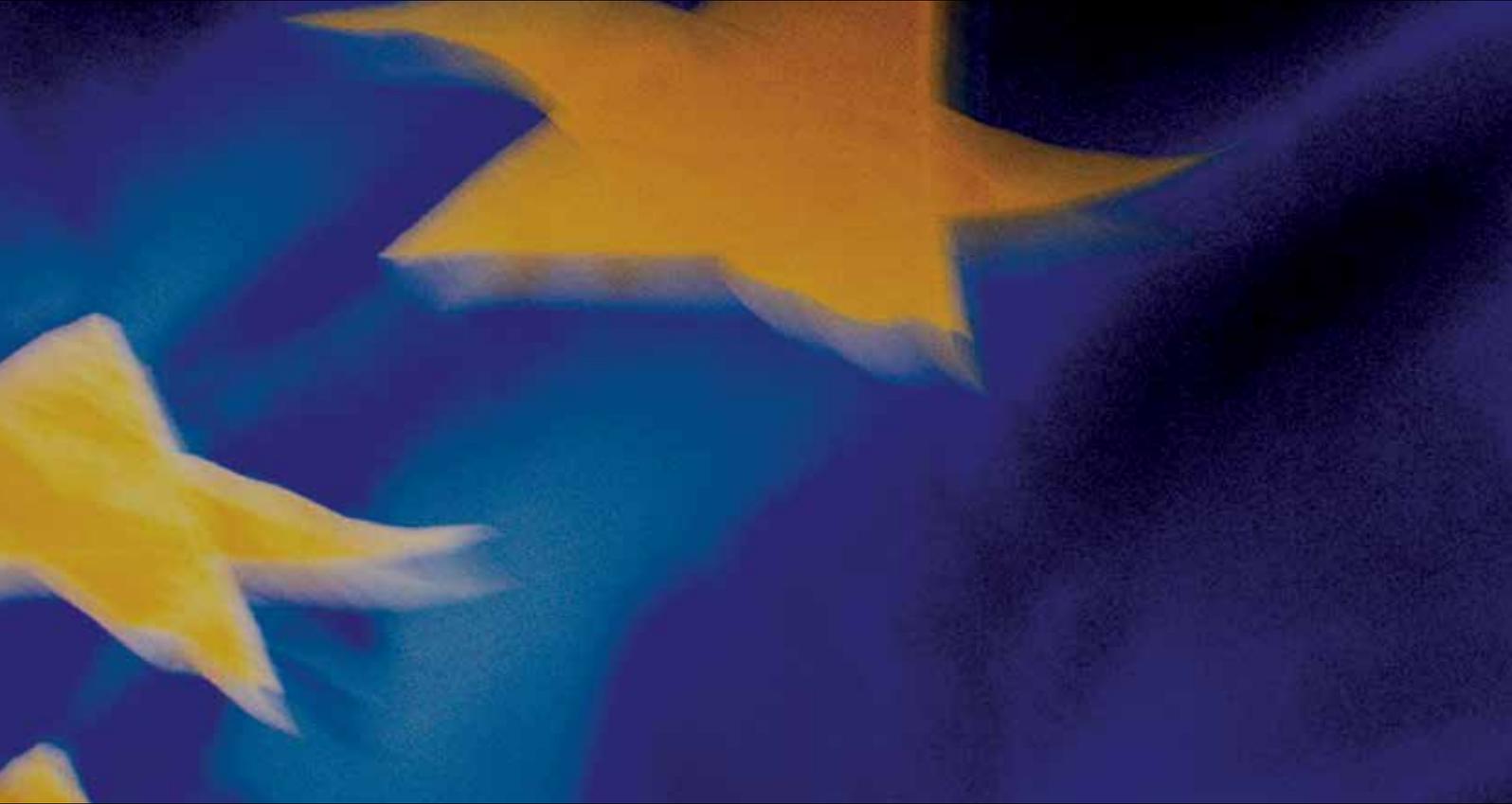


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France promulgated a new law on arbitration on 13 January 2011 which was widely commented upon. This law generally reflected well-established case law, and was, as such, largely uncontroversial.¹ This new law has unsurprisingly given rise to few issues of interpretation or application.

