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Paris Court of Appeal rules on duties of due diligence and disclosure in arbitration (AGI v CFH & Ors)

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Arbitration analysis: in a decision dated 14 October 2014, the Paris Court of Appeal confirmed and clarified the previous position developed by the French Court of Cassation in the Jarvin saga, concerning the independence of arbitrators. Xavier Nyssen, partner in Dechert's International Arbitration practice, assesses the decision in AGI.

Paris Court of Appeal, Pôle 1 - Chambre 1, 14 October 2014, No. 13/13459

In a decision rendered on 14 October 2014, the Paris Court of Appeal confirmed and clarified the previous position developed by the French Court of Cassation in the *Jarvin* saga (Court of cassation, 10 October 2012), concerning the independence of arbitrators.

Conflicts of interests in International Arbitration have been the subject of extensive litigation in France for the past few years. Following the *Tecnimont v Avax* decision (Reims Court of Appeal, 2 November 2011, No. 10/02888), some authors argued that French courts created an obligation of total disclosure for the arbitrator, applicable even to facts the arbitrator may not directly know about. To comply with this extensive obligation to disclose, an arbitrator had an obligation of extensive investigation.

Such an extensive obligation to disclose was hardly practicable and subsequent to *Tecnimont* French courts have narrowed the scope of this obligation by assessing more precisely the importance of an unrevealed fact.

Laying the groundwork--*Tecso v Neoelectra*

Tecso v Neoelectra French Cour de cassation, 10 October 2012, No. 11-20.299

The *Tecso v Neoelectra* case from 2012 illustrates this tendency. In that case, the arbitrator failed to reveal that seven years prior to his appointment as arbitrator, and following his nomination by Neoelectra, he had worked for more than ten years as 'of counsel' at Freshfields, of which an associate was currently acting as counsel to Neoelectra. After leaving Freshfields, the arbitrator carried out a few legal opinions for this firm, a fact which he also failed to reveal (French Cour de cassation, 10 October 2012, No. 11-20.299).

When Tecso learned about these facts, it applied for the annulment of the award, claiming that this failure to disclose deprived it of its right to challenge the arbitrator. The Paris Court of Appeal annulled the award, but the French Cour de cassation reversed the appeal decision on 10 October 2012. 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' (Fn 1).

According to the Cour de cassation, courts cannot simply note that an element has not been revealed in order to annul an award; it also has to be demonstrated how this element was 'likely to cast a reasonable doubt in the parties' minds as to the arbitrator's independence and impartiality'. Such a statement also means that

the party applying for the annulment will have to demonstrate that the unrevealed elements were likely to cast a doubt in its mind as to the arbitrator's independence and impartiality (Fn 1).

The Court of Appeal's decision in AGI

Paris Court of Appeal, Pôle 1 - Chambre 1, 14 October 2014, No. 13/13459

In its recent decision rendered on 14 October 2014, the Paris Court of Appeal took a similar approach. Here, a French company, AGI, and a corporation registered in Delaware, CFH (a subsidiary of Leucadia National Corporation (LCN), another American company), concluded a joint-venture agreement for the construction and operation of a submarine telecommunication cable system. After negotiations began concerning the sale of its interest in the joint-venture, AGI decided to terminate these negotiations. CFH claimed that the sale contract had in fact been concluded and started arbitration proceedings in 2009 to obtain the performance of the sale, as well as compensation.

The sole arbitrator provided a statement of independence in 2009. He wrote: 'I wish to disclose that a partner in my firm's Toronto office has represented Leucadia National Corporation in Canada in respect of Canadian based matters over a number of years; I understand that at present there are no matters in respect of which my firm is currently providing advice to Leucadia National Corporation'.

A partial award was rendered in March 2011, in favour of CFH.

In December 2010, the arbitrator's law firm published an article relating the important deal made by LCN's US parent with the assistance of several of its lawyers. This information was then confirmed in a journal dedicated to lawyers, in the early days of 2011. It was clear from these two publications that at the same time as the arbitration was going on, the sole arbitrator's law firm had been representing the US claimant's parent.

CPH sought to enforce the partial award against AGI in the French courts. The Paris Court of First Instance granted an enforcement order. AGI appealed the order on the ground that the sole arbitrator had not disclosed the conflict of interest and as a result the arbitral tribunal had been irregularly composed. On 14 October 2014, the Court of Appeal overturned the enforcement order.

What did the court hold?

The court held that the arbitrator's failure to mention the assignment was source of a reasonable doubt as to his independence and impartiality.

