

Arbitrators' independence and impartiality—a new decision from the International Chamber of the Paris Court of Appeal (Rio Tinto France and Rio Tinto Alcan Inc v SAS Alteo Gardanne)

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Arbitration analysis: In a recent decision, the International Commercial Chamber of the Paris Court of Appeal dismissed an application to set aside an International Chamber of Commerce (ICC) arbitration award brought by two Rio Tinto companies (collectively 'Rio Tinto'). The award had been handed down on 10 September 2019 in a dispute that arose between Rio Tinto and Alteo Gardanne ('Alteo') after Rio Tinto sold an aluminium production plant in southern France to Alteo. In support of their application, Rio Tinto argued that the arbitrator appointed by Alteo had breached her duty of independence and impartiality because she had failed to disclose that during the arbitration, the firm where she was a partner at the time had acted on behalf of an Alteo-affiliated company in a dispute that came before the High Court of Justice in London. This case offered another opportunity for the Paris Court of Appeal to develop its case law on the requirements that arbitrators be independent and impartial, and on the disclosure duty they bear, further to a number of rulings handed down on that same subject matter in recent months. Written by Vincent Bouvard, senior associate at Herbert Smith Freehills Paris LLP.

Rio Tinto France and Rio Tinto Alcan Inc v SAS Alteo Gardanne [11 January 2022, No 19/19201](#)

What are the practical implications of this case?

In the decision, the International Commercial Chamber of the Paris Court of Appeal reiterated some of the main rules aimed at guaranteeing arbitrator independence and impartiality. In particular, arbitrators are required to disclose any circumstances that may affect their independence or impartiality before accepting their appointment and during the arbitration. This duty of disclosure does not end with their appointment, and their independence and impartiality must be verifiable throughout the arbitral proceedings.

The mere fact that the omitted disclosure was attributable to a defect in the system for conducting conflict checks at her former firm, rather than to the arbitrator herself, did not release her from the duty of disclosure.

Not all breaches of an arbitrator's duty of disclosure are serious enough to result in the arbitration award being set aside. The failure to satisfy the duty must potentially give rise to reasonable doubt about the arbitrator's independence or impartiality in the eyes of the parties. All circumstances of the case are relevant when evaluating whether or not there is such reasonable doubt.

What was the background?

In 2012, Rio Tinto sold a production plant located in southern France to Alteo. Alteo's shares were later sold in their totality to a private equity firm belonging to the HIG Capital group. The parties had signed several contracts including a guarantee of liabilities, under which Rio Tinto undertook to indemnify Alteo for certain types of environmental damage. A dispute over the guarantee arose between the parties, and when no amicable solution was found, Alteo initiated arbitration. On 10 September 2019, the Arbitral Tribunal issued an award ordering Rio Tinto to pay various amounts to Alteo.

In the application to set aside, Rio Tinto argued that a conflict of interest had arisen during the arbitration for the arbitrator appointed by Alteo, and that she had breached her duty of disclosure.

In support of its case, Rio Tinto cited the discovery that the firm where the co-arbitrator was a partner at the time had acted on behalf of an Alteo affiliated company in a dispute before the High Court while

the arbitration was ongoing. Since the co-arbitrator had failed to disclose this during the arbitration, Rio Tinto decided it was 'objective cause for setting aside the award'. At the very least, Rio Tinto argued, the facts showed there was reasonable doubt as to whether the arbitrator appointed by Alteo was truly independent and impartial.

What did the court decide?

The court began by pointing out that both the ICC Rules of Arbitration and article 1456, paragraph 2 of the French Civil Procedure Code—which applies to international arbitration through article 1506 of that same code, requires all arbitrators to disclose any circumstances that could potentially affect them or cast doubt on their independence or impartiality in the eyes of the parties. The duty of disclosure applies before and after the arbitrator accepts the appointment: an arbitrator's independent and impartiality must be verifiable throughout arbitral proceedings.

The court then stated, in time-honoured fashion, that a lack of independence or impartiality cannot be inferred simply from an arbitrator's failure to disclose information that should have been disclosed. The undisclosed information must be capable of giving rise to a reasonable doubt in the parties' eyes about the arbitrator's independence or impartiality, ie, 'a doubt that would arise for a person in the same situation with access to the same reasonably available information'.

In applying these principles, the court found that the arbitrator appointed by Alteo should have disclosed that the firm where she was a partner at the time had acted on behalf of an Alteo affiliated company in a dispute before the UK High Court. The court relied—as it has in the past (see *PT Ventures v Vidatel LTD*, [26 January 2021, No. 19/10666](#))—on the Note to Parties and Arbitral Tribunals on the Conduct of Arbitration according to the ICC Rules of Arbitration, which gives guidance on what circumstances arbitrators need to disclose. The court also noted that while the failure to disclose was not the arbitrator's doing, but rather caused by errors in the conflict check system at her former firm, she was not thereby released from her duty of disclosure to the parties.

A co-arbitrator's failure to make a disclosure is not automatic grounds for setting an award aside. Rio Tinto bore the burden of showing that the circumstance gave rise to reasonable doubt about the co-arbitrator's independence or impartiality in the case. The court found that Rio Tinto had not succeeded in demonstrating this. In reaching its conclusion, the court cited the following circumstances:

- as soon as the co-arbitrator had been appointed by Alteo, she disclosed that the firm where she was a partner had advised various companies from the HIG group (and the Rio Tinto group) in cases unrelated to the arbitration, and Rio Tinto did not raise any objections whatsoever on this point
- to facilitate arbitrator appointments, the parties had formed a procedural agreement in which they agreed to consider that 'the fact that a co-arbitrator (or law firm with which the arbitrator is associated) may have had some relationship to either party in this case or to a parent or affiliated company in a context unrelated to the present dispute should not, in and of itself, prevent the arbitrator from being appointed and confirmed by the ICC Court of Arbitration'
- the co-arbitrator had no connections to the HIG group company involved in the dispute before the High Court. The dispute was also unrelated to the arbitral proceedings
- there was a chain of 11 companies between Alteo and the HIG company involved in the High Court proceedings
- the firm where the co-arbitrator was a partner at the time had also acted for Rio Tinto in other matters

In light of the circumstances of the case, the court found that the co-arbitrator's failure to satisfy the duty of disclosure was not likely to give rise to a reasonable doubt about her independent or impartiality in the eyes of the parties.

Case details:

- Court: Paris Court of Appeal (International Chamber)
- Judges: François Ancel; Fabienne Schaller; Laure Aldebert
- Date of judgment: 11 January 2022

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