A Duty to Disclose, A Duty to Inquire: French and European Courts Address an Arbitrator's Independence and Impartiality

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Arbitrator independence and impartiality is the subject of several recent decisions of the Paris Court of Appeal, which has jurisdiction over set-aside proceedings for awards rendered in international arbitrations seated in Paris, and the European Court of Human Rights (the "ECtHR"), which hears applications against Council of Europe Member States for breaches of the European Convention on Human Rights (the "ECHR"). These decisions address:

- The scope of an arbitrator's duty to disclose publicly available information;
- The parties' responsibility to investigate potential conflicts;
- The possibility of challenging an award based on arguments regarding an arbitrator's alleged lack of independence that were not previously raised; and
- The competent jurisdiction to hear claims of personal liability of arbitrators for alleged breaches of the duty to disclose.

Duty to Disclose and "Notorious" Information under French Law: A Reminder

Under French law, arbitrators have a duty to reveal any circumstance likely to affect their independence or impartiality before accepting an appointment.[1] Arbitrators must also disclose without delay any such circumstance that may arise after they are appointed. An arbitrator's lack of independence and impartiality may lead to the annulment of the award by the French courts, on the ground that the arbitral tribunal was improperly constituted.[2]

[1] Articles 1456 and 1506 of the French Code of Civil Procedure ("CPC").

[2] Articles 1492, 2° and 1520, 2° of the CPC.

As reaffirmed by the Paris Court of Appeal in the June 2020 *Dommo decisions*, failure to disclose does not constitute a lack of independence and impartiality in and of itself (see our previous update).[3] For this to be the case, the undisclosed information must provoke a reasonable doubt in the minds of the parties as to the impartiality and independence of the arbitrator. This assessment is objective, taking into account the specific facts of the case.

French case law has developed an exception to the obligation to disclose: the so-called "notoriety" exception.[4] Under this exception, relevant circumstances need not be disclosed if they are "notorious"—in other words, publicly available and easily accessible—at the time of the arbitrator's appointment.

French courts must also bear in mind the jurisprudence of the ECtHR, which hears applications for violations of rights and guarantees set out in the ECHR, including the right to a fair trial (Article 6). The ECtHR is not often called upon to address arbitration issues. It last weighed in on independence and impartiality in the context of arbitral proceedings in a 2018 decision, *Mutu and Pechstein v. Switzerland*,[5] in which it found that two Court of Arbitration for Sport tribunals were independent and impartial and that, accordingly, there had been no violation of Article 6.1 of the ECHR.

Four Decisions

Four decisions rendered this summer by the French and European courts discuss various questions revolving around an arbitrator's independence and impartiality.

- ***BEG v. Italy.*** On May 20, 2021, in the *BEG v. Italy* case, the ECtHR unanimously held that there had been a violation of the right to a fair trial under Article 6.1 of the ECHR, owing to the lack of impartiality of an arbitrator appointed in arbitration proceedings between the applicant, BEG, and ENELPOWER (a company which had been spun off from ENEL).[6] The arbitration arose out of an agreement for a hydroelectric power generation project in Albania. A dispute arose under the

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3 Paris Court of Appeal, February 25, 2020, No. 19/07575.

4 *See, e.g.,* Paris Court of Appeal, March 13, 2008, No. 06/12878; Paris Court of Appeal, March 10, 2011, *Tecso v. Neoelectra*, No. 09/28537; Paris Court of Appeal, May 28, 2013, *Catering International & Services v. Société YEMGAS FZCO*, No. 11/17672; French Court of Cassation, Civil Chamber 1, May 25, 2016, No. 14-20532; French Court of Cassation, Civil Chamber 1, June 15, 2017, *République de Guinée Equatoriale v. société Orange Middle East and Africa*, No. 16-17108; French Court of Cassation, Civil Chamber 1, December 19, 2018, *J&P Avax v. Tecnimont, SPA*, No. 16-18349.

5 ECtHR, October 2, 2018, *Mutu and Pechstein v. Switzerland* (40575/10 and 67474/10).

6 ECtHR, May 20, 2021, *BEG S.p.a. v. Italy* (5312/11).

agreement and arbitration proceedings were commenced. ENELPOWER appointed N.I. as arbitrator, who did not disclose at the time of his appointment that he had been Vice-Chairman and member of the Board of Directors of ENEL, and was acting as counsel to ENEL in separate proceedings. When BEG subsequently challenged the award on this basis, the Italian courts refused to set aside the award, finding, among other things, that the applicant was probably aware of the professional links between N.I. and ENEL. The ECtHR disagreed, rejecting "a presumption of knowledge which does not rest on any concrete evidence to the effect that the applicant was in fact aware of the professional activities of N.I." The ECtHR held that there had been a violation of BEG's right to a fair trial and ordered Italy to pay compensation.

