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*(Translated from French)*

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**THE REPUBLIC OF FRANCE  
IN THE NAME OF THE PEOPLE OF FRANCE**

**COURT OF APPEAL OF PARIS**

**Section 5 - Chamber 16  
International Commercial Chamber**

**RULING OF 14 SEPTEMBER 2021**

(No. /2021, 8 pages)

Case number: **19/16071 - Portalis No. 35L7-V-B7D-CAQ26**

Decision on appeal before the Court: An international arbitration award handed down in Paris on  
in ICC Case No. by the arbitral tribunal comprised of [H&A] as  
a sole arbitrator.

**CLAIMANT IN THIS ACTION:**

**The National Highway Authority**

An Independent Pakistani Body

Office address: 28 Mauve Area Section G-9/1c, Islamabad, Pakistan

Represented by its legal representatives

Represented by: , Barrister-at-Law of Selarl , member of the Paris  
Law Society (Law Society Membership # ) and by , of  
Law Society (Law Society Membership # ) Barristers-at-Law and members of the Paris

**RESPONDENT IN THIS ACTION:**

**China International Water and Electric Corporation**

A Chinese Company

Registered office: CWE Mansion # 3, Liu Pu Kang St, West District, Beijing, People's Republic of China

Represented by its legal representatives

Represented by: , Barrister-at-Law and member of the Paris Law  
Society (Law Society Membership # ) and i , Barrister-at-  
Law and member of the Paris Law Society (Law Society Membership # )

**MEMBERS OF THE BENCH:**

Pursuant to the provisions of articles 804 and 907 of France's Rules of Civil Procedure, the case was tried on 18 May 2021 at a hearing open to the public, the lawyers not being opposed thereto, before the Lord Justice of Appeal Fabienne Schaller, Presiding Justice, charged with the report and the Lord Justice of Appeal Laure Aldebert, Associate Justice.

The following justices reported on the trial hearing during the deliberations of the Court:

Lord Justice of Appeal François Ancel, Presiding Justice  
Lord Justice of Appeal Fabienne Schaller, Associate Justice  
Lord Justice of Appeal Laure Aldebert, Associate Justice



**Clerk:** at the appellate trial hearing: Inès Vilbois.

**RULING:**

The ruling was handed down after adversarial proceedings and made available at the Administrative Office of the Court, the parties having previously been notified as required by virtue of the second paragraph of Article 450 of France's Rules of Civil Procedure. The official copy of the ruling was signed by Lord Justice of Appeal François Ancel, the Presiding Justice and Najma El Farissi, the clerk to whom the official copy of the ruling was given by the justice who signed it.

**I. STATEMENT OF FACTS AND PROCEEDINGS**

1. The Chinese company China International Water and Electric Corporation (hereinafter "CWE") was hired by the Pakistani company National Highway Authority (hereinafter "NHA") to build a section of highway between Faisalabad and Gojra in Pakistan under an agreement entered into on 3 December 2009 based on the standard-form agreement of the International Federation of Consulting Engineers ("FIDIC").
2. By virtue of subsection 20.4 of the general terms of the agreement, the parties submitted several of their disputes in connection with the agreement to a Dispute Board. Two disputes were unable to be resolved by the Dispute Board: one was a claim related to the costs generated by the delay in the works for which CWE attributed the responsibility to NHA and the other one implicated the contractual liability of the project owner. The Dispute Board permanently resolved the other disputes, which the parties approved.
3. CWE submitted a request for arbitration with the Secretariat of the International Court of Arbitration (hereinafter the "ICC Court") on 13 April 2015, pursuant to subsection 20.6 of the general terms of the agreement.
4. On 26 May 2015, NHA submitted three names of arbitrators for the appointment of a sole arbitrator, proposing among them the appointment of Mr [CA], which was accepted by CWE. The arbitrator, Mr [CA], signed his statement of independence on 11 June 2015 and his appointment was confirmed by the General Secretary of the ICC Court on 24 June 2015.
5. The sole arbitrator handed down a provisional award on [blank] pursuant to which it was considered that the decision of the Dispute Board relating to the claim of CWE for compensation for the delays in the project were valid and binding and that NHA was to pay the amount awarded against it, pending the impending final award.
6. This award was included in the final award handed down on [blank], which held that NHA was supposed to pay to CWE [various sums of money].



