

# DOES THE ARBITRATORS' FAILURE TO DISCLOSE CONFLICTS OF INTEREST FATALLY LEAD TO ANNULMENT OF THE AWARD? THE APPROACH OF THE EUROPEAN STATE COURTS.

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## **I. Independence and Impartiality**

The distinction between independence and impartiality adopted by European domestic courts is the same distinction that is universally accepted, whereby: (i) independence is an objective “state of profession”, so that where the arbitrator’s remuneration is originated, directly or through his law firm, by professional services performed for one of the parties (or its affiliates) appearing in the arbitration, his financial relationship with the party is established and he ceases to be

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independent; and (ii) impartiality is a subjective “state of mind”, implying absence of bias or predisposition towards the outcome of the case, caused by the arbitrator’s publications, or public statements, or positions manifested as arbitrator or counsel in previous cases, that might be seen as impairing his impartial judgment on the merits.

These two essential prerequisites are accepted without reservation amongst arbitration practitioners, but are not easy to implement with the necessary rigor. The case law analysis that follows confirms the difficulties met by national courts in achieving consistent results.

## II. How the European Courts Address Arbitrator’s Independence

### A. Arbitrator Acting as Party’s Attorney in Other Cases

*France:* Concurrently with the arbitral proceedings, the sole arbitrator was advising and acting as technical expert for one of the parties in an unrelated judicial matter. He failed to disclose this relationship although he was still being paid by that party for his services. Not surprisingly, he was disqualified by court order.<sup>2</sup> The outcome of the case was quite obvious and similar flagrant situations are indeed rare.

*Sweden:* The Svea Court of Appeal was requested to set aside an award on the ground that an arbitrator had not disclosed that he had acted as counsel for an affiliate company of the respondent in insolvency proceedings. Surprisingly, the court determined that the facts did not constitute a ground for disqualification. The request was dismissed and validity of the award confirmed.<sup>3</sup> What makes the decision astonishing is the lack of disclosure of a circumstance that should have been disclosed. The reticence of the arbitrator should have alerted the court on his ability to act independently.

### B. Arbitrator’s Interest in the Subject Matter of the Dispute

*United Kingdom:* The Commercial and Appeal Courts were requested to remove the Chairman of an ICC Tribunal and put aside some partial awards that the tribunal had rendered. The application was based on the Chairman’s failure to disclose that he was a non-executive

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<sup>2</sup> Société des Équipements Industriels Stolz SA v. Ets. Letierce et autre, Tribunal de Grande Instance[TGI][ordinary court of original jurisdiction] Paris, January 15, 1988,, *Revue de l’Arbitrage*, 1988, 316 available at [KluwerArbitration.com](http://KluwerArbitration.com).

<sup>3</sup> Rapla invest AB in liquidation v. TNK Trade Limited (Cyprus), Stockholm Int. Arb., Svea Court of Appeal, 2006-12-07 p.132 T 5044-04 (Swed.).

director of a third party having an interest in the outcome of the arbitration. The third party was an important competitor of the claimant and the unsuccessful bidder for the same contract (awarded to the claimant) from which the dispute had arisen. Both the Commercial and Appeal Court dismissed the application. According to the Commercial Court, the possible benefit that the rival company might receive from the outcome of the arbitration was “entirely intangible” and “too indirect”. In addition, the Chairman had no pecuniary interest in the parties or in the third competitor. The role he was covering in the competitor’s organization (non-executive director, with no managerial power) was not a “vital”, but a minimal and incidental part of his professional life. The Court of Appeal confirmed these findings and underlined the “excellent reputation of the chairman as lawyer and arbitrator”, considering this circumstance sufficient to remove any suspicion that he might be interested in the outcome of the case for favoring the rival company. The rigorous way he had conducted the proceedings were a proof thereof.<sup>4</sup>

The reasoning was likely sound in the circumstances of the specific case, where no proof of bias had been established. However, the chairman’s failure to disclose his relationship with the rival company remains inexplicable. The Court of Appeal did indeed admit that non-disclosure was unfortunate and that the claimant might have preferred a different Chairman had it been made aware of the connection. What probably influenced the court is its conviction that the non-disclosure was “not intentional” and that, the proceedings being at a too advanced stage, a replacement of the Chairman would have been seriously detrimental.

### **C. Business, Professional or Personal Relationships of the Arbitrator**

*France:* One of the arbitrators had failed to disclose that he was the father in law of one of the parties’ counsel. The Paris Court of Appeal obviously annulled the award.<sup>5</sup>

*Switzerland:* The claimant complained of his exclusion from sport competitions based on the use of doping. The arbitral tribunal (acting under the CAS Rules) dismissed his claim. The claimant sought

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<sup>4</sup> AT&T Corporation v. Saudi Cable Company, [2000] 2 L.M.C.L.Q. 127 (App. Cas.) (Eng.).

