Arbitrator Disclosure Requirements: First Insights from the International Chamber of the Paris Court of Appeal

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On February 25, 2020, the recently created International Chamber of the Paris Court of Appeal rendered a series of five decisions related to the same arbitral proceeding (see the court's press release) in a matter involving a Brazilian oil & gas company (*Dommo Energia*). These are the Chamber's first significant decisions on the setting-aside of international arbitral awards, specifically on the important topic of arbitrator independence and impartiality. These new decisions provide a first insight into the Chamber's position regarding an arbitrator's duty to disclose and more generally on how it may exercise its review role going forward.

The New International Chambers of the Paris Courts. The International Chamber of the Paris Commercial Court and the International Chamber of the Paris Court of Appeal (together, the "International Chambers") were created to make France more attractive to international business (see our previous update). The International Chambers hear disputes relating to international commercial contracts. Among other innovations, proceedings before the International Chambers may be conducted in English and judges may take live testimony of witnesses and experts and give counsel the opportunity to cross-examine them. The International Chamber of the Paris Court of Appeal has been operational since March 1, 2018. Since January 1, 2019, it is also the jurisdiction that hears all proceedings for setting aside arbitral awards rendered in international arbitrations seated in Paris.

The decisions in the Dommo case are the first significant decisions on review of international arbitral awards rendered by the International Chamber of the Paris Court of Appeal. The Court's discussion of the scope of an arbitrator's duty to disclose potentially relevant information, including where such information may be publicly accessible, signals a pragmatic approach and suggests that the fact that relevant information is in the public domain will not in and of itself be enough to relieve an arbitrator of the duty to disclose it.

The *Dommo* Case at a Glance. A dispute arose out of business relationships between Dommo and several other Brazilian companies bound by a joint operating agreement. Dommo brought arbitration proceedings against some of these companies under the

LCIA Rules, seated in Paris. The tribunal split the proceedings into several phases and rendered five awards.

Dommo sought to set aside all of the awards based on the improper constitution of the arbitral tribunal, in particular the tribunal's lack of independence and impartiality.

Dommo claimed that the arbitrator appointed by the respondents had failed to reveal links between him and one of the respondents. Dommo argued that, in the course of the arbitration, it became aware that the arbitrator had worked for a Saudi law firm that was affiliated with another law firm that had connections with the respondent (two of its shareholders were clients of that law firm) from 2012 to 2015 (two-and-a-half years before the beginning of the arbitration). Dommo had already challenged the arbitrator, but the LCIA rejected the challenge.

Disclosure of Publicly Available Information: What Is Sufficiently Notorious?

French law recognizes that arbitrators have a duty to reveal any circumstance likely to affect their independence or impartiality before accepting their mission. Arbitrators must also disclose without delay any circumstance of the same nature that may arise after the acceptance of their mission.

This obligation is, however, subject to the so-called "notoriety" exception (*notoriété*): relevant circumstances need not be disclosed if they are publicly available at the time of the arbitrator's appointment. Once the arbitrator is appointed, he or she must disclose relevant circumstances subsequent to the appointment even if they are publicly available. Indeed, while parties can be expected to investigate potential incompatibilities at the time of appointment, the burden of continuing diligence after the appointment falls on the arbitrator.

French courts had defined publicly available information as information that is "easily accessible." One of the questions before the Court in *Dommo* was just how easy such access should be.

The Court ultimately upheld the five awards. It decided that the information was not sufficiently easily accessible and should have been disclosed, but the facts that the arbitrator failed to disclose were not sufficient to show a lack of independence or impartiality, and as a result that the arbitral process was not affected by irregularities. The main takeaways are as follows:

- The Court held that the **arbitrator's obligation to disclose is assessed in light of the *notoriété* of the disputed situation, its connection to the dispute and its impact on the arbitrator's judgment**. It confirmed that the arbitrator's disclosure obligation exists both before and after his or her acceptance of the appointment. It

noted that the circumstances to be disclosed may relate to potential conflicts of interest, relationships ("*relations d'intérêts*") or a "stream of business" ("*courant d'affaires*") that the arbitrator may have had with the parties or third parties likely to be interested in the dispute. The specific circumstances to be disclosed must be assessed on a case-by-case basis. Consistent with typical French court practice, the Court did not refer to any soft law guidance on the issue, such as the IBA Guidelines on Conflicts of Interest in International Arbitration.

- The Court provided a **detailed discussion of the *notoriété* exception**, including some developments on what should be considered "easily accessible information." The Court held that, in this case, the arbitrator had the obligation to disclose his connections because this information was not easily accessible. The Court took a pragmatic approach, noting that access to this information was possible only after several successive operations on the arbitrator's website, which the Court considered to be akin to "investigative measures." The Court held that the *notoriété* exception could thus not apply in this case.

- The Court reaffirmed that **failure to disclose should not in itself lead to setting aside an award**. The Court affirmed that the information that was not disclosed must be such as to provoke a reasonable doubt in the minds of the parties as to the impartiality and independence of the arbitrator. This assessment has to be made objectively and taking into account the specific facts of the case. The Court noted that the ties between the arbitrator and one respondent were indirect, through another firm, and had ceased two-and-a-half years before the start of the arbitration. It thus concluded that the circumstances did not establish the existence of any element that would be likely to create a reasonable doubt about independence and impartiality.

The International Chamber of the Paris Court of Appeal's début thus indicates a pragmatic approach to issues of arbitrator disclosure, which has been the subject of several recent initiatives.

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Please do not hesitate to contact us with any questions. Debevoise is well placed to assist clients before the new Paris International Chambers, 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.


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