- ***Delta Dragon v. BYD.*** On May 25, 2021, the Paris Court of Appeal upheld an ICC award that had been challenged on the ground that one of the arbitrators had failed to disclose information likely to cast doubt on his impartiality.[7] The applicant, Delta Dragon, alleged that, after the issuance of the award, it found that the award was inconsistent with the hearing and the arbitrator's position during the proceedings. After an investigation conducted by an economic intelligence consultancy firm, it had discovered that the arbitrator had not disclosed his links with the automotive industry even though the opposing party, BYD, was a Chinese electric car manufacturer. More specifically, the arbitrator had not disclosed that he was a member of the advisory board of Star Venture, the parent company to Star Cooperation GmbH, a company that, according to Delta Dragon, was connected to the Daimler group, which was a client and strategic partner of BYD and was likely to have an interest in the dispute. In line with its position in *Dommo*, the Court held that "the arbitrator's obligation to disclose must be assessed in light of the notoriety of the facts or situations concerning him or her… only easily accessible public information that the parties could not fail to see before the start of the arbitration is likely to qualify as a notorious situation that may affect the scope of the arbitrator's obligation to disclose". The Court then found that the information *was* "notorious", that the applicant had failed to raise its objection in time, and therefore had waived it.[8] The Court found that the information was "very easily accessible on the Internet" and explained how it could be obtained through a search featuring the name of the arbitrator in quotation marks and the German term "automobil". Stating that "the parties must display a modicum of curiosity" ("*les parties devant faire preuve d'un minimum de curiosité*") when conducting their own due diligence, the Court upheld the award.

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7 Paris Court of Appeal, May 25, 2021, No. 18/20625.

8 Article 1466 of the CPC ("A party that, knowingly and without legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity.")

- ***CNAN & IBC v. CTI & Pharaon.*** On June 15, 2021, the Paris Court of Appeal upheld an USD 7 million ICC award in favor of Saudi company Pharaon Commercial Investment Group Limited ("Pharaon") and Cayman company CTI Group Inc ("CTI"), in a matter concerning the constitution of a maritime freight transport company, International Bulk Carrier ("IBC"), involving a loan from Pharaon and CTI to Algerian company CNAN Group SPA ("CNAN").[9] CNAN twice sought to disqualify the arbitrator appointed by Pharaon and CTI on the basis that he lacked independence, specifically, based on the geographical proximity between the arbitrator and the president of Pharaon and the professional relationship between the arbitrator and counsel to Pharaon and CTI. The ICC International Court of Arbitration rejected both requests. CNAN and IBC later challenged the resulting award on several grounds, including improper constitution of the tribunal and violation of international public policy.[10] The Court held that the "improper constitution of the tribunal" argument was inadmissible because the applicants had failed to raise this specific lack of independence argument before the arbitral tribunal (even though CNAN had twice applied to the ICC Court of International Arbitration to disqualify the arbitrator, without success). The Court based its decision on article 1466 of the CPC (a party that, knowingly and without legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity). However, the Paris Court of Appeal accepted as admissible CNAN's argument of "violation of international public policy", because arguments based on international public policy can be raised for the first time at the annulment stage. The Court agreed that an arbitrator's lack of independence could in principle constitute a public policy violation, but rejected the argument on the merits, considering that lack of independence was not demonstrated on the facts of the case.

- ***Saad Buzwair Automotive v. Audi Volksvagen Middle East.*** On June 22, 2021, the Paris Court of Appeal held that the French courts, as the courts of the arbitral seat, were competent to hear a claim of civil liability against a German arbitrator whose failure to disclose a conflict of interest had led to the annulment of the award.[11] The case concerned a Paris-seated ICC arbitration between Qatari company Saad Buzwair Automotive ("SBA") and a Dubai subsidiary of Audi Volkswagen. In 2018, the Paris Court of Appeal granted SBA's request to set aside the ICC award on the basis that one of the arbitrators had failed to disclose connections between his law firm and the Volkswagen group. SBA then sued the arbitrator in the French courts, arguing that he was liable in damages for the arbitration and court costs and fees that it had

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9 Paris Court of Appeal, June 15, 2021, No. 20/07999.