The two major topics that subsequently arose, in 2012 and 2013, were either not directly addressed (in respect of the impecuniosity issue) or only briefly so (in respect of the disclosure obligation) in the new law of 2011: these are the impecuniosity of a party and arbitrators' obligation to disclose, respectively.

Impecuniosity of a party

The question relating to the impecuniosity of a party in France is relatively new.

It appeared first in the *Pirelli* case, in which an Italian company, Pirelli, signed a licence agreement with LP, a Spanish company. According to this agreement, LP had the exclusive licence on the production and sale of specific shoes, and in return had to pay royalties to Pirelli. LP stopped paying the royalties and insolvency proceedings were initiated against LP. Pirelli brought an action before the ICC, which rendered an award against LP.

In deciding an action to set aside the award by LP, the Paris Court of Appeal annulled the award on 17 November 2011 because LP's counterclaims had been considered as withdrawn by the ICC and LP did not pay its share of the advance on arbitration costs. The Court considered this to be an excessive measure, violating the right of access to justice and the principle of equality between parties, as LP had been deprived of its right to submit its counterclaims.²

On 28 March 2013, the Court of Cassation reversed the judgment thereby reversing the annulment of the award. The refusal by a tribunal to consider a party's counterclaims violates the aforementioned principles only if the counterclaims were 'inseparable' from the claims, which the Court of Appeal did not research at all.³

On 26 February 2013, the Paris Court of Appeal ruled again on the topic of impecuniosity of a party.

In that case, *Lola Fleurs*, the franchisee, brought an action against Monceau Fleurs, the franchisor. *Lola Fleurs* had sold its goodwill and Monceau Fleurs disagreed with the sale price. Despite the presence of an arbitration clause in the franchise agreement, *Lola Fleurs* brought an action against the franchisor before national courts, alleging that it had been prejudiced by the franchisor's excessive prices. *Lola Fleurs* was alleging that national courts were competent as the arbitration clause was 'manifestly inapplicable' because of *Lola's* inability to pay the arbitration costs. Forcing *Lola Fleurs* to resort to arbitration would deprive it of its right of access to justice.

The Court of Appeal rejected this argument: the arbitration clause cannot be 'manifestly inapplicable' because of *Lola's* financial inability to pay arbitration costs.⁴ The efficiency of the arbitration clause was thus preserved. However, the Court indicated

that the arbitral tribunal itself has to guarantee and facilitate access to justice.

These two judgments confirm that an impecunious party, as any party, will have access to arbitral justice. But such right is limited.

In *Pirelli*, the Court of Cassation reversed the Court of Appeal's judgment, for lack of a legal basis. It confirmed the principle of the right of access to justice enunciated in the Court of Appeal's judgment, but restricted it.

In *Lola Fleurs*, the Court confirmed that it is the arbitral tribunal's duty to guarantee the right of access to justice, and thus the right of access to arbitration: the arbitration clause will be maintained, even if one party is impecunious.

Thus, the right of access to justice is guaranteed for defendants (*Pirelli*) as well as for claimants (*Lola Fleurs*).

Those judgments have been well accepted in France. However, some comments can be made.

First, in *Pirelli*, the concept of 'inseparability' of claims and counterclaims does not exist in civil procedure. According to the French courts, a counterclaim will now be admissible if it is 'sufficiently linked' to the claim. This required 'inseparability' is thus likely to be the subject of extensive and maybe unnecessary litigation.

Second, in *Lola Fleurs*, the Court decided that impecuniosity can never be the cause of the 'manifest inapplicability' of an arbitration clause. However, this might be conceivable in exceptional circumstances. For example, what happens if arbitrators, because they have not been paid, refuse to render an award? Would the parties be forbidden to go before national courts and thus be subjected to a denial of justice? Those questions still have to be answered.⁵

Conflicts of interests and obligation to disclose

According to article 1456 of the French Code of Civil Procedure, applicable to international arbitration according to article 1506 of the same Code:

The arbitrator shall, before accepting his mission, disclose any circumstance that is likely to affect his independence or impartiality. He shall also promptly disclose any circumstance of this nature that might arise after he has accepted his mission.