7. NHA filed notice of an action for the annulment of the arbitration award with the Court of Appeals of Paris on 31 July 2019, on grounds that the sole arbitrator was not independent and impartial.

## **II. CLAIMS OF THE PARTIES**

8. In its last legal brief served electronically on 10 May 2021, NHA asked the Court, based on Article 1520(2) of France's Rules of Civil Procedure and the general principles of international arbitration, to:

- FIND that the ground for annulment raised by the National Highway Authority based on the irregularity of the composition of the Arbitral Tribunal is admissible;
- FIND that the Arbitral Tribunal was irregularly constituted;
- ANNUL the arbitration award appealed, handed down in Paris on [CH. A] by the arbitral tribunal comprised of [CH. A] in ICC Case No. [CH. A];
- ORDER China International Water and Electric Corporation to pay EUR 100,000 to the National Highway Authority by virtue of the provisions of Article 700 France's Rules of Civil Procedure;
- ORDER China International Water and Electric Corporation to pay all court costs;
- DISMISS all claims, pleas and submissions of China International Water and Electric Corporation.

9. In its latest legal brief served electronically on 6 May 2021, CWE asked to court to:

- DISMISS the action for annulment of the arbitration award handed down by [CH. A], the sole arbitrator on [CH. A] under the aegis of the ICC International Court of Arbitration ([CH. A]);
- ORDER the Pakistani government's National Highway Authority to pay EUR 100,000 to the China International Water and Electric Corporation by virtue of the provisions of Article 700 France's Rules of Civil Procedure;
- DISMISS all of its claims, pleas and submissions;
- ORDER it to pay costs by virtue of the provisions of Article 700 France's Rules of Civil Procedure;

## **III. DEFENCES OF THE PARTIES AND GROUNDS FOR THE DECISION**

The Sole Ground Based on the Irregular Constitution of the Arbitral Tribunal

- **The ground based on the existence of an undisclosed ties between the sole arbitrator and Sinohydro**

10. NHA argued, on the basis of Article 1456 of France's Rules of Civil Procedure, Article 11 of the 2012 ICC Arbitration Rules and the IBA Guidelines on Conflicts of Interest in International Arbitration, 23 October 2014, that the sole arbitrator should have informed the parties of his ties with a company named Sinohydro, to the extent that it was alleged in the arbitration that Sinohydro was implicated as an unreported subcontractor of CWE, and this failure to disclose was such as to create reasonable doubt in the mind of NHA concerning the independence and the impartiality of the arbitrator.



11. It explained that it learned about these ties only after the award was handed down. For instance, it said that it discovered that Mr [CA], the sole arbitrator, was appointed to serve as a member of a Dispute Board on 4 April 2016 in a dispute between Sinohydro Group Ltd and a Pakistani company Wapda about a hydro-electric installation in Pakistan and that, to the extent that it was claimed during the arbitration that CWE had used Sinohydro as a subcontractors in the dispute that was the subject of the arbitration and the name of the company was cited during the arbitration proceedings, in the written statements and during the arbitration hearings, it should have caused the arbitrator to disclose his ties with Sinohydro.

12. In response, CWE argued that the arbitrator did not violate his duty to disclose. It maintained that Sinohydro and CWE have no capital or financial ties, it did not enter into a subcontracting agreement with Sinohydro and there was nothing that the arbitrator needed to disclose and that could have created a reasonable doubt in the eyes of the parties about his independence or impartiality.