<sup>5</sup> Milan Presse v. Media Sud Communication, Cour d’appel [CA] [regional court of appeal] Paris, January 12 1999, *Revue de l’Arbitrage*, 1999, 381 available at [KluwerArbitration.com](http://KluwerArbitration.com).

annulment of the award before the Federal Court on the ground that one of the arbitrators had an undisclosed professional relationship with the most important respondent, WADA (World Anti-Doping Agency), for which he had contributed to the revision of the Anti-Doping Code and by which he had been designated to chair an “independent observer team” at the 2004 Athens Olympic Games. According to the claimant, the arbitrator’s position was comparable to that of a lawyer sitting as an arbitrator over one of his most important clients. The Federal Court dismissed the application. The arbitrator had simply performed some short-term or ad hoc services to WADA, as well as many other sport agencies, receiving allowances for expenses and no remuneration. Being a full time professor paid by his university, he was completely independent of WADA. Moreover, the Federal Court took into consideration the peculiarities of the CAS Rules, which impose that arbitrators be chosen from a closed list of personalities with recognized experience in sport law and related matters. Consequently, the arbitrators appointed in CAS proceedings have inevitable professional contacts amongst them and with sport organizations and other specialists in the field. The professor’s relationship with WADA being in the public domain since well before the start of the arbitration, disclosure was totally superfluous.<sup>6</sup>

*France:* The claimant (State of Qatar) had sought annulment of four ICC awards (made in Paris) on the ground that, long before commencement of the arbitration, one of the arbitrators had assisted the law firm of the respondent to select a Qatari lawyer to represent it in another local construction dispute that had commenced before the arbitration, but was still opposing the parties before a Qatari forum. The Paris Appeal Court dismissed the request, determining that the arbitrator’s help was an isolated episode comparable to a gesture of courtesy and nothing indicated that he had acted as counsel or advisor for the respondent, or that he had entered into the merits of the current or previous dispute. The *Cour de Cassation* confirmed the decision of the Court of Appeal and the awards remained valid and effective.<sup>7</sup>

*Switzerland:* The claimant requested the Federal Court to annul an award made by CAS on the ground that two arbitrators and the respondent’s counsel were members of the same “professional association”

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<sup>6</sup> Valverde v. CONI, WADA and ICA, Bundegericht (BGer) (Federal Supreme Court) Oct. 29, 2012, available at <http://relevancy.bger.ch> (Switz.).

<sup>7</sup> Qatar v. Creighton, Cour de Cassation (Cass) (Court of Cassation) Paris, Jan. 12, 1996, *Revue de l'Arbitrage*, 1999, 308 available at [KluwerArbitration.com](http://KluwerArbitration.com) (Fr.).

created as a discussion group among sport lawyers. Both arbitrators had failed to disclose this information. According to the Claimant, the association was a closed club of 26 members, who systematically appointed each other in their arbitrations. The Federal Court was not persuaded and rejected the annulment request. It found that common participation to the particular kind of professional association was not sufficient to question the independence of the two arbitrators, holding they were not required to disclose this circumstance. The Court denied the secret or opaque nature of the association, which visibly pursued its statutory object of an academic nature. Not even the systematic cross-appointments were relevant in the Court's view, since arbitrators "are presumed of being capable to adjudicate independently" irrespective of past cross-appointments. According to the Federal Court, the award might have been annulled had the claimant established that tribunals so composed "systematically decide" in favor of the party represented by another member of the same association, but this was not the case, because the outcomes varied.<sup>8</sup>

*Switzerland:* The respondent requested the Federal Court to refuse the enforcement of an award because the sole arbitrator had failed to disclose that he had previously acted as co-counsel of the claimant's counsel in an unrelated judicial proceeding before United States courts. The complaint was dismissed. The respondent was unable to explain the nature and the duration of the common work performed by the arbitrator and the claimant's counsel jointly. Second, and most important, the court held that practicing before the same court as co-counsel in an unrelated dispute does not objectively amount to a circumstance that should be disclosed, or is capable of triggering the disqualification of the arbitrator.<sup>9</sup>

*Switzerland:* The Swiss Federal Court had been requested to annul an award because one of the arbitrators had failed to disclose his former employment with the appointing State, a party in the arbitration. The Court observed that the question was not whether the arbitrator might be criticized for not having provided more information, but whether the facts that had not been revealed were as such sufficient to establish an

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<sup>8</sup> Parties Unknown Bundegericht (BGer) (Federal Supreme Court), March 20, 2008, ASA Bulletin, 565 available at [KluwerArbitration.com](http://KluwerArbitration.com) (Switz).

<sup>9</sup> Parties Unknown, Bundegericht (BGer) (Federal Supreme Court), July 28, 2010, Vol. VIII, Issue 11, ITA Arbitration Report, available at [KluwerArbitration.com](http://KluwerArbitration.com) (Switz).

appearance of partiality or dependence. In the current case, having been a State employee in the past, a situation that concerns a vast multitude of citizens of the same State, did not amount to such a striking circumstance capable to diminish the arbitrator's impartiality.<sup>10</sup>

*Germany:* The Berlin Higher Regional Court was requested to remove the Chairman of a tribunal because he and the opposing party's counsel had participated in the same legal education course and group meetings discussing medical law (the law relevant to the dispute). Since the meetings used to take place regularly five times a year, this established, in the applicant's view, a social relationship incompatible with the independence of the arbitrator, a circumstance that should have been disclosed. The court dismissed the request, holding that common participation in meetings for discussing professional matters of common interest does not affect independence.<sup>11</sup>

*Italy:* The claimant applied for disqualification of an arbitrator under Article 815 of the Italian code of civil procedure, on account of the fact that the arbitrator and the respondent's counsel had co-authored several relevant legal publications, co-chaired the Commercial Law Department at the same university and were members of the Board of Professors for a Ph.D. in international trade law in that same university. Accordingly, "a close relationship and an unreserved mutual trust" existed between arbitrator and counsel of the opposing party. The Naples Court of First Instance dismissed the challenge holding that being members of collective academic bodies cannot imply lack of independence in adjudicating a specific case. The same applies to co-authorship, given that this is common practice between academicians, who remain fully independent in the exercise of their extra-academic profession.<sup>12</sup>

