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The Arbitrator's Duty of Disclosure: Case Law from the International Chamber of the Paris Court of Appeal

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In establishing an International Chamber of the Paris Court of Appeal in 2018, France signalled its desire to make Paris a favoured venue for resolving complex international disputes. The International Chamber has jurisdiction in France over any and all disputes that involve international commercial interest, which include, in particular, disputes related to commercial and transport agreements, unfair competition, and securities transactions.

The International Chamber is also meant to play a key role in international arbitration. It can hear any appeals made against "decisions rendered in the field of international arbitration" — in other words, both applications to set aside international awards issued in French seated arbitrations, and appeals against exequatur orders for awards with a seat abroad. Statistics published by the International Chamber at the end of 2020 confirm its leading role in this arena: on 1 December 2020, over one-half of the 129 cases on its docket were applications to set aside French-seated international awards.

In 2020 and early 2021, the International Chamber issued its first rulings on international arbitration cases. Many involved a fundamental issue directly related to the requirement that arbitrators be independent and impartial: the duty to disclose any circumstances that might affect that independence or impartiality. No fewer than three rulings have been handed down on this question since January 2020 (no.19/07575, 25 February 2020, *Dommo Energia*; no.19/10666, 26 January 2021, *Vidatel LTD*; and no.18/16695, 16 February 2021, *Grenwich Enterprises Ltd*).

These rulings indicate that, while the International Chamber is very much following in the footsteps of previous French case law, it also aims to build up and refine French case law on arbitrators' duty of disclosure. The International Chamber specifically addresses the nature of this duty in its ruling on *Vidatel LTD.*

The International Chamber's Decisions as a Continuation of Existing Case Law

Arbitrators owe an ongoing duty of disclosure

Article 1456 of the French Civil Procedure Code (applicable to international arbitration via article 1506 of the same Code) specifically provides that an arbitrator's duty of disclosure does not end with their appointment; their independence and impartiality must be verifiable throughout the arbitral proceeding. Previous rulings on this issue have frequently reiterated that arbitrators owe a duty of disclosure throughout "the entire arbitration" until "the end of the proceeding".

The recent rulings from the International Chamber have followed this existing case law. In the *Dommo Energia* decision, the International Chamber found that "an arbitrator's duty of disclosure applies both before the appointment is accepted and thereafter, depending on whether the relevant circumstances already exist or arise after acceptance".

Similar language appears in the decision on *Vidatel LTD*, in which the International Chamber stated that "arbitrators must disclose any circumstance that could potentially affect them, or that might cause the parties to doubt their independence or impartiality; this duty applies both before and after accepting their appointment as arbitrator".

The arbitrator's duty of disclosure is partially offset by the parties' "duty of curiosity"

Under French law, the arbitrator's duty of disclosure is not absolute. According to longstanding case law, this duty is partly offset in particular where the circumstances in question are widely known. The parties have a duty to demonstrate a certain degree of curiosity; they cannot complain an arbitrator has not disclosed widely known and easily available facts. However, this caveat with regard to well-known circumstances applies only *before* an arbitrator has accepted the appointment: once the arbitrator is appointed, the parties are no longer under this duty of curiosity and it falls to the arbitrator to disclose any circumstances arising thereafter that might affect their independence.

With respect to the parties' duty of curiosity, rulings from the International Chamber have, again, followed existing French case law.

In the *Dommo Energia* decision, the International Chamber notes that arbitrators are not required to disclose widely known, easily available facts to the parties prior to appointment. Furthermore, guidance has been given on how far the parties are expected to search, confirming that widely known or easily available facts will not include facts that are only available after a "thorough review" and "meticulous perusal" of the arbitrator's website that would require "opening all links to conferences the arbitrator has participated in and reading the content of each publication to which he contributed". In short, while parties must display some degree of curiosity, they are not required to essentially "investigate" the arbitrator's background.

In *Vidatel LTD*, the International Chamber took a similar view, pointing out that

arbitrators are "not responsible for disclosing well-known facts, understood to mean public, easily available information that the parties could not have failed to look at before beginning the arbitration." However, it is worth noting that in this case, the court found that information published in the *Global Arbitration Review* – a publication that is widely known in the field of arbitration, but charges a fee for access – qualified as easily available. The fact that the parties might have to pay a fee to access the information did not release them from their duty of curiosity.