### **WHEREFORE:**

13. Under Article 1456, paragraph 2, of France's Rules of Civil Procedure, applicable to international arbitration by virtue of Article 1506 of the same rules: *"An arbitrator, before accepting his or her mandate, must disclose any situation likely to affect his or her independence or impartiality. He or she also under a duty to disclose forthwith any circumstance of a similar nature that may arise after accepting his or her mandate."*

14. As a result, the duty to disclose of the arbitrator applies both before he or she accepts the mandate and after, based on the offending pre-existing situations or that may arise after said acceptance.

15. Whilst the specific content of the duty to disclose is not detailed in Article 1456 of France's Rules of Civil Procedure, it relates to what can reasonably create a doubt, in the mind of the parties, about the independence or the impartiality of the arbitrator. What is more, in the case in point, with respect to arbitration carried out under the aegis of the ICC, in order to better assess the scope of his or her duty, an arbitrator can in particular refer himself or herself to the guidance notes issued in such matters by this arbitration centre.

16. In this regard, the 23 February 2016 ICC guidance note on conflict disclosures by arbitrators, the arbitrator or his or her law firm must consider specifically certain situations:

- the arbitrator or prospective arbitrator or his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates;
- the arbitrator or prospective arbitrator or his or her law firm acts or has acted against one of the parties or one of its affiliates;
- the arbitrator or prospective arbitrator or his or her law firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute;
- the arbitrator or prospective arbitrator or his or her law firm acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise;
- the arbitrator or prospective arbitrator or his or her law firm is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality;
- the arbitrator or prospective arbitrator has a professional or close personal relationship with counsel for one of the parties or its law firm;
- the arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates;
- the arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case;
- the arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel for one of the parties or its law firm.





17. In any case, the failure by the arbitrator to disclose one of these situations is not sufficient to constitute a lack of independence or impartiality. The undisclosed information would still have to create in the mind of the parties a reasonable doubt concerning the impartiality and the independence of the arbitrator.
18. In order to be characterised, this reasonable doubt must be the result of a potential conflict of interest involving the arbitrator, which can be either direct because it relates to a connection with a party or indirect because it pertains to a connection that the arbitrator has with a third party that has an interest in the arbitration.
19. In this regard, when the potential conflict of interest is only indirect, the assessment of reasonable doubt will depend in particular on the intensity and closeness of the connection between the arbitrator, a third party with an interest and one of the parties to the arbitration.
20. It is in light of these considerations that it must be determined, in the case in point, whether Mr **CAJ**, the sole arbitrator, should have revealed that he was appointed to serve as a member of the Dispute Board in connection with a dispute between Sinohydro Group Limited of China and the Pakistani company WAPDA after he was appointed as arbitrator and whether the fact of having omitted to report it is such as to create in the mind of NHA a reasonable doubt concerning the impartiality and the independence of the arbitrator so as to lead to the annulment of the award rendered.
21. In the case in point, it is not contested that no company named Sinohydro Group Limited of China was involved in the arbitration proceedings between NHA and CWE, since reference to the names of third-party companies, Sinohydro as well as Qingdao, appeared only in the written witness statement of dated 25 January 2018 referencing "independent Chinese companies" that had worked on the project and mentioning in this connection the employees of Qingdao and of Sinohydro and on page 33 of the document entitled "skeleton arguments on behalf of respondent" filed by NHA in preparation for the hearings from 18-23 June 2018 which makes reference in §12.3.3 to the Chinese staff of Qingdao and of Sinohydro working at various places. This in essence was unapproved subletting [5/E/5]. In addition to the fact that said companies so referenced were described as independent both by the witness and by NHA itself and a possible loan of labour was mentioned and not subletting, the reference cannot under any circumstances be used to consider that it generated a duty to disclose for the arbitrator.
22. In effect, based on the legal opinion of Dr , while there does indeed exist a Chinese company named Sinohydro Corporation Ltd (or Sinohydro Group Ltd), it does not have any capital or financial ties with CWE. It appears from this opinion that the two companies are members of separate groups, they do not have officers in common, trade under different marks and the 2018 profit and loss statement do not show any financial ties between these companies.
23. Based also on the hearings, there is no company called Sinohydro Power Development Co Ltd referred to wrongly in exhibits produced in the proceedings by HNA. As a matter of fact, the D&B report dated 18 November 2019 and the CBC-Primasia report dated 25 December 2019 produced in Court by NHA wrongly mentioning an affiliate link between CWE and a company named Sinohydro Development Power Co Ltd, a non-existent company, so named because of a translation mistake between Chinese and English. NHA recognised the erroneous nature of this assertion, the translator having confused with CWE Power Development Co Ltd, which is the only affiliate of CWE. NHA having admitted this in its last submissions and supplied a corrected report in support of it, it no longer contested that there is no CWE affiliate named Sinohydro and acknowledged its mistake.