The court considered that different obligations were attributable to the parties and the arbitrators, depending both on the scope and on the moment of the arbitration. Indeed, before the constitution of the arbitral tribunal, parties should be considered as having a duty to perform their due diligence, outside of the arbitrator's declared statement of independence. However, after the constitution of the arbitral tribunal, it should be the arbitrator's duty to disclose and adopt a diligent behaviour.

The parties' obligation to perform due diligence

The decision of the Paris Court of Appeal underlines the expected behaviour of parties, and reaffirms an established and logical solution. In order to render its decision on the parties' obligations, the court opted for a threefold reasoning regarding both the scope of the duty and the period when the duty should be exercised.

First, the court recognised the existence of a duty for the parties to gather information on the arbitrator. It, however, restricted the scope of such an obligation to the resources that were publicly and easily accessible concerning the arbitrator. Indeed, the Court emphasized the notion of notoriety and considered that no obli-

gation for the arbitrator to disclose should be retained in this situation. In this hypothesis, the judge considers that the parties should find the relevant information on their own (Fn 2).

Second, the court considered that there should not be any obligation for the parties to specifically gather and scrutinize, or to seek out every source of information that may potentially mention the name of the arbitrator and of the persons related to him. This second step of reasoning is realistic and should also be understood as a rule of fairness to the parties.

Finally, the court concluded that there is no duty to either party to research information on the arbitrator after the proceedings have started. Therefore, the court considers that once an arbitration has started, the parties have no obligation to carry on their research.

The arbitrator's duty to disclosure during the arbitration

According to article 1506 of the French Code of Civil Procedure (Fn 3), the arbitrator shall, before accepting any designation, 'disclose any circumstance that may affect his or her independence or impartiality. He or she also shall disclose promptly any such circumstance that may arise after accepting the mandate'. Therefore, before accepting an arbitral nomination, the arbitrator shall always establish a statement of independence.

This decision of the Paris Court of Appeal, under discussion, is relevant among the different decisions of the French courts on the topic of independence, for it clarifies two issues.

First, French courts have constantly held that, from the designation of the arbitrator to the completion of the proceedings, the arbitrator must disclose any element likely to cast a reasonable doubt in the parties' minds as to the arbitrator's independence and impartiality (Fn 4).

The same reasoning is adopted by the court in this decision. It further comments that this duty to disclose is only borne by the arbitrator when the facts to be revealed are unknown to the parties, or if they did not have the obligation to know of such facts.

Second, the same reasoning has been extended to the concept of courant d'affaires (Fn 5). The extension of the obligation to disclose to the courant d'affaires was first developed in the *Jarvin* saga when the Reims Court of Appeal considered that the independence of the arbitrator should also be considered in light of (i) the links between the law firm of the arbitrator and any companies affiliated to one of the parties; and (ii) the fees received by the law firm as a result of working with said companies.

In the commented decision, the court underlines that information was published on the law firm's website as well as in a legal specialised magazine revealing that a team from the sole arbitrator's law firm had assisted LCN in the sale of its shares in a copper mine, for about USD 575 million. The court then highlights that the law firm had been assisting LCN in this operation since 2005. The court further notes and emphasizes that the importance of the deal, the number of lawyers involved and the publicity given to the deal by the law firm showed the importance that the law firm gave to this matter. Therefore, Mr. Alvarez, as a partner in the firm, necessarily had an indirect interest in this transaction and an obligation to disclose this interest.

In conclusion, although this decision of the Paris Court of Appeal dated 14 October 2014 is fully in line with the previous position of the French Cour de Cassation, it has the merit of clarifying certain issues and of confirming the French in concreto approach to the question of the independence of arbitrators.

Footnotes

- 1--C Jarrosson, *A propos de l'obligation de révélation: une leçon de méthode de la Cour de cassation*, Rev. arb. 2013, p. 130.

- 2--Eric Loquin, *Les limites de l'obligation faite à l'arbitre de révéler les liens existant entre le cabinet d'avocats où il exerce sa profession et l'une des parties à l'arbitrage ou un tiers intéressé par le litige* (Paris, 2 juill. 2013, n° 11/23234, Sté La Valaisanne Holding), RTD Com. 2014 p. 318, Dalloz
- 3--Through a reference to article 1483 of the French Code of Civil Procedure
- 4--Daniel Cohen, Indépendance des arbitres et conflits d'intérêts, Revue de l'Arbitrage, Volume 2011, Issue 3 pp 611-652
- 5--Unofficial translation: flow of business