*Spain:* The claimant sought to set aside an arbitral award that he considered contrary to public policy because the sole arbitrator and the counsel for the respondent were members of the Council of the Madrid Arbitration Court under the auspices of which the arbitration had been conducted. The Madrid Court of Appeal excluded that the circumstance

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<sup>10</sup> Parties Unknown, Tribunale Federale (TF) (Federal Tribunal) October 15, 2001, ASA Bulletin, 321 available at [KluwerArbitration.com](http://KluwerArbitration.com) (Switz.).

<sup>11</sup> Parties Unknown, Kammergericht (KG Berlin) (Higher Regional Court of Berlin), July 7, 2010, ITA Newsletter, Vol. D(2), 2011 available at [KluwerArbitration.com](http://KluwerArbitration.com) (Ger.).

<sup>12</sup> Unpublished decision of 31 January 2011, reported on in ITA Report, Vol. D(4), 2011.

amounted to a breach of public policy, as being members of the same Arbitration Court did not affect the independence of the arbitrator towards the respondent's counsel, a situation that is not uncommon.<sup>13</sup>

#### **D. Relationships Between the Law Firm of the Arbitrator and a Party or its Counsel**

*Sweden:* The Swedish Supreme Court was requested to set aside an arbitral award because the respondent (Ericsson) was a client of the law firm with which the Chairman of the tribunal shared offices and to which he provided part-time legal advice as an external consultant. The Chairman had failed to disclose this connection, although the nature of this circumstance implied an obvious duty of disclosure. Understandably, the Supreme Court granted the request and set aside the award. It held that the connection amounted to an important business relationship between client and law firm diminishing confidence in the independence and impartiality of the arbitrator when he is employed at the same law firm whose client is a party appearing before him in the proceedings. Although the Chairman himself did not have direct client contacts with that party, the substantive connection between the party and its law firm did not allow him to chair the arbitral proceedings, all the more considering that he had wrongly omitted to reveal that fact.<sup>14</sup>

*Sweden:* The respondent challenged an arbitral award on the ground that the law firm of its own party-appointed arbitrator was acting as counsel in another case in which the respondent was counter-party. The arbitrator objected that, during the arbitration, he had not been aware of his firm's involvement in the other case. The Svea Court of Appeal set aside the award, determining that whether the arbitrator knew of his firm's involvement or not (a point on which the court remained skeptical) was not decisive: "the mere fact that his law firm had accepted to act in the other case created objective conditions of bias." The court did not entirely accept the arbitrator's excuse, determining that he should have been aware of his firm's concurrent involvement, because he was the head of its Stockholm office in which a conflict check had been circulated in advance designating the respondent as a counter-party,

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<sup>13</sup> Santiago María Inés v. Juan Manuel, Nov. 26, 2006 (Madrid Court of Appeal, No. 28079370252010100571), ITA Report, Vol. IX (4) *available at* [KluwerArbitration.com](http://KluwerArbitration.com) (Spain).

<sup>14</sup> Anders Jilikén v. Ericsson, Hogsta Domstolen [HD] [Supreme Court] 2007-11-19, *Stockholm Int. Arb. Rev.*, 2007, 167.



especially in consideration of the significant economic value of the new case. The Appeal Court considered that the above circumstance, left undisclosed during the proceedings, undermined the confidence in the arbitrator's independence and made the tribunal's constitution, and the resulting award, invalid.<sup>15</sup>

*France:* A Greek respondent sought for annulment of an ICC award rendered in favor of an Italian claimant on the ground that the Chairman of the tribunal had failed to make complete and timely disclosure of the connection between the Paris office of his law firm and the claimant's group, a connection that materialized when the arbitration proceedings were reaching their end. The Paris Court of Appeal granted the request and set aside the award, holding that the activities of the arbitrator's law firm, taken as a whole, created a conflict of interests between the Chairman and the claimant, although such activities commenced well after the arbitrator's appointment.<sup>16</sup>

The Italian claimant had objected that the overall activities of the law firm had a negligible value and, more important, that the Greek company, although aware of the above circumstances since long time, had failed to timely challenge the arbitrator, by thus forfeiting and waiving any right to challenge both the arbitrator (during the proceedings) and the award later on. Indeed, the ICC Court had rejected a challenge made by the Greek company against the arbitrator during the last phase of the arbitration proceedings. What was striking was the fact that the challenge was filed with the ICC Court a few weeks after the Tribunal had informed the parties that a draft award had been submitted to the ICC Court for scrutiny, but several months after discovery by the applicant of the facts allegedly giving rise to conflicts, meaning long after the time limit (30 days) prescribed in the ICC arbitration rules that both parties had accepted.