24. There are thus no ties between Sinohydro and CWE.
25. Whilst a Sinohydro company was indeed mentioned by NHA in the allegations discussed at the hearing during the arbitration proceedings in the aforementioned "skeleton" document, it was in reference to a prohibited use of subletting and the absence of coordination between the companies involved in the project, arguing, according to its theory, that CWE had allegedly left a part of the works unsupervised on two separate sections of the highway entrusted, according to the account of a witness, to subletters, including Sinohydro and Qingdao and the lack of coordination was, according to NHA, a cause of the delay in the works—delay attributable to CWE—which the arbitrator did not determine to be the case, considering that there was no evidence to support this contention after taking into account the examinations and cross-examinations of the witnesses, which did not corroborate any subletting and even less the involvement of a Sinohydro company.
26. Therefore, NHA wrongly maintained, which it later backed down from, that Mr [CA] had had an indirect connection with CWE through one of its affiliates as a member of the Dispute Board of Sinohydro, which turned out not to be an affiliate of CWE and had no ties to it.
27. Absent any capital or financial ties between Sinohydro and CWE, the fact that the employees of third-party companies were mentioned during the arbitration to argue the contested existence of subletting, and potentially a loan of labour, and the fact that Mr [CA] had been a member of the Dispute Board of Sinohydro, are therefore insufficient to establish any ties whatsoever, direct or indirect, between the arbitrator and CWE or that Sinohydro had an interest in the litigation.
28. With respect to the alleged subletting, it is furthermore not up to the Court to re-adjudicate whether the employment contracts produced in the arbitration and the list of employees working on the projects make it possible or not to establish the existence of subletting or a loan of labour, which the arbitrator rejected.
29. What is more, the mere fact that the name of a Sinohydro company, without specifying whether it involved Sinohydro Group Ltd, was mentioned during the hearings by a witness while maintaining that Chinese staff worked on the project and that the alleged subletting ties were brushed aside, could not suffice to qualify Sinohydro as a third party with an interest in the proceedings, and this all the less because it has not been established that Sinohydro Group Ltd had anything to do with the staff about whom the witness indicated that they were employees of Sinohydro or Qingdao with details.
30. Similarly, the mere fact that a witness mentioned the name of a company of which the arbitrator was a member of the Dispute Board and whose staff allegedly worked on the project, when none of the parties had ties to said company, which had no interest in the litigation, is not liable to create a reasonable doubt concerning the independence of the arbitrator.
31. Based on all of the foregoing, the appointment in 2016 of the arbitrator as a member of the Dispute Board in litigation involving Sinohydro Group Ltd of China which did not give rise to any particular statements on his part during the disputed arbitration could not, in any case, have created in the mind of NHA a reasonable doubt concerning his independence or his impartiality.
32. Consequently, the claim by NHA on this account is dismissed.
- **The ground based on the partiality of the award in favour of CWE**
33. NHA argued that the attitude of the sole arbitrator during the hearings vis-à-vis the representatives and witnesses for NHA and the description that he gave of their interventions in



the award also constitute a situation that creates a reasonable doubt concerning his impartiality.