Parties may lose the right to rely on an arbitrator's failure to satisfy the duty of disclosure

Under the general rule laid down in article 1466 of the French Civil Procedure Code, if a party refrains, knowingly and without reason, from making a timely assertion of irregularity before an arbitral tribunal, that party is deemed to have waived its right to do so. Applied to the arbitrator's duty of disclosure, this means parties are required to act as soon as the circumstance they believe undermines the arbitrator's independence and impartiality is revealed. If the parties do not act promptly and fairly, they lose the ability to rely on the undermining circumstance in proceedings to set aside.

The International Chamber upheld this rule in *Grenwich Enterprises Ltd*. and found that the argument based on an arbitrator's lack of independence and impartiality was admissible: the party seeking to have the award set aside was relying on facts that arose after the hearing phase was closed, which the party only discovered after the award had been handed down.

Refining the Definition of the Duty of Disclosure

The Civil Procedure Code is silent as to the exact content and scope of the duty of disclosure owed by arbitrators. Although they must disclose to the parties any circumstances that might affect their judgment or cast reasonable doubt on their independence or impartiality, the Code says nothing specific about how to identify such circumstances. In many decisions, the courts have been satisfied with saying that "the arbitrator's duty of disclosure must be assessed with regard to how well-known the relevant circumstance is, how it relates to the dispute, and how it could impact the arbitrator's judgment."

The generality of this wording puts arbitrators in an awkward position when determining what they should disclose. Arbitrators must share any facts that could, in the eyes of the parties, give rise to a doubt regarding their independence or impartiality. They must therefore imagine themselves in the parties' shoes in order to identify what might seem to have an effect on their judgment.

In *Vidatel LTD*, the International Chamber sought to resolve this tension by offering arbitrators more detailed guidance on disclosure of conflicts for ICC arbitrations. The International Chamber noted that for ICC arbitration, there are recommendations

issued by the ICC on 23 February 2016 ("*Guidance Note on conflict disclosures by arbitrators*"). These recommendations include a non-exhaustive list of circumstances that must be disclosed, arising from existing relationships between an arbitrator (or the arbitrator's firm) and the parties to arbitration (or their affiliates).

Although the ICC Guidance Note is not in itself a source of French law, the Chamber suggested a differentiated approach to the question of disclosure depending on whether or not the circumstance is expressly listed in the ICC Guidance Note. If the circumstance was one of those listed in the Guidance Note, the arbitrator must disclose it (presumably, unless the situation qualifies as well-known, but the International Chamber has not expressly said so).

For all other circumstances, the opposite principle applies: the presumption is that arbitrators are released from the duty of disclosure, according to the International Chamber. However, this principle is not absolute – even where the circumstance is not listed in the Guidance Note, arbitrators must still declare it if it could reasonably cause the parties to doubt their independence, but this "reasonable doubt" must "arise out of a potential conflict of interest for the arbitrator". The conflict may be "direct" if it involves a link between the arbitrator and a party to the arbitration, or "indirect" if it involves a link between the arbitrator and a third party with an interest in the arbitration.

The *Vidatel* ruling has the obvious merit of trying to clarify the actual nature of an arbitrator's duty of disclosure and to help arbitrators draft their statements of independence. However, it raises certain issues that the International Chamber will surely need to clarify at some point.

First, the guidance given by the International Chamber only pertains to ICC arbitration: a distinction is made between circumstances that must be disclosed and those that normally do not, based solely on recommendations published by the ICC. The rule therefore does not apply to non-ICC arbitrations, giving us some reason to fear the emergence of multiple systems that vary according to the type of arbitration, adding unnecessary and undesirable complexity.

Second, the International Chamber's approach raises many questions about how it would apply in practice. For example, would an arbitrator's failure to disclose one of the circumstances expressly listed in the ICC Guidance Note necessarily result in the award being set aside? The Chamber seems to imply this, although it does not specifically say so. In addition, the notion of "reasonable doubt" is not necessarily straightforward to apply in this context, and will probably require further discussion.

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The three decisions issued by the International Chamber address the issue of arbitrator conflicts and the duty of disclosure owed by arbitrators, a highly topical subject internationally at present. These decisions will for sure be taken into account by parties, arbitrators and more generally the arbitration community.

Although these decisions leave certain points unanswered, the fact remains that the Chamber has openly displayed its intention of playing a major role in French

arbitration law, making it a force to be reckoned within the future.

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