The Paris Court of Appeal completely ignored the defense based on the manifestly belated nature of the challenge, thus endorsing the

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<sup>15</sup> *ProfilGruppen v. KPMG, Hovratt [HovR][Court of Appeals] 2011-09-27, in Karel Daele, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION, 24 INT'L ARBITRATION LAW LIBRARY, 339, (2012) AVAILABLE AT KLUWERARBITRATION.COM (ACCORDING TO WHICH BOTH PARTIES ARE SEEKING COMPENSATION FROM THE ARBITRATOR FOR THE ARBITRAL EXPENSES VAINLY INCURRED AND THE ARBITRATOR HAS BEEN REFERRED TO THE SWEDISH BAR ASSOCIATION'S DISCIPLINARY COMMITTEE FOR BREACH OF PROFESSIONAL RULES ON CONFLICTS OF INTEREST) (SWED.).*

<sup>16</sup> *J&P Avax SA v. Technimot SPA, Cour d'appel [CA] [regional court of appeal] Paris, Feb. 12, 2009, Revue de l'Arbitrage, 186 (Fr.).*



circumvention by the applicant of the procedural rules (ICC) agreed between the parties. It is for this very reason that it has received severe critical comments by French arbitration specialists.<sup>17</sup>

The Italian company appealed the above decision to the French Supreme Court, based on the Greek party's failure to challenge the Chairman within the time limit set by the applicable ICC Rules and on the Appeal Court's failure to decide this point. The Supreme Court granted the appeal, vacating the decision of the Paris Court of Appeal and referring the case for re-trial to the Court of Appeal of Reims<sup>18</sup>.

The Reims Court of Appeal annulled the arbitral award for the second time. The court held that the institutional rules establishing a fixed time limit for challenging the arbitrator "are not binding on the judge of the annulment" (without providing specific reasons for this rather extravagant dictum).<sup>19</sup>

Since the Italian company challenged also the judgment of the Reims Court of Appeal, the matter is now again pending before the *Cour de Cassation*, the decision of which is expected in the next months: if the ICC award is validated, the arbitration will resume on quantum matters; if definitively annulled, the case is over.

Both the Paris and Reims judgments were severely criticized by French commentators on two points. The first is the fact that nobody contested that the arbitrator in question was totally unaware of the existence of the conflict. He could not disclose, at the third year of the proceedings, circumstances that had recently occurred, but were not discovered in the conflict check system of his firm, because the names and nationality of the third parties assisted by the firm could not reveal any connection with the Italian party appearing in the arbitration. The second point is given by the blatant and astonishing disregard by both

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<sup>17</sup> Th. Clay, *La disparition de l'obligation d'indépendance de l'arbitre au profit de l'obligation de révélation*, REVUE DE L'ARBITRAGE, 186 (2009); M. HENRY, *L'obligation d'indépendance de l'arbitre ou le mythe d'Icare*, Chronique de droit de l'arbitrage, 4 (2009); L. Degos, *La révélation remise en question*, Gazette du Palais, 6 (2009).

<sup>18</sup> Technimont SPA v. J&P Avax, Cour de Cassation [Cass] [Court of Cassation] 4 Nov. 4, 2010, in Th. Clay, *L'obligation de révélation de l'arbitre au prisme de l'indiscipline de la cour d'appel de Paris*, Les Cahiers de l'Arbitrage, 1147 (2010) (Fr.).

<sup>19</sup> Technimont SPA v. J&P Avax, Cour d'appel [CA] [regional court of appeal] Reims, Nov. 2, 2011, in Th. Clay, *L'application perlée du règlement d'arbitrage pour la contestation des liens non révélés entre arbitre et conseil*, Les Cahiers de l'Arbitrage, 1109 (2011) (Fr.).

Appeal Courts of the extremely belated challenge, to the extent that the two judgments sponsored the circumvention by the challenging party of the mandatory time limit set-forth in the procedural rules (ICC) that both parties had accepted to apply in their arbitration agreement.<sup>20</sup>

*Switzerland:* A party requested to annul an award because a partner of an arbitrator was acting as counsel in another proceeding against an affiliate of the claimant, the Swiss Federal Court dismissed the request. The reasoning was that the parties in the arbitration and in the parallel court proceedings were different. There was no relationship between the party challenging the arbitrator and the party that instructed his partner to represent it in the parallel proceedings.<sup>21</sup>

*Italy:* A party objected that one of the arbitrators and the law firm of the counsel for the other party had been jointly involved as co-counsel in two important unrelated disputes pending before the Milan Court of First Instance. The connection had not been revealed by the arbitrator when accepting the appointment. The Council of the Milan Arbitration Chamber rejected the objection resolving that there are a few law firms capable of managing complex judicial disputes in the field (financial disputes arising from post-closing M&A operations) and, therefore, it is common practice for them to co-represent clients in the same matter. All the more considering that the matter disputed and the parties to the current arbitration were completely different from and unrelated to the matters to the object and parties of the litigation pending before the Milan judge.<sup>22</sup>

*France:* The Paris Court of Appeal annulled an award because one of the arbitrators had not disclosed that, prior to commencement of the arbitration, he had been counsel in the law firm acting for the respondent and that he had continued to provide legal opinions to the same firm afterwards.<sup>23</sup> However, the decision was then vacated by the *Cour de Cassation*, on the ground that the Court of Appeal had failed to explain

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<sup>20</sup> A. Crivellaro, *The Arbitrator's failure to disclose conflicts of interest: is it per se a ground for annulling the award?*, Liber Amicorum Bernardo Cremades, La Ley, 309 (2010) (disclosing that the author was the counsel for the Italian party in the ICC arbitration in question. He published his own critiques to the 2009 decision of the Paris Court of Appeal).

