

Is Chairperson Biased when Representing Counterparty in Another Lawsuit?

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In its decision of 6 October 2008 (5A_201/2008), the Swiss Federal Supreme Court had another opportunity to address its practice regarding conflicts of interests of part-time judges and arbitrators. It had stated in earlier decisions that a judge is deemed to be biased if he or she acts or recently acted as counsel for one of the parties in other proceedings. The facts before the Swiss Federal Supreme Court in the case 5A_201/2008 were different in that the chairman of the arbitral tribunal had acted not as counsel of one of the parties in the past, but as counsel of the counterparty of one of the parties (party X) in another lawsuit. X requested that the chairman be declared biased on these grounds.

The Swiss Federal Supreme Court found that a lawyer who also acts as part-time judge or arbitrator should in principle be able to distinguish between his different functions. Hence, one would expect him/her to treat the parties of an arbitration equally even if he/she represented the counterparty of one of the parties in another lawsuit. However, the relevant criterion is whether a judge may be considered biased from an objective point of view. In this context, the Federal Supreme Court pointed out that, as a matter of experience, a party often passes its negative feelings towards its opponent on to its counsel. Hence, many parties consider not only the counterparty, but also its counsel as their opponent. For this reason, the Swiss Federal Supreme Court reached the conclusion that the chairman appeared to be biased due to the mandate in question.

The cited decision was rendered in the context of domestic arbitration proceedings, but is also relevant for international cases. We believe that the findings of the Swiss Federal Supreme Court are sensible as a lawyer may indeed build up negative feelings against the counterparty and may have difficulties to completely ignore them in arbitration proceedings where he or she acts as arbitrator. We would be interested in learning whether courts of other countries have adopted similar views regarding the impartiality of an arbitrator and whether the decision of the Swiss Federal Supreme Court is welcomed in the arbitration community.

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