As explained by Tim Portwood in the previous edition of this chapter, conflicts of interests have been the subject of extensive litigation for the past few years. Tim Portwood described the *Tecnimont v Avax* case, which was still pending when he wrote his article.

The extensive scope of the obligation to disclose *Avax* brought annulment proceedings against an award rendered in 2007. The Paris Court of Appeal upheld the application and

annulled the award in 2009. The Court of Cassation reversed the decision in 2010 on unrelated grounds.⁶ The case was then remitted to the Reims Court of Appeal, which confirmed the annulment of the award on 2 November 2011.⁷

In this case, the chairman of the tribunal, Mr SJ, was a partner at a global law firm (JD) which advised Tecnimont itself, one of Tecnimont's subsidiaries (Sofregaz) and two of its parent companies (Edison and EDF) in six different cases. Mr SJ, however, was unaware of those links; but the Reims Court of Appeal decided that this lack of awareness by Mr SJ did not matter: the sole fact that Avax did not receive appropriate and complete information on time is sufficient to cast doubts on the arbitrator's independence. The arbitrator has to provide all information about him and his law firm.⁸

This judgment has been largely interpreted by some authors as creating an obligation of total disclosure for the arbitrator, applicable even to facts that the arbitrator does not know about. In order to fulfil such an extensive disclosure obligation, the arbitrator has an obligation of investigation, according to the same authors. It has also been argued that this extensive obligation to disclose was replacing the arbitrator's obligation of independence and impartiality.⁹

However, such an interpretation might have been too broad.

First, in *Tecnimont*, the fact that Mr SJ was the chairman of the arbitral tribunal probably had an impact on this extensive scope of his obligation to disclose. Indeed, the Court itself states that 'the arbitrator's obligation of information, especially when he is the chairman, [is aimed at] strengthening the parties' confidence in the arbitral tribunal'.¹⁰

Second, it is technically possible for an arbitrator to breach his obligation to disclose without breaching his obligation of independence and impartiality: both obligations should not be confused, because only the latter is considered to be of public policy.¹¹

After *Tecnimont*, the courts may have realised that such an extensive obligation to disclose was not really pragmatic. Indeed, an obligation of 'total disclosure' about the arbitrator and his law firm does not seem technically practicable, and not even necessary.¹² Some authors have even declared that 'the extension of the scope of the obligation of disclosure seems to have been carried away'.¹³

The narrowed scope of the obligation to disclose

The courts seem to have tempered the scope of this obligation by assessing more precisely the importance of the unrevealed fact.

For example, a party brought a civil liability action against an arbitrator, because he did not reveal the fact that he attended – without speaking at – a colloquium which was organised by a trade union whose hostility against this party was well-known and which the adverse party and its counsel attended. The Court of Cassation dismissed the appeal on 4 July 2012 and ruled that an arbitrator did not have to reveal the fact that he occasionally attended this colloquium, as such circumstances were not likely to question his independence and impartiality.¹⁴

Another case from 2012 confirmed this tendency by the French courts to limit the scope of the obligation to disclose post-*Tecnimont*. In it, the arbitrator failed to reveal that, seven years prior to his appointment, he had worked for more than 10 years as an attorney at Freshfields. An associate from this law firm was acting as counsel for one of the parties, Neoelectra. The arbitrator had also provided several legal opinions for Freshfields during the course of the arbitration on unrelated matters, which he also omitted to disclose.

When Tecso learned of these facts, it sought the annulment of the award on the basis that this failure to disclose had deprived it of the right to challenge the arbitrator. The Paris Court of Appeal annulled the award, but the Court of Cassation reversed this decision on 10 October 2012.

