



Arbitration panel not impartial owing to close ties to a party in commercial dispute

In today's **Chamber judgment**¹ in the case of [Beg S.p.a. v. Italy](#) (application no. 5312/11) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights

The case concerned the arbitration of a dispute involving a hydroelectric-power agreement for power generation in Albania involving the applicant company and ENELPOWER, a company which had been spun off from ENEL, the former State power company. It related to, in particular, the impartiality of the arbitration panel, as one of its members (N.I.) had been on the board of ENEL and had worked as that company's lawyer.

The Court found in particular that owing to N.I.'s close ties to ENEL and thus connections to ENELPOWER, it could not be said that the arbitration panel had been objectively impartial, leading to a violation.

Principal facts

The applicant, Beg S.p.a., is a company registered in Italy which operates in the sector of the construction and management of hydroelectric power plants and the installation of renewable energy plants.

In 1996 the applicant company contacted ENEL (a formerly State-owned electricity and gas provider) to see if it would be interested in distributing the power generated from a hydroelectric plant it was building in Albania. At that time N.I. was vice-president and sat on the board of ENEL. ENEL declared its interest and ultimately an agreement was signed between Beg S.p.a. and ENELPOWER S.p.a. (which had recently been spun off from, but was still owned by, ENEL) in 2000.

Pursuant to the agreement, future disputes would be taken to the Arbitration Chamber of the Rome Chamber of Commerce (ACR). Disagreement came in mid-2000 when ENELPOWER was unhappy with the audit of the applicant company's concession in Albania. Arbitration proceedings were opened by the applicant company, which sought the termination of the cooperation agreement and damages of around 130 million euros (EUR).

On 28 December 2000 ENELPOWER appointed N.I. as its arbitrator. At about this time N.I. was representing ENEL in a civil dispute.

According to the Government, on 25 November 2002 the ACR dismissed all the applicant company's counterclaims but the arbitrator appointed by the applicant, G.G., refused to sign; according to the applicant, no decisions were reached and G.G. never expressed an intention not to sign.

Beg S.p.a. became aware that N.I. had been working as counsel for ENEL. The ACR made its award against it on 25 November 2002, dismissing G.G.'s later complaints, including a demand for the withdrawal of N.I. The Rome District Court also twice rejected applications to have N.I. withdrawn.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On an unspecified date, the applicant lodged a claim against the ACR for negligence, seeking compensation of EUR 374,482.91, which was dismissed by the Rome District Court. The court ruled that, among other things, the ACR could not be held responsible for N.I.'s failure to declare a conflict of interest and it had no obligation to require an explicit negative disclosure.

The applicant company appealed against the arbitral award. That appeal was dismissed by the Rome Court of Appeal and later, on 15 November 2010, by the Court of Cassation. The latter court stated that the existence of a link between N.I. and ENELPOWER resulting in an "alignment of interests" in a specific outcome of that very dispute had not been demonstrated.

Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair trial) of the European Convention on Human Rights, the applicant complained that the arbitrator N.I. had not been impartial owing to his professional links with ENEL, impinging on its rights.

The application was lodged with the European Court of Human Rights on 21 January 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Ksenija **Turković** (Croatia), *President*,
Krzysztof **Wojtyczek** (Poland),
Alena **Poláčková** (Slovakia),
Péter **Paczolay** (Hungary),
Gilberto **Felici** (San Marino),
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),

and also Renata **Degener**, *Section Registrar*.

Decision of the Court

Article 6

The Government argued that in agreeing to arbitration, parties voluntarily waived some of their Convention rights. The Court reiterated that Article 6 § 1 gave everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal. The tribunal must be independent and impartial.

There was no dispute between the parties that arbitration had been entered into voluntarily. However, the Court emphasised that that decision on the part of Beg S.p.a. had been prior to N.I.'s appointment as an arbitrator. It did not agree with the Government's argument that the fact that the Beg S.p.a. had not challenged the lack of an explicit negative disclosure demonstrated the waiver of its right to have its dispute settled by an independent and impartial tribunal. The Court adjudged that the reasons advanced by the domestic courts and the Government were based on a presumption of knowledge – that the applicant company was in fact aware of the professional activities of N.I. – for which there was no real evidence. It also stated that the applicant company had not waived its right to having the courts guarantee the independence of the arbitration proceedings and compliance with Italian law.

The Court determined that N.I. had been acting as ENEL's lawyer when appointed arbitrator, and that that company had owned 100% of ENELPOWER and had had close ties at that time. In the light also of N.I.'s having previously been vice-chairman and on the board of ENEL, the Court considered that Beg S.p.a.'s fears concerning the impartiality of N.I. to have been objectively justified.

There had been a violation of the Convention.

Just satisfaction (Article 41)

The Court held that Italy was to pay the applicant 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 35,000 in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.