<sup>21</sup> ISA v. Hong Kong, Tribunal federal [TA] [Federal Court] Feb. 9, 1998, in ASA Bulletin, 634 (1998) (Switz.).

<sup>22</sup> Council of the Milan Chamber of Arbitration. Resolution of 14 May 2005.

<sup>23</sup> Tesco v. Neoelectra, Cour d'appel [CA] [regional court of appeal] Paris, Mar. 10, 2011, ITA Newsletter, (2011) (Fr.).

why the above facts were such as to put into question the impartiality of the arbitrator, which impeded the Supreme Court to exercise its control over the decision of the Appeal Court. The *Cour de Cassation* obviously endorsed the rule requiring the arbitrator to disclose the circumstances that, in the eyes of the parties, may objectively put into question his independence. However, it did not find that the facts of the case amounted to such circumstances and observed that the Court of Appeal had not provided reasons for the contrary, but simply delivered an unsubstantiated decision.<sup>24</sup>

It seems that the Appeal Court was more correct than the Supreme Court: a clear conflict was not disclosed, as it should, and this should have sufficed to persuade the Supreme Court to confirm the appellate ruling irrespective of its adequate or inadequate reasoning.

### **E. Multiple Appointments by the Same Party or Same Law Firm**

*France:* An award was annulled by the Paris Court of Appeal on the ground that the arbitrator had failed to disclose that he was systematically designated as arbitrator in many previous disputes arising from the respondent's general contractual conditions. Given this "permanent business relationship", the arbitrator's independence was excluded<sup>25</sup>.

*Austria:* The claimant requested the Vienna Commercial Court to remove the respondent's nominee, because he had been appointed by the respondent in several earlier arbitrations, all dealing with the same matter, without disclosing the circumstance. Having already pre-judged a number of issues that were relevant also to the current arbitration and having acquired confidential information that he could not share with his co-panelists, the challenged arbitrator had lost independence. Surprisingly, the challenge was rejected. Referring to the practice of Austrian courts, the court recalled that it was quite common for a same judge to deal with a number of disputes between the same parties. This was perceived as an advantage rather than a disadvantage. The court therefore took no issue with the arbitrator's multiple appointments and noted that the tribunal's decisions were in any case to be taken by three arbitrators, two of which were not bound to follow the views of the

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<sup>24</sup> *Société Neoelectra Group c. Société Tesco*, Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., N°11-20.299,1072, LexisNexis SA, (2012) (Fr.).

<sup>25</sup> *SA Serf v. Société DV Construction*, Cour d'appel [CA] {regional court of appeal} Paris, Jan. 29, 2004, *Revue de l'Arbitrage* 709 (2005) (Fr.).

challenged arbitrator, if different. Taking into account the above judicial practice, non-disclosure by the arbitrator was not viewed as irregular.<sup>26</sup>

*Sweden:* The claimant had requested the Svea Court of Appeal to set aside an award because an arbitrator had been appointed three times (included the current case) by the respondent's law firm. Based exclusively on the IBA Guidelines, requiring more than three consecutive appointments for disqualifying the arbitrators, the Court dismissed the request observing that the arbitrator had only received two prior appointments.<sup>27</sup> The decision was subsequently confirmed by the Swedish Supreme Court. Although it noted that multiple appointments by the same law firm create the impression of existing ties between the arbitrator and the appointing firm, upon examination of the facts it concluded that the arbitrator in question worked especially as counsel from which he derived the greatest part of his remuneration. When acting as arbitrator (mostly as chairman), he received appointments from various law firms other than the one representing the respondent. Based on these facts, the Supreme Court concluded that the tribunal had been regularly constituted and the award was valid.<sup>28</sup>

*Switzerland:* The Swiss Federal Court was requested to set aside two ICC awards on the allegation that one of the arbitrators had been appointed to approximately ten arbitrations by the appointing party. The request was rejected. The allegation of multiple appointments had indeed been inspired by a newspaper article and was not supported by any better evidence. Since the challenging party was unable to identify the previous cases, the time of appointment, the parties involved, the appointing parties and the relationship of the previous cases with the respondent in the present arbitration, the challenge was considered unfounded.<sup>29</sup>

*France:* The claimant requested the Paris Court of Appeal to annul an award on the ground of the arbitrator's multiple appointments by the

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<sup>26</sup> *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 Dispute Resolution Int'l 5,7 (2010).

<sup>27</sup> Korsnäs Aktiebolag v. AB Fortum Väme samägt med Stockholms stad, Hovratt [HovR] [Court of Appeal] 2008-12-10 in <http://www.sccinstitute.com/filearchive/3/36913/Öv...>

<sup>28</sup> Nytt Juridskt Arkiv [NJA] [Supreme Court] 2010-06-09 in [://www.sccinstitute.com/filearchive/3/36912/Öv...](http://www.sccinstitute.com/filearchive/3/36912/Öv...)