Indeed, it ruled that the Court of Appeal had 'failed to demonstrate how those elements were likely to cast a reasonable doubt in the parties' minds as to the arbitrator's independence and impartiality'.¹⁵

The Court of Cassation reasoned that a court cannot simply rely upon an undisclosed fact in order to annul an award, but must further determine that it is 'likely to cast a reasonable doubt in the parties' minds as to the arbitrator's independence and impartiality'. It accordingly falls on the party applying for the annulment of an award in such circumstances to demonstrate that the undisclosed facts were likely to cast a doubt in its mind as to the arbitrator's independence and impartiality.¹⁶

The *Tecso* case was then remanded to the Lyon Court of Appeal, which agreed with the Court of Cassation: that the arbitrator had no obligation to disclose the above-mentioned facts.¹⁷

This solution seems more reasonable than the one adopted in *Tecnimont*, given that every undisclosed fact cannot constitute a ground for the annulment of an award. The obligation to disclose is limited to what can reasonably be expected from an arbitrator.¹⁸ It is unrealistic in this regard to expect an arbitrator to disclose facts whose relation to the dispute and potential influence on the arbitrator's independence or impartiality was unknown to the arbitrator himself. Indeed, in *Tecso*, it was not even demonstrated that the arbitrator had ever met Neoelectra's counsel, as they did not work at Freshfields at the same time. Neoelectra's counsel was also acting in her own name, and not that of Freshfields.¹⁹

The scope of the obligation to disclose is still broad for arbitrators

However, there is no doubt that an arbitrator's obligation to disclose is still broad and burdensome. Judges still show some severity in their assessment of an arbitrator's violation of his obligation to disclose.

For example, an award was annulled in October 2013 because of 'the deliberately truncated and simplistic nature of the declaration of independence' given by one of the co-arbitrators. Indeed, he had failed to mention in his declaration of independence and impartiality that he was collaborating on diverse projects with one of the party's counsel.²⁰

In another case, an arbitrator revealed in his declaration of independence that he had been appointed 'several times' by the nominating party, without providing further specifics as to the number, frequency or regularity of such appointments. Nor did he disclose subsequent nominations by this party during the course of the arbitration. It transpired that the arbitrator had been appointed by the same party on more than 34 occasions through to the end of the arbitration: namely, on 12 occasions in the year prior to his appointment in the arbitration in question and on a further 24 occasions during the ensuing proceedings.

The French judges annulled the award because the arbitrator should have disclosed such information. Indeed, such regular appointments by the same party constitute a significant volume of business between the appointed arbitrator and the appointing party, and are likely to cast a reasonable doubt in the parties' minds as to the arbitrator's independence and impartiality. The lack of disclosure by the arbitrator was held to violate the right to due process which is protected by procedural public order.²¹

Finally, French courts have held that arbitrators do not need to reveal public, official or well-known information such as:

- the fact that the partner of the arbitral tribunal's chairman was the executive director in a company, a major shareholder of which was also one of the party's shareholders: this information was sufficiently well-known as it was public and easy to find on the internet;²² or
- the fact that, two or three years earlier, the chairman of the arbitral tribunal acted as co-counsel together with the counsel of one of the parties in two very high-profile lawsuits, and participated with the counsel of the same party in a working group whose report had been published.²³

