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Paris Court of Appeal grants application for review of award rendered in favour of French businessman Bernard Tapie

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Arbitration analysis: On 17 February 2015, the Paris Court of Appeal overturned an award rendered by a panel of three arbitrators which awarded damages to Mr Tapie for EUR 403 million. The court held that the award was tainted by fraud, due to the 'personal proximity' of one of the arbitrators who exercised a 'decisive influence over the awards'. Xavier Nyssen, International Arbitration Partner at Dechert LLP discusses the latest step in this saga.

Facts and background

The decision by the Paris Court of Appeal is the latest development in a long-running legal saga involving businessman Bernard Tapie and the now defunct French bank Crédit Lyonnais.

In 1992, Bernard Tapie decided to sell his industrial and commercial assets after he joined the socialist government. He entrusted the sale of the majority stake he owned in the German sportswear company Adidas to his bank, Crédit Lyonnais, for 2 billion francs (around EUR 300 million). Mr. Tapie later found out that the Crédit Lyonnais had actually acquired Adidas and then resold it at a much higher price, realizing a gain of around one billion francs (around EUR 150 million).

Mr. Tapie sued the Crédit Lyonnais and then the *Consortium de réalisation* (CDR), the State-run body that took over the Crédit Lyonnais' liabilities after it almost went bankrupt in 1994. In 2006, the French Cour de cassation overruled a Court of Appeal decision that the bank was at fault, referring the case to a new Court of Appeal.

After years of litigation before the French courts, Bernard Tapie and the CDR agreed to refer the case to arbitration. The arbitral tribunal (consisting of Pierre Estoup, Jean Denis Bredin and Pierre Mazeaud) decided in 2008 to award Mr. Tapie EUR 403 million by way of damages, including EUR 45 million for moral damages.

The circumstances of the decision to refer the dispute to arbitration at such a late stage in the dispute as well as the amount of the damages raised serious suspicions in France. After President Hollande was elected in 2012, the French government initiated criminal investigations. Mr. Estoup, Mr. Tapie and his main lawyer Mr. Lantourne have since been charged with *escroquerie en bande organisée*: the investigations had revealed collusions between Mr. Estoup, Mr. Tapie and his lawyer in the arbitration.

The usual challenge of an award, that is the initiation of annulment proceedings, being time-barred, the French government thus decided to challenge the award before the Paris Court of Appeal, in the form of an application for review (*recours en révision*), under the former Article 1491 of the French Code of Civil Procedure.

What did the Paris Court of Appeal decide?

Paris Court of Appeal decision 13/13278 (in French)

In its 17 February 2015 ruling, the Paris Court of Court did not rule on the merits of the case. It granted the application for review and referred the case back to a court.

All the arguments put forward by Mr. Tapie's side to oppose the application for review were dismissed.

First, Bernard Tapie claimed that the arbitration was of an international nature, and thus could not be reviewed by the court since the dispute resulted from the sale by a French company of its shares in a German company. As a matter of French law, under Article 1492 of the French Code of Civil Procedure, the international nature of an arbitration depends upon whether the interests of international trade are at stake. Considering that the arbitrators were not petitioned to rule upon the sale contract itself, but over the mandate to sell, which only involved Mr. Tapie and the Crédit Lyonnais, the Paris Court of Appeal held that the interests of international trade were not at stake in the case at hand.

Second, the court dismissed Mr. Tapie's argument that evidence found in the course of the criminal investigations was covered by an obligation of secrecy. The judges then heavily relied upon evidence from the criminal investigations to establish that the arbitration proceedings had been fraudulent.

Fraud requires corroborating evidence to be characterized. Of the elements the court took into account, the most decisive evidence was that of the undisclosed proximity between the arbitrator Mr. Estoup and Mr. Tapie's side, as a party to the arbitration. According to the court, the concealment of this proximity purported to favour the interests of that party. The court also pointed out that Mr. Estoup had exercised a decisive influence over the proceedings in order to systematically orient the decision in Mr. Tapie's favour. Thus the court held that Mr. Estoup had not met the standard of impartiality required of an arbitrator. As a result, the award would be regarded as fraudulent.

Hence, the award was retracted (*rétracté*). There is still some debate over the consequence of such a decision, because the court did not expressly order Mr. Tapie to reimburse the CDR, maybe to avoid criticism that it ruled *ultra petita*. Although retraction is supposed to have the same effect as annulment, Mr. Tapie's lawyers claim that the businessman is not compelled to pay back to the CDR the amount he has been awarded until the court decides on the merits.

French case law

Applications for review are hardly ever filed, and even more rarely are they granted by French courts.

The reason for this is that an application for review aims at obtaining an extraordinary legal remedy (*voie de recours extraordinaire*). As a consequence, French law provides for limited grounds for an application for review to be admissible, as set out at Article 595 of the French Code of Civil Procedure:

- o fraud
- o disclosure of evidence that the other part had previously concealed
- o in the event the tribunal relies on exhibits that turned out to be false subsequent to judgment
- o in the event the tribunal relied on certificates, testimonies or oaths that turned out to be false subsequent to the judgment

Not only are these grounds strictly listed, they also are very restrictive from a substantial perspective. Parties thus hardly ever have the opportunity to lodge applications for review, either because their case does not fall under one of these grounds, or because they are not able to provide sufficient evidence that one of these grounds has been met. In this respect, the criminal investigations in relation to the Tapie arbitration played a key role in allowing the French government to meet the standard of proof required to show fraud.