<sup>29</sup> Unknown parties, Decision of Jan. 11 2010, in G. Von Segesser, *The Swiss Federal Court Dismisses Two Appeals Concerning the Constitution of an Arbitral Tribunal*, available at <http://kluwerarbitrationblog.com>.

same party, although the claimant had no information on the exact number of appointments. Since the respondent refused to provide the missing information, in contrast to the approach taken by the Swiss Federal Court, the court, instead of rejecting the request, appointed an expert to investigate and determine the number of contractual disputes in which the arbitrator had been designated by the same party and to compare them with the number of similar disputes in which another arbitrator had been designated.<sup>30</sup>

### **III. How the European Courts Address Arbitrator's Impartiality**

#### **A. Arbitrator Who Acts or has Acted as Arbitrator or Counsel in Other Similar Cases**

*Netherlands:* In an investor-to-State arbitration against Ghana<sup>31</sup>, one of the arbitrators was challenged by Ghana because he was concurrently acting as counsel in a pending ICSID proceeding where he advocated a legal position contrary to the treaty interpretation pleaded by Ghana in the arbitration. What was questioned was his ability to render an impartial judgment in the arbitration towards Ghana without being inconsistent with his pleadings in the pending parallel case. Ghana suspected he might be influenced by the interest to make an award providing support to his legal defences in the case in which he was an advocate. The Hague District Court shared Ghana's concerns that an arbitrator in a similar situation might be viewed as biased and ruled that the arbitrator could not simultaneously serve in the two cases. He was given a time limit for opting to serve either as advocate in one case, or as arbitrator

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<sup>30</sup> STPIF v. SB Ballestrero, Cour d'appel [CA] [regional court of appeal] Paris, May 16 2002, *Revue de l'Arbitrage*, 1236 (2003) (stating that a similar decision by the same Appeal Court was rendered on 2 April 2003 (*Frémarc v. ITM Entreprises*, *Revue de l'Arbitrage*, 2003, 1231) in which an expert was appointed to determine the number of arbitrations in which the challenged arbitrator had been appointed by the same party in the last ten years compared to the global number of arbitrations involving that party in the same period of time. Repeat appointments of the same arbitrator by the same party have been frequently brought before French courts and in most of the cases the award was annulled) (Fr.); *See also* Th. Clay, *Études et Commentaires/Panorama/Arbitrage*, *Recueil Dalloz*, 44 (2010).

<sup>31</sup> UNCITRAL arbitration *Telekom Malaysia Berhad v. Republic of Ghana*, with seat in The Hague.

in the other.<sup>32</sup> He resigned as counsel in the first case and remained arbitrator in the second.

However, displeased with the arbitrator's continuing participation in the Tribunal, Ghana challenged him again on the ground that, having acted as lawyer in the concurrent case for a considerable time, in the pending arbitration he would take a position prejudicial to Ghana, but the second challenge was dismissed. The court saw no reason to assume that the arbitrator would decide the same legal matters "less open-minded than if he had not defended such points of view before."<sup>33</sup>

*United Kingdom:* The Commercial Court was requested to set aside an interim award due to the fact that the Chairman of the Tribunal, when acting as counsel in an arbitration conducted a few months earlier, had offered the oral testimony of a witness who was eventually found to have produced fraudulently manipulated documents. The same person was now appearing as a key witness before the Chairman, his past counsel, and the Chairman had failed to make any disclosure of these facts. The Chairman had been invited to resign before rendering the award, but refused asserting that his connection with the witness had been very limited and he had not colluded in the exhibition of false evidence. By a perfectly correct decision, the Commercial Court was not persuaded by the Chairman's defence and annulled the award. Any third observer would share the feeling of discomfort for the Chairman's bias, all the more considering that allegations of witnesses' dishonesty were made also in the present arbitration and that the solicitors who had instructed the Chairman to act in the earlier arbitration were also acting in the present case.<sup>34</sup>

*Belgium:* The Brussels Court of First Instance upheld a challenge brought on the basis that the arbitrator had participated in six other arbitrations dealing with the same subject matter and the same kind of bank liability. The court concluded that a justifiable and reasonable doubt existed as to the arbitrator's ability to address the new case with a completely open and free mind in the light of his potential pre-judgement made when deciding the previous cases.<sup>35</sup>

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<sup>32</sup> The Hague District Court, 18 October 2004.

<sup>33</sup> The Hague District Court, 5 November 2004.

<sup>34</sup> A.S.M. Shipping Ltd of India v. T.T.M.I. Ltd of England, [2005] EWHC (Comm), Lloyd's Rep., 375 (2006).

<sup>35</sup> Decision of Dec. 14 2006, in K. Daele, *Challenge and Disqualification...*, 388.

*Switzerland:* Two CAS arbitrations were held to resolve this dispute: the first determined that the employment by Chelsea F.C. of a football player had been terminated by his unlawful conduct; the second determined the damages that the football player had to pay to Chelsea F.C. The player requested annulment of the second award because one of the arbitrators had served in both CAS tribunals and had therefore prejudged the outcome of the second case. Adopting a rather formalistic approach, the Federal Court observed that the two arbitrations concerned different proceedings. Turning to the facts, the Court acknowledged that some doubts could be raised as to the impartiality of the arbitrator who had served in both proceedings, but noted that the second arbitration exclusively dealt with quantum of damages, whereas liability had already been decided in the previous case. Arbitrating the liability issue against the player, it could not be argued that the arbitrator had already prejudged the quantum issue in favour of Chelsea. On this basis, the request was dismissed.<sup>36</sup>

*France:* The Paris Court of Appeal was requested to refuse enforcement of an ICC award on the ground of lack of impartiality by one of the arbitrators. He had participated, in parallel, to another ICC arbitration, involving the same project and the same parties. One case related to a dispute over the construction of a plant; the second related to a dispute over the renovation of the plant. The court was not persuaded that this amounted to a pre-judgment by the arbitrator of the issues decided in the challenged award and dismissed the request to refuse enforcement. According to the court, the rule of due process was not breached by the simultaneous presence of the arbitrator in the two proceedings as proved by the fact that such circumstance did not affect the parties' defensive rights in either case.<sup>37</sup>

