Has Acting as Arbitrator Become a Risky Business?

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Comments on the Decision of the Paris Court of Appeal Dated 27 March 2018[fn]CA Paris, Pôle 1, Chambre 1, 27 mars 2018, n°16/09386.[/fn]

Neither the author nor Schellenberg Wittmer was personally involved in any of the cases mentioned in this blog, and all information disclosed is publicly available.

The appellant in the case before the French Court of Appeal, Saad Buzwair Auotomotive and Co., (SBA) is a Qatari car distributor who in 2007 concluded two agreements (one regarding Audi and one regarding Volkswagen vehicles) with Audi Volkswagen Middle East Fze (AVME) limited to the distribution of cars, spare parts and after-sales services for the territory of Qatar.

In February 2013, SBA initiated arbitration under the ICC Rules after AVME informed SBA that it would not renew the two distribution agreements. In an award of March 2016, the three-member Paris-seated tribunal fully rejected SBA's claim of USD 150 million, holding that AVME was entitled not to renew the distribution agreements. In April 2016, SBA filed a request to set aside the award. Almost two years later, on 27 March 2018, the Paris Court of Appeal granted the request and annulled the award.

The Paris Court was called upon to decide whether a partner of a German law firm appointed by SBA was conflicted. In the five-page "*whereas*"-decision there were several, also evidentiary, issues at stake. The key findings regarding the issue of

conflict are as follows:

- Based on the 2015/16 edition of a JUVE, a German legal magazine, the Court considered it as established that the co-arbitrator's law firm represented Porsche, an entity of the Volkswagen group, in a case before German state courts in the years 2014 and/or 2015. Since this representation took place during the arbitration, and because this case was important to the firm, such circumstance could create reasonable doubt as to the co-arbitrator's independence and impartiality.
- In addition, the co-arbitrator had not disclosed, when being appointed, that his firm had provided banking law advice to Porsche between June and November 2010. According to the testimony of an in-house counsel of Porsche, this was a one-time occurrence and the fees amounted to EUR 7,520.80.

It is common ground that justifiable doubts as to an arbitrator's impartiality and independence exist if there is, from the point of view of a reasonable third person, a likelihood that an arbitrator "*may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision*" as expressed in GS 2(c) IBA Guidelines on Conflicts of Interest.

The most striking feature of the decision of the Paris Court is that it does not explain why the co-arbitrator's assessment of the merits of the case before him could have been influenced by his firm's representation of Porsche, a representation which was terminated at the time when the award was rendered. The only fact that is mentioned is that Porsche is an entity of the Volkswagen group. The Paris Court obviously assumed that this was *per se* sufficient to constitute an appearance of a conflict.

According to GS (6)(a) IBA Guidelines "*if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest […]*." Furthermore, according to GS 6(b), "*If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party*."

While the IBA Guidelines are obviously not binding, this nevertheless shows the general understanding that an affiliation is not sufficient *per se* to create a conflict, but rather that additional elements must occur. The IBA working group chose the elements “controlling influence”, “direct economic interest”, or “duty to indemnify”, to identify an affiliate to a party in the arbitration. One can consider this threshold as too high but it shows that as a minimum, there must be a *real and actual interest* of the affiliate in the outcome of the arbitration.

Other courts have shown what constitutes an adequate analysis in similar situations and have considered when the representation of an affiliate by the law firm of the arbitrator constitutes an appearance of a conflict.

The Swiss Supreme Court addressed the issue at stake in 2013. The so-called “Nespresso-decision”[fn]DSC 139 III 433 dated 27 August 2013.[/fn] was rendered in the context of patent infringement proceedings before the Federal Patent Court between Nestlé and Denner over Nespresso-compatible coffee capsules. The Supreme Court had to decide on the appearance of a conflict of a judge in the following situation: A French sister company of Denner had instructed a partner of the judge’s law firm regarding trademark matters. The Supreme Court rejected a rigid approach to conflicts in a ‘group-of-companies’ situation which would consist in treating all affiliates as one entity. However, the Supreme Court found that the mother company, Migros-Genossenschafts-Bund, had an immediate interest in all its trademarks, including all trademarks held by any of its subsidiaries, and in related disputes. Therefore, Migros-Genossenschafts-Bund itself was to be treated both as a party to the proceedings before the Federal Patent Court and a client of the judge’s law firm. The Supreme Court, therefore, concluded that there was an appearance of bias.

