Code of Civil Procedure: "*Before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality. He or she shall also disclose promptly any such circumstance that may arise after accepting the mandate*".

[9] It should also be recalled that the ICC published in January 2021 its revised Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration (available for download at https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf).

[10] 1st Civil Chamber of the *Cour de Cassation*, October 10, 2012 – No. 11-20.299.

[11] CCIP-CA, February 16, 2021 – No. 18/16695.

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