## **B. Writings and Public Statements**

*Germany:* The Chairman of an arbitral tribunal was challenged because he was co-editor of a publication to which the respondent's counsel had also contributed. In his contribution, the counsel had advocated law principles similar to those then applied by the arbitral tribunal. The Higher Regional Court of Frankfurt rejected the challenge

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<sup>36</sup> Adrian Mutu v. Chelsea Football Club Ltd, 2008 C.A.S. 1644 (2010), available at <http://www.bger.ch>

<sup>37</sup> Technip v. Asmidal, Cour d'appel [CA] [regional court of appeal] Paris, April 2 1998, Revue de l'Arbitrage, 821 (1999) (Fr.).



because there was no evidence that the Chairman had publicly advocated a specific legal theory, either in the preface of the book, or in other public statements. Therefore, there was no indication that he was partial or influenced by prejudice.<sup>38</sup>

#### IV. Belated Challenges

Relevance is also given by courts to the timing of a challenge for alleged dependence or partiality of the arbitrators.

A bad faith challenging party may decide to challenge the arbitrator and then the award long time after occurrence of the facts of which it was already aware (see the French decisions on *Technimont* saga discussed here above). As commentators underlined in relation to these cases, the Greek challenging party omitted to raise a formal challenge against the arbitrator until it was informed that the draft award was ready to scrutiny by the ICC Court and challenged the award based on the same facts after it had lost the case. Other cases in which the belated challenge had a determinative relevance include the following.

*Switzerland*: The Federal Court was requested to annul a CAS award on the ground of the relationships between the arbitrators and the counsel of one of the parties. However, annulment was denied by the Swiss Federal Court because the circumstances underlying the request were known or should have been known to the challenging party if it made the necessary diligent enquiries at the start of the arbitration. The relationships in question were indeed easy to discover since the sport arbitration community is relatively small. The challenge against the award was considered belated, especially because the challenging athletes had full access to the documents that might have readily revealed the relationships in question.<sup>39</sup>

*Switzerland*: In a similar case, the Federal Court was requested to annul a CAS award for irregular composition of the tribunal. The party challenging the award asserted that it was only after the issuance of the award that it had discovered the existence of a professional relationship between two of the three arbitrators and the counsel of the other party. The court dismissed the annulment request, observing that the

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<sup>38</sup> *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 Dispute Resolution Int'l 5,12 (2010).

<sup>39</sup> *A&B v. International Olympic Committee, International Ski Federation and CAS*, Federal Supreme Court, ASA Bulletin,, 601 (2003).

party requesting annulment could not reasonably be unaware of the professional relationships in question at the start of the arbitration and that, if really unaware, it had the duty to investigate timely and with no particular difficulties considering the close nature of the sport community. Information was publicly available and the court concluded that the claimant, having waited until notice of the award, had lost its right to object to the irregular composition of the Tribunal.<sup>40</sup>

*Switzerland*: The situation was similar to the previous case and the conclusion was identical in a further 2008 decision of the Federal Court.<sup>41</sup>

## V. An Overview of the Case Law

Out of the many cases reported, in only ten cases the non-disclosure by the arbitrator of actual or potential conflicts lead the national courts to grant the remedy applied for by the challenging party, namely annulment of the award in the vast majority of the cases, or removal of the arbitrator in few other cases, or non-enforcement of the award in one case. In the outstanding cases, the application was dismissed.

Applications were granted whenever the non-disclosed facts appeared to the courts so material that disclosure was objectively required, particularly when the arbitrator omitted to reveal:

- (a) his personal relationship with one of the parties;
- (b) his family relationship with the counsel of a party;
- (c) his professional connection to the law firm representing one of the parties;
- (d) the professional services performed by other partners in his law firm on behalf or against one of the parties;
- (e) his past or concurrent participation in other cases in which he advocated a solution conflicting with the position pleaded by one of the parties;
- (f) his interest in the subject matter of the dispute or on its outcome, for instance deriving from his involvement as counsel in parallel similar arbitral disputes;

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<sup>40</sup> Unknown parties, Mar. 20 2008, ASA Bulletin, 656 (2008) (Fr.).

<sup>41</sup> Decision of April 4 2008, ASA Bulletin, 580 (2008).

- (g) his repeat appointments by the same party in the similar matters, so as to create the appearance of a permanent link with the party.

Where application was dismissed, the courts determined that the non-disclosed facts were immaterial or irrelevant, because:

- (a) the facts were too remote or too indirectly linked to the current dispute;
- (b) the facts were in the public domain or readily discoverable with a minimal diligence by the challenging party;
- (c) the facts amounted to an isolated episode of minor significance;
- (d) no evidence was provided that the alleged facts did actually materialize;
- (e) co-authoring books, co-participating in seminars, co-administering academic functions or co-administering arbitral institutions cannot be viewed as circumstances which raise doubts as to independence and impartiality;
- (f) the challenge was unjustifiably belated, which implies waiver or loss of the right to the claimed remedy.