34. In response, CWE argued that the decision of the arbitrator is reasoned and based on exhibits and witness testimonies of which he determined within his sole discretion the relevance and the credibility and contested the terms of the award suggesting a certain degree of partiality on the part of the arbitrator.

#### **WHEREFORE:**

35. Independence must be determined based on an objective approach consisting of characterizing precise and verifiable factors external to the arbitrator and impartiality assumes the absence of partiality and bias liable to affect the judgment of the arbitrator.

36. If a reasonable doubt concerning the impartiality of the arbitrator can, depending upon the case, arise as a result of the award itself, to the extent that the content of the reasoning of the arbitration award is not subject to review by the judge adjudicating the action for annulment, the doubt still has to be based on precise and objective factors related to the structure of the award or its very terms, which could suggest that the attitude of the arbitrator was partial or, at the very least, could create the perception that it was. An award that settles a dispute in favour of one party to the detriment of the other necessarily contains an assessment of the facts necessary for the reasoning, although it does not reflect any partiality. The arbitrator can decide to rely on some exhibits or witness testimonies instead of other exhibits or witness testimonies and accept the argument put forward by one of the parties instead of the other.

37. In the case in point, the grievances raised by NHA in relation to some passages of the award, of which it cited only a few examples in order to show the lack of impartiality of the sole arbitrator are not relevant and in actual fact invite the court to review the award on the merits, which the judge adjudicating the action for annulment is not permitted to do.

38. This is the case with the grievance raised that the arbitrator had found that NHA had waived the notice requirement in relation to the EoT claim despite the testimony of Mr [CB]. It indicated, although that does not denote any partiality, that the arbitrator had said to Mr [CB] that *"It's the NHA's position in this arbitration that it did waive—any notice requirement in relation to the EoT claim. Are you aware of that?"* These references are insufficient to show any bias.

39. Similarly, the grievance of NHA relating to the failure by the arbitrator to take into account the procedural conduct of CWE and specifically the alleged failure to take into account the extension of the arbitration proceedings due to CWE and the order for NHA to pay at a 6% interest rate per annum is not evidence of a lack of partiality of the arbitrator, all the more because NHA failed to prove any dilatory behaviour on the part of CWE in the conduct of the arbitration proceedings or that it had asked the sole arbitrator to sanction CWE for any such behaviour.

40. Equally, the complaint that the sole arbitrator dismissed the ground of appeal of NHA based on the limitation period may not be accepted by the court insofar as this decision is based on the assessment by the sole arbitrator of evidence laid before him and in particular the witness testimony given.

41. So it was, lastly, with the assessment of the testimonials produced by CWE and the qualifiers used by the arbitrator when finding the compelling or probative weight of the CWE witnesses when that was not the case with regard to the NHA witnesses for which the arbitrator brushed aside any probative value.



42. Under cover of a lack of impartiality of the sole arbitrator, NHA actually invites the appellate court to review the merits of the award, which is prohibited.

43. It shall not be upheld.

#### **Expenses and Court Costs**

44. NHA, the losing part, is ordered to pay costs.

45. In addition, it must be ordered to pay to The National Highway Authority, which had to undertake unrecoverable expenses to assert its rights, compensation by virtue of Article 700 of France's Rules of Civil Procedure that it is only fair to set at EUR 100,000.00.

#### **IV. DECISION**

On these grounds, the Court:

1. Rejects the action for the annulment of the arbitration award handed down on
2. Orders the National Highway Authority to pay to China International the amount of EUR100,000.00 by virtue of Article 700 of France's Rules of Civil Procedure.
4. Orders the National Highway Authority to pay court costs.

The Clerk

Najma El Farissi

The Presiding Justice

François Ancel







I, Granville Wesley Fields,  
sworn translator,  
French/English, certify that  
the preceding is an exact  
translation of the original  
and of the attached copy  
in French

This document is assigned  
the number 2021-2822

Signed and stamped *ne varietur* in  
Paris, France  
on 8 December 2021