

# Kluwer Arbitration Blog

## Disclosing the Elephant in the Case File? Costa Rican Court Sets Aside Award

Felipe Volio Soley (Busse Disputes) · Thursday, May 21st, 2020

The Costa Rican court in charge of deciding upon arbitral matters recently set aside an award on the ground of the arbitrator's failure to disclose a circumstance that could be found in the case file.

In a five-page [judgment](#) dated June 27, 2019,<sup>1)</sup> the **First Chamber of the Supreme Court of Costa Rica** annulled the award, which ruled against the **Costa Rican Electricity Institute (ICE)**, a state-owned company that exclusively manages the electricity system in the Central American country.

### The arbitration

The arbitration was conducted under the 2014 **International Centre for Conciliation and Arbitration, US–Costa Rican Chamber of Commerce (CICA)** Rules and governed by the domestic arbitration law of Costa Rica (**Law 7727**).

The arbitral tribunal ruled in favor of the Claimant, **PH CHUCÁS, S.A.** – a Costa Rican registered company in charge of the development of an electricity power plant under the public tender *200LI-000043-PROV* – and ordered ICE to restore the financial equilibrium of the tender from US\$ 107.5 million to \$280 million, *inter alia*. The arbitration is high profile in Costa Rica due to the amount in dispute and the repercussions that such contingency could have on the finances of the state-owned entity.

The arbitral tribunal was composed by three arbitrators: **Mario Pacheco Flores** (President designated by the co-arbitrators and appointed by CICA), **Fernando Montero Piña** (appointed by PH CHUCÁS), and **Adrián Alvarenga Odio** (appointed by ICE).

### The judgment

Once the award was rendered, ICE discovered that the arbitrator's law firm provided several notarial services to the claimant. The First Chamber found in the [Case No. 989-F-21-2019](#) that the president – Mr. Pacheco – had failed to disclose that he had acted himself as Notary Public in 2011

for the Claimant in one occasion. This public deed in which Mr. Pacheco acted as Notary Public could have been discovered in the arbitration's case file as it formed part of the public tender (subject of the dispute).

Furthermore, Mr. Pacheco omitted to disclose work that was carried out by his law firm in favor of the Claimant and its related companies for the course of 10 years. One of Mr. Pacheco's partners acted as Notary Public in the Claimant's deed of incorporation and served as its agent. The judgment also considered as "critical evidence" the fact that Mr. Pacheco's son used to be part of the Claimant's Board of Directors.

Mr. Pacheco did not disclose these circumstances during the course of the arbitration. In fact, in his Statement of Impartiality and Independence he marked the option "Nothing to Declare".

While all of the documents containing the above-mentioned information can be retrieved from the Public Registry of Costa Rica, ICE did not raise such issues during the arbitration, but only alleged them once the award was rendered.

### **The annulment of the award**

The First Chamber relied on Article 11 of [CICA's Code of Ethics](#) to annul the award. This provision states that the arbitrator's failure to disclose any circumstance that could generate reasonable doubts as to his [impartiality or independence](#) shall be considered as an element of partiality and will entail the arbitrator's removal, even if said circumstance does not justify the arbitrator's removal.

The Court did not analyze the exception established in Article 11(a) of the Code of Ethics which clarifies that "the failure to disclose an indirect connection will not generate a ground for removal". Instead, the Court made reference to the *Herrera Ulloa v. Costa Rica Case* of the Interamerican Court of Human Rights which states that the mere suspicion of partiality is sufficient to exclude a person from deciding a case.

The First Chamber therefore set aside the award due to Mr. Pacheco's failure to disclose the above mentioned links that connected him and his law firm to the claimant and warned the arbitral community to perform "a higher level of assessment of its professional relationships, and the ones of its partners and family members."

The Chamber also acknowledged that some of the documents in which the challenge was based were part of the case file and that all the information forms part of the public domain. Nevertheless, it reasoned that it was not reasonable for ICE to conduct an inquiry when the President was designated by the co-arbitrators and appointed by CICA, as it did not know about the professional connections between the arbitrator and the related entities.

The First Chamber derived the case file to the Costa Rican Bar Association for a thorough investigation of Mr. Pacheco's conduct.

### **An international duty to disclose test**

On March 27, 2018, the Paris Court of Appeal set aside an ICC arbitral award rendered in favor of Audi Volkswagen on similar grounds. In that case, the arbitrator appointed by Audi Volkswagen (Mr. Klaus-Albrecht Gerstenmaier) failed to disclose work carried out during the arbitration by his law firm (Haver & Mailänder in Stuttgart) for Porsche, which is part of Volkswagen's Group.<sup>2)</sup>

Unlike the Costa Rican case, the work performed by Mr. Gerstenmaier's law firm became part of the public domain only after the arbitration was over. Furthermore, Mr. Gerstenmaier had not personally worked on the specific case and he alleged to have had no knowledge about it. Nevertheless, the French Court still found that the arbitrator's failure to disclose such circumstances created doubts as to his independence, and annulled the award.

The English Court of Appeal followed a different approach in 2018. In *Halliburton v Chubb*, the English Court found that even if good practice requires the arbitrator to disclose a circumstance and he fails to do so, a fair-minded and informed observer would not conclude that there is a possibility that he was biased solely because of such failure. The Court considered that "something more is required".

The Court therefore concluded that the lack of disclosure alone did not constitute justifiable doubts as to the arbitrator's impartiality under section 24(1)(a) of the [English Arbitration Act 1996](#).

Halliburton appealed the decision to the Supreme Court of England and Wales and a hearing took place in November 2019. The final decision is still awaited.

## Concluding Remarks

In line with the [IBA Guidelines on Conflicts of Interest \(2014\)](#) "nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so."

Thus, as the English Court of Appeal suitably inferred, nondisclosure of a circumstance that should have been disclosed does not make an arbitrator biased – "something more is required". The First Chamber of Costa Rica set aside the award because of the arbitrator's failure to disclose alone and did not analyze if the circumstances themselves gave rise to justifiable doubts. Such approach should be discouraged.

Arbitrators shall follow the "in case of doubt, disclose" approach in light of the complex commercial context and their duty to render an enforceable award. If an arbitrator fails to disclose a circumstance, courts shall consider whether the challenging party could have reasonably obtained the information in which the challenge is based during the arbitration. Otherwise, parties could become aware of a non-disclosed public connection between the arbitrator and the other party during the arbitration and hide it as a smoking gun for a later challenge in case they do not prevail. That situation seems to have arisen in this case, where the elephant in the room formed part of the case file all along.

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### References

- <sup>1</sup> Judgment from 27 June 2019, PH Chucás S.A. v. Instituto Costarricense de Electricidad, Case No. 989-F-21-2019 from the First Chamber of the Supreme Court of Justice of Costa Rica.
- <sup>2</sup> Ross, Alison. “Audi Volkswagen award set aside in Paris”. *Global Arbitration Review* (29 March 2018).

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