## **VI. Disclosing or Not Disclosing?**

The case law shows that the risks deriving from non-disclosure may be particularly serious. Under any arbitration law provision or institutional rule, an arbitrator has the duty to make an award that will stand as a valid and enforceable decision. The outcome of the dispute may be adversely affected by an imprudent or negligent arbitrator's failure to make transparent, timely and exhaustive disclosures.

The practice shows that the most frequent and delicate cases are those in which it was not the personal conduct of the arbitrator that was in question. In fact, the arbitrator had complete knowledge and control over the facts concerning his own professional life and relationships, disclosure of which presumably exhaust the information to be provided. If it is not because of the arbitrator's reticence, the consequent sanctions are deserved and justified and the arbitrator is exposed to potential liability for damages. Simply said, the facts that an arbitrator must disclose are those that, if known by the parties, would give them an opportunity to challenge the prospective arbitrator. In other words, non-disclosure is sanctioned whenever a legitimate doubt exists that the prospective arbitrator tried, by his reticence, to avoid the challenge.

In conclusion, a prudent arbitrator has the duty to make prompt, full and exhaustive disclosures. If he is doubtful as to whether certain

facts must be disclosed or not, he should resolve the doubt by eventually disclosing rather than non-disclosing.

## **VII. Conflict Checks Within Large Law Firms Should be Improved**

A more difficult scenario materializes when the arbitrator must disclose the professional activities of his own partners, especially when the law firm is made of a large number of partners and is structured through several offices disseminated in different regions. Whereas, at the time of appointment, the conflict-check circulating within the law firm may more easily detect actual or potential conflicts based on the names of the parties appearing in the arbitration, during the course of the proceedings one of the parties may become an affiliate of another company assisted by some of the partners, but the conflict is hard to discover because no external signs exist which might help surfacing the new connection created between the client and the party to the arbitration.

Consequently, large law firms should improve their conflict check systems, to avoid that the arbitrator might be found to have inadvertently passed from independence to dependence at his own surprise. In particular, this might be the source of serious consequences when the finding of the new situation surfaces at a late stage of the arbitral proceedings. In these cases, the possible annulment of the award would destroy a lengthy work for all arbitrators, parties, counsel and experts involved and make the huge costs of the proceedings irrecoverable.

Some law firms wonder whether disclosures should be fully exhaustive, or selective. My advice is that they should be exhaustive in terms of facts that are relevant to the case. The arbitrator is in the position to reasonably identify, with the assistance of his firm, what are the facts that a party needs to know. In doubtful cases, all facts known to the arbitrator or his firm should be revealed and the judgment on their relevance should be left to the parties.

In all cases, it must be considered that non-disclosure is often in itself alone a circumstance that in case of posterior discovery justifies serious suspicions concerning the arbitrator's ability to act independently and impartially.

### VIII. Annulment of the Award Should be an Extreme Remedy

A final reflection should be devoted to the following question: is annulment of the award the fatal remedy in all instances of incomplete or reticent disclosure by the arbitrator?

In my understanding, annulment should be viewed as the inevitable outcome when it is established that a failure to disclose amounts to a culpable omission, for instance because the arbitrator was aware that certain circumstances existed and were relevant, but preferred to pass them over silence. This means that the arbitrator intentionally deprived the parties of the opportunity to consider whether keeping or excluding him from the panel.

In addition, the parties' behavior may also become relevant, especially when they are aware of the non-revealed facts since the outset, but prefer to keep this information as a (secret) weapon in their pockets and use it at a later more convenient stage, for instance when the party understands that its claims are likely bound to fail.

In this context, I firmly hope that the Reims Appeal Court's extravagant opinion, whereby the time limit for a challenge provided in the rules agreed by the parties may be disregarded by the *juge de l'annulation* (sic; § 2.4 above), shall remain an isolated erroneous statement and shall not be followed by any other court.

Before destroying the product of long and costly procedural activities, the domestic judge requested to annul the award should first respond to some fundamental questions, which include the following:

- (i) was the arbitrator aware of the unrevealed facts?
- (ii) did he or his firm carry out a proper conflict check?
- (iii) did the challenging party know the relevant facts irrespective of the arbitrator's statement? Since when? Should it have made its own proper investigations at the time of the arbitrator's appointment?
- (iv) does a belated, sometime extremely belated challenge (see the Paris and Reims appeal rulings in *Technimont* case, § 2.4 above) amount to direct or at least circumstantial evidence of bad faith of the challenging party?
- (v) is the judge bound to apply the procedural arbitration rules obliging the challenging party to disqualify the arbitrator within a given time frame after discovery of the facts?

Depending on the replies, the award will be annulled when inevitable, but confirmed when the arbitrator's good faith is established,

whereas the challenger's bad faith is proved or may be reasonably presumed.

Annulment cannot be taken as an automatic result of a failure to disclose without considering that it harms too many victims: the parties (both, or at least one, of which have no liability for the non-disclosure), the other (innocent) co-arbitrators (unsatisfied for the waste of their contribution in the adjudication process), the arbitral institution (presumably unhappy for the collapse of a case it had itself administered) and, in the end, the need to make substantive justice in the case, frustrated by the annulment.

One should wonder why, at least in case of inadvertent omissions by an unaware arbitrator, alternative and much less injuring remedies are not applied, such as disciplinary professional sanctions to the arbitrator or his firm, for instance in the form of a temporary prevention from exercising activities in the field of arbitration.

This would deter arbitrators and law firms from unsatisfactory conflict check practices, without penalizing the many other victims created by an annulment of the award.