CMS arbitrator cleared of law firm network conflict

Sebastian Perry 04 October 2016

Hansjürg Schürmann

The independence of a sole arbitrator at CMS in Zurich was not compromised as a result of counsel work undertaken by another firm in the CMS network, a Swiss court has ruled.

The Swiss Federal Supreme Court held on 7 September (http://res.cloudinary.com/lbresearch/image/upload/v1475601612/bge_4a_386_2015_of_7_49116_1820.pdf) that an ICC award rendered by **Hansjürg Schürmann** of CMS von Erlach Poncet in favour of an affiliate of German engineering group Bosch should stand, despite his failure to disclose that CMS Hasche Sigle in Germany

had acted for Bosch in an unrelated matter.

Schürmann was nominated by the ICC's Swiss national committee to serve as sole arbitrator in a dispute between Italian construction group Piacentini and Dutch-registered hydraulics company Bosch Rexroth arising from a ship-lift accident at the Italian port of Livorno in 2007. He issued his award in May 2015, dismissing all claims against the Bosch entity and awarding it €2.27 million in costs.

Piacentini did not bring ordinary set-aside proceedings within the 30-day deadline provided for under Swiss law, but filed in August last year for "revision" of the award – an extraordinary remedy that allows the court to send an award back to the arbitral tribunal or to a new tribunal if new facts come to light.

The Italian company said it had only just discovered a press release (https://cms.law/bg/DEU/News-Information/Bosch-Software-Innovations-advised-on-e-mobility-by-CMS) issued by CMS Hasche Sigle in December 2014 concerning its advice to Bosch Software Innovations on the implementation of a smartphone app for drivers of electric cars. Piacentini contended that the Swiss and German offices should be considered as one and the same law firm, and that the financial benefit derived from the Bosch instruction justified Schürmann's disqualification.

But the court found that, while the CMS network describes itself on its website as a "law firm" and puts great emphasis on the close ties between its 3,000 lawyers in 60 offices, it is made up of 10 legally independent law firms that do not share their profits with each other.

It also said the growing size of law firms was a commercial reality

that the International Bar Association had sought to address in its guidelines on conflicts of interest in international arbitration. In the present case, the court said none of the situations listed in the guidelines as potentially giving rise to a conflict applied here. In particular, Schürmann and CMS von Erlach Poncet had not advised either of the Bosch companies nor derived any income from them.

Contacted by *GAR*, CMS von Erlach Poncet said, "The court properly applied the test under the IBA guidelines and we are very happy that it recognised the independence of the arbitrator in this case."

In a commentary (http://thouvenin.com/wp-content/uploads/2016/09/Arbitration-Newsletter-Switzerland-of-27-September-2016.pdf) on the decision, Swiss firm Thouvenin says the court has "taken a liberal approach" that reflects its awareness of the legal market for international arbitration. However, it suggests the decision does not give law firm networks "a free ride" and that the independence of an arbitrator still has to be analysed based on the particular circumstances.

Thouvenin notes that the judgment also touches on "a yet unresolved issue", namely whether material facts revealing that an arbitrator was not independent can form a valid ground for revision of an award.

The court acknowledged that scholarship and case law was divided on the question but suggested that such a petition ought to be admissible provided that new facts reveal an arbitrator to have actually lacked independence and the petition is filed in time. However, the court said it did not have to rule definitively on this question and invited the Swiss legislature to clarify the

grounds for revision.

Thouvenin notes that Switzerland's arbitration statute is currently under review by the Department of Justice, supported by a team of experts made up of **Gabrielle Kaufmann-Kohler**, **Felix Dasser**, **Daniel Girsberger** and **Elliott Geisinger** – and that the absence of any provisions in the statute for revision of awards rendered in Switzerland was one of the main reasons for the reform initiative.

Revision applications are rare in Switzerland. The last time the court granted such an request was in 2009 when it vacated (http://globalarbitrationreview.com/article/1028701/swiss-court-cancels-decade-old-icc-award-after-new-evidence-surfaces) an ICC award rendered 12 years earlier against French defence contractor Thales, after a criminal investigation revealed that one of the witnesses in the case had lied to the tribunal at the hearings.

That case related to a 1991 deal to sell six frigates to Taiwan's navy that became the subject of a political scandal in France because of allegations that Thales paid kickbacks to Taiwanese officials to secure the contract. Thales paid US$875 million (http://globalarbitrationreview.com/article/1030466/the-end-of-the-frigates-affair) to Taiwan in 2011 to settle another ICC award which found it had breached a "no agents or commissions" clause in the frigates contract.

Piacentini Costruzioni SpA v Bosch Rexroth BV

Before the Swiss Federal Supreme Court (4A_386/2015)

Counsel to Piacentini

- LPPV Avocats

Julien Perrin in Lausanne

Counsel to Bosch

- Pestalozzi

Michael Kramer and **Matthias Wiget** in Zurich

In the ICC arbitration

Sole arbitrator

- **Hansjürg Schürmann** (Switzerland) (appointed by the ICC Court)

Counsel to Piacentini

Unconfirmed

Counsel to Bosch Rexroth

- Houthoff Buruma

Dirk Knottenbelt and **Thomas Stouten** in Rotterdam

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