The Scope of the Obligation of the Arbitrator and the Parties to Disclose and Disclose Cases of Conflict of Interest with Emphasis on French Case Law

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Abstract

The independence and impartiality of the arbitrator constitute the fundamental pillars of legitimacy and effectiveness in international commercial arbitration. Guaranteeing these principles hinges on the clear definition and proper execution of two key duties: the duty to disclose and the duty to identify (investigate) circumstances that may give rise to conflicts of interest. The duty to disclose mandates the explicit declaration of all past and present relationships and facts that could reasonably cast doubt on the arbitrator's impartiality, whereas the duty to identify is a preliminary step, obliging the arbitrator to actively search for and inquire about the existence of such potential conflicts. While a just arbitral process requires the cooperation of all participants, a comparative study of national laws, institutional rules (such as the ICC and IBA), and particularly the robust jurisprudence of leading jurisdictions like France reveals that the scope and nature of these duties are distinct and asymmetric for the arbitrator and the disputing parties. The primary objective of this analytical and comparative research is to delineate the boundaries of these responsibilities to prevent the abuse of party rights, as well as tactical manipulation during the arbitral proceedings or the subsequent annulment stage. This study establishes that the arbitrator's duty to disclose is an inherent and perpetual obligation, closely linked to the public policy of arbitration, and is therefore non-waivable by the parties. The scope of this disclosure is significantly broader than mere statutory grounds for challenge, compelling the arbitrator to announce any circumstance that might "legitimately give rise to doubts regarding his or her impartiality." The criterion for assessing these circumstances often adopts a nuanced or intermediate approach, integrating the objective standard of the "reasonable person" with the subjective expectations and particular concerns of the parties; a position firmly established in French case law which mandates broad disclosure, even if the arbitrator is personally convinced of their own impartiality. The primary consequence for breaching this duty, beyond the challenge of the arbitrator at the outset, is the potential annulment of the arbitral award—a severe sanction heavily emphasized by national courts, including the French Court of Cassation, aimed at preserving public confidence in the arbitral process. Complementing the duty to disclose, the arbitrator's obligation to identify potential conflicts is equally crucial. The arbitrator cannot passively rely on

immediately known information but is required to undertake a “reasonable effort” and “proper and moderate inquiry” to check their relational history with the parties, their counsel, and co-arbitrators; this investigative requirement is reinforced by the IBA Rules and case law, signifying that the arbitrator’s obligation transcends a merely reactive or passive role. These stringent duties remain incumbent upon the arbitrator throughout all stages of the proceedings, from acceptance of the appointment until the issuance of the final award, and their breach can form the basis for the arbitrator’s civil liability stemming from contractual fault and professional misconduct. Contrasting the arbitrator's extensive duties, the central question revolves around the parties’ duty to identify conflicts of interest. In principle, parties are not obligated to disclose information that might lead to the disqualification of their chosen arbitrator, as their primary goal is self-interest. However, arbitral law and case law, particularly following repeated attempts to exploit non-disclosure as a tactical ground for later annulment, have gradually imposed a limited duty to inquire (obligation de curiosité) upon the parties. Justified by the principle of “good faith” and the prohibition of “inconsistent conduct,” this duty requires the parties, at the time of the arbitrator's appointment and within the initial deadline for challenge, to at least investigate information that is publicly and readily accessible. French case law, notably in the Synergy decision and subsequent rulings, has emphasized that if a potential conflict (such as a publicly documented relationship within a company or a public case) could have been easily discovered through a basic initial search, the parties’ failure to inquire limits their right to rely on the arbitrator’s non-disclosure for annulment later. This limited duty applies only at the initial stage of the arbitration, and the burden of proving that the information was readily available rests upon the party invoking the failure to inquire. The conclusion of this research highlights an asymmetric balance in the division of disclosure and identification responsibilities: the arbitrator, as the guardian of arbitral impartiality, bears a broader and continuous responsibility for active identification and disclosure throughout the entire arbitration, while the parties’ obligation is narrowly confined to an initial duty of inquiry, limited to public information, and restricted to the prescribed time for challenge. This disparity in the scope of duty serves as an effective mechanism for strengthening good faith in arbitration, preventing delaying tactics and award annulment maneuvers, while simultaneously upholding the foundational principles of arbitrator independence and impartiality, which are essential for arbitral justice. This comparative framework offers valuable guidance for reforming national arbitration laws and domestic judicial practices.

Keywords: Duty of arbitrator, Impartiality, Independence, Disclosure, Conflict of Interest, Arbitrator Challenge.

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