10 Articles 1520.2°, 1520.5° of the CPC.

11 Paris Court of Appeal, June 22, 2021, No. 21/07623.

incurred. On March 31, 2021, the Paris *Tribunal judiciaire* ("TJ") rejected this request, holding that under the Brussels I *bis* Regulation (the European regulation that determines jurisdiction in legal disputes of a civil or commercial nature),[12] the courts of the jurisdiction where the arbitrator's services were performed—and not the courts of the arbitral seat—are competent to hear claims regarding an arbitrator's performance of services. Although the seat of the arbitration was in Paris, the TJ found that the services had been performed in Germany and that the German courts were thus competent to hear the claim. The Paris Court of Appeal overturned this decision, reasoning that the Brussels I *bis* Regulation does not apply to matters relating to arbitration, including the constitution of an arbitral tribunal and the conduct of arbitral proceedings. French procedural law instead applied, allowing a party to sue either in the jurisdiction where the defendant is domiciled or, in contractual matters, at the place of performance of the contract.[13] The Court concluded that, in international arbitration, the place of performance of the arbitrator's contract is the seat of arbitration, unless the parties agree otherwise.

Key Takeaways

The main takeaways from these four decisions are as follows.

- **According to the ECtHR, there is no presumption of knowledge of an arbitrator's professional activities.** In *BEG v. Italy*, the ECtHR reasoned that courts may not presume that a party knows about an arbitrator's undisclosed professional activities, without concrete evidence of such knowledge. The impact of this holding on the French courts' "notoriety" doctrine remains to be seen.

- **From an arbitrator's duty to disclose to a party's duty to enquire?** The *Delta Dragon* decision illustrates the French courts' evolving position on "notoriety" exception and what constitutes publicly available and easily accessible information. The Paris Court of Appeal considered that conducting internet searches using quotation marks and a word in the German language was not "excessive" or "particularly difficult", and expressly referred to the applicant's "lack of curiosity" ("*manque de curiosité*"). One may wonder whether the "notoriety" exception to the arbitrator's duty to disclose is evolving into a fully-fledged duty of "curiosity", putting the onus on the parties to conduct sufficient vetting, possibly in several languages.

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[12] Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[13] Article 46 of the CPC.

- **Independence and impartiality cannot be raised at the annulment stage if they were not raised before the arbitral tribunal—even if they were raised before the institution—unless there is a violation of international public policy.** In *Pharaon*, the Paris Court of Appeal held that challenging the arbitrator before the administering institution was not enough to avoid a waiver under article 1466 of the CPC: the alleged irregularity of constitution must have been raised *before the arbitral tribunal itself*, even though many rules require challenges to arbitrators to be submitted to the institution. The Court observed that the applicant had neither raised an objection nor even so much as reserved its rights before the tribunal itself, and had therefore waived any argument of improper constitution. At the same time, the Court opened the door to allowing an applicant to raise new independence arguments at the annulment stage under the rubric of international public policy. The Court reasoned that an award rendered by an arbitrator who lacked independence would violate the principle of equality between the parties and the rights of defense, hence violating international public policy.[14]

- **As a matter of French law, the courts of the seat of arbitration are competent to hear claims relating to an arbitrator's performance of their duties, unless the parties have agreed otherwise.** In *Saad Buzwair Automotive*, the Paris Court of Appeal held that the place of performance of an arbitration agreement is the seat of the arbitration, even if hearings and deliberations physically take place at a different location. Thus, for arbitrations seated in France, unless the parties agree otherwise, the French courts will have jurisdiction to hear claims against arbitrators for alleged breaches of their contractual duties, including the duty of impartiality and independence and the duty to disclose.

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Please do not hesitate to contact us with any questions. Debevoise is well placed to assist clients before the Paris Court of Appeal, with a team of litigators based in Paris, London and New York, who work in French and English, and routinely argue cases before French courts.

[14] Paris Court of Appeal, June 15, 2021, No. 20/07999, at 142.

Lord Goldsmith QC
London/Paris
phgoldsmith@debevoise.com

Ina C. Popova
New York/Paris
ipopova@debevoise.com

Samantha J. Rowe
London/Paris
sjrowe@debevoise.com

Patrick Taylor
London/Paris
ptaylor@debevoise.com

Antoine F. Kirry
Paris
akirry@debevoise.com

Alexandre Bisch
Paris
abisch@debevoise.com

Floriane Lavaud
New York/Paris
flavaud@debevoise.com

Fanny Gauthier
Paris
fgauthier@debevoise.com

Romain Zamour
New York
rzamour@debevoise.com