Notes

- 1 T Portwood, *The European, Middle Eastern and African Arbitration Review 2013*, 'France', Global Arbitration Review.
- 2 Paris Court of Appeal, 17 November 2011, No. 09/24158; F-X Train, 'Impécuniosité et accès à la justice dans l'arbitrage international (à propos de l'arrêt de la Cour d'appel de Paris du 27 novembre 2011 dans l'affaire LP c/ Pirelli)', *Rev arb* 2012, p267.
- 3 French Court of Cassation, 28 March 2013, No. 11-27.770; P Chevalier, 'L'affaire Pirelli resituée dans son contexte', *Cahiers de l'arbitrage 2013*, No. 3, p585; L Weiller, 'Retour sur l'effectivité du droit au juge arbitral', *Procédures* 2013, No. 6, comm 189.
- 4 Paris Court of Appeal, 26 February 2013, No. 12/12953.
- 5 C Seraglini, 'Droit de l'arbitrage', *JCP G* No. 27, 1 July 2013, doct 784; P Chevalier, 'L'affaire Pirelli resituée dans son contexte', *Cahiers de l'arbitrage 2013*, No. 3, p585; A Pinna, 'La confirmation de la jurisprudence Pirelli par la Court of Cassation et les difficultés pratiques de garantir au plaideur impécunieux l'accès à la justice arbitrale', *Cahiers de l'arbitrage 2013*, No. 2, p. 479; F-X Train, *Rev arb* 2013 No. 3, p746; T Clay, 'Arbitrage et modes alternatifs de règlement des litiges', *D* 2013, p2936; M de Fontmichel, 'L'accès à l'arbitrage de la partie impécunieuse' in 'Chronique de droit de l'arbitrage no 11 (1re partie)', *Petites affiches* 2014, p4.
- 6 T Portwood, *The European, Middle Eastern and African Arbitration Review 2013*, 'France', Global Arbitration Review.
- 7 Reims Court of Appeal, 2 November 2011, No. 10/02888.
- 8 Reims Court of Appeal, 2 November 2011, No. 10/02888; L Kante, 'Lorsque l'obligation de révélation se transforme en obligation d'investigation' in 'Chronique de droit de l'arbitrage no. 9 (Suite et fin)', *Petites affiches*, 17 July 2012, No. 142, p3.
- 9 M Henry, 'Note – 2 novembre 2011, Cour d'appel de Reims', *Rev Arb* 2012, p120, section 4, 5; T Clay, 'Arbitrage et modes alternatifs de règlement des litiges', *D* 2012, p2991; L Kante, 'Lorsque l'obligation de révélation se transforme en obligation d'investigation' in 'Chronique de droit de l'arbitrage no. 9 (Suite et fin)', *Petites affiches*, 17 July 2012, No. 142, p3.
- 10 Reims Court of Appeal, 2 November 2011, No. 10/02888.
- 11 M Henry, 'Note – 2 novembre 2011, Cour d'appel de Reims', *Rev Arb* 2012, p120, section 5.
- 12 M. Henry, 'Note – 2 novembre 2011, Cour d'appel de Reims', *Rev Arb* 2012, p120, section 12.
- 13 C Jarrosson, 'A propos de l'obligation de révélation: une leçon de méthode de la Court of Cassation', *Rev arb* 2013, p130.
- 14 French Court of Cassation, 4 July 2012, No. 11-19.624.
- 15 French Court of Cassation, 10 October 2012, No. 11-20.299.
- 16 C Jarrosson, 'A propos de l'obligation de révélation: une leçon de méthode de la Court of Cassation', *Rev arb* 2013, p130.
- 17 Lyon Court of appeal, 11 March 2014, No. 13/00447.
- 18 C Jarrosson, 'A propos de l'obligation de révélation: une leçon de méthode de la Court of Cassation', *Rev arb* 2013, p130.
- 19 S Jarvin, 'Eclairages sur l'étendue de l'obligation de révélation' in 'Chronique de droit de l'arbitrage no 10 (1re partie)', *Petites affiches*, 29 April 2013, No. 85, p7.
- 20 Paris Court of Appeal, 29 October 2013, No. 12/17423; T Clay, 'Arbitrage et modes alternatifs de règlement des litiges', *D* 2013, p2936.
- 21 French Court of Cassation, 20 March 2013, No. 12-18.238; T Kaissi, 'Consécration d'une obligation de révélation étendue' in 'Chronique de droit de l'arbitrage no 11 (suite et fin)', *Petites affiches*, 28 January 2014, No. 20, p6; T Clay, 'Arbitrage et modes alternatifs de règlement des litiges', *D* 2013, p2936.
- 22 Paris Court of Appeal, 28 May 2013, No. 11/17672 ; T Clay, 'Arbitrage et modes alternatifs de règlement des litiges', *D* 2013, p2936 ; J Ortscheidt, 'Droit de l'arbitrage', *JCP G* No. 52, 23 December 2013, doct 1391.
- 23 Paris Court of Appeal, 29 October 2013, No. 12/05854 and No. 12/05855; T Clay, 'Arbitrage et modes alternatifs de règlement des litiges', *D* 2013, p2936.



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