In another 2013 decision, the Southern District of New York Second Circuit[fn]*Ometto v. ASA Bioenergy Holding A.G.,* 2013 WL 174259 (SDNY), *aff’d*, 2014 WL 43702 (2d Cir.).[/fn] applied § 10(a) of the Federal Arbitration Act providing for setting aside of an award in cases where there was “evident partiality” of an arbitrator. Ometto argued that in three instances the chairperson’s law firm had advised an affiliate of the opposing party. While these mandates were not disputed, Judge Rakoff found no evidence refuting the sworn testimony of the arbitrator that he had no knowledge of the circumstances put forward by Ometto. The mistakes made when recording the conflict could not create evident partiality nor could the deficiency of the law firm’s conflict check system. Therefore, he

rejected the request for setting aside.[fn]Other Circuit courts apply a lower threshold and to date there is no subsequent Second Circuit or Supreme Court decision on "evident partiality" clarifying this issue. The latest Circuit Court decision is Hawaiian Supreme Court decision in *Noel Madamba Contr. LLC v. Romero* (2015); 133 Haw. 447, 329 P.3d 352, 2014 Haw. App. LEXIS 252 (Haw. Ct. App., May 23, 2014).[/fn]

The Swiss Supreme Court discussed the simultaneous representation of an affiliate by the arbitrator's law firm again in 2016 in the "CMS-Case".[fn]See DSC 4A_386/2015 dated 7 September 2016.[/fn] An arbitration partner in the Swiss branch of CMS acted as sole arbitrator. Respondent lost over a damage claim and filed a petition to the Supreme Court to vacate the award. It claimed that only then did it discover a press release of CMS Germany revealing that CMS Germany had represented a German company belonging to the same group of companies as the claimant in the arbitration. The Supreme Court analyzed the specific circumstances and held that that the arbitrator's subjective impartiality could not be doubted since he was undisputedly not aware of the advice provided by CMS Germany to the affiliate of the claimant. Therefore, the arbitrator had no reason to favor the claimant. Regarding the objective impartiality, given that CMS constituted a network of financially independent firms, the link between the arbitrator and claimant's affiliate was too tenuous to be relevant.

The decision of the Paris Court of Appeal is in stark contrast to these decisions. There is no discussion of any reasons why the previous representation of Porsche by the co-arbitrator's law firm could have influenced his decision. Considering the territorial and strictly pecuniary aspect of the dispute between SBA and AVME, it seems difficult to see an overreaching interest of the whole Volkswagen group and thus also of Porsche in the arbitration. Furthermore, the assumed representation was apparently over when the award was rendered. Finally, it is unclear whether the Paris Court assumed that the co-arbitrator was aware of the representation and how this impacted its decision.

As to the second leg of the reasoning put forward by the Paris Court of Appeal, the advice in question was given more than two years prior to the co-arbitrator's appointment. While it should have been disclosed, the relevant question is whether non-disclosure as such justifies setting aside the award. The more convincing and reasonable position is that this is not the case.[fn]See Explanation (c) to GS (3) IBA Guidelines.[/fn] Setting aside has too important consequences to warrant using it

to reprimand an arbitrator whose lack of disclosure was possibly the consequence of circumstances outside the scope of his or her personal responsibility.

In order to maintain the legitimacy of arbitration, the impartiality and independence of arbitrators is of the highest importance. However, courts have the obligation to explain why there is a real likelihood that an arbitrator might have been influenced by factors other than the merits of the case.

Where courts limit themselves to a cursory analysis, accept very tenuous connections to disqualify arbitrators, or take a non-disclosure as such as a basis for setting aside an award, they open the door to potential liability claims against arbitrators. Then, yes, being an arbitrator has become a very risky business.