Kluwer Arbitration Blog

Tecnimont, the saga continues but is not yet over

Laurence Franc-Menget (Herbert Smith Freehills LLP) and Vanina Sucharitkul (University of Paris Descartes) · Friday, November 25th, 2011 · YIAG

In a decision rendered on 2 November 2011, the Reims Court of Appeal annulled an ICC Award for failure to disclose conflict of interest during proceedings, irrespective of the ICC Rules on challenging arbitrators in the case *Avax v. Technimont*.[1)] This post considers the latest instalment, the Reims Court of Appeal decision, and its two key findings: the inapplicability of the ICC Rules for challenging an arbitrator post-award, and the broad scope of an arbitrator's continuing disclosure obligations.

For those who may have missed the previous blog posts,[2)] these proceedings occurred further to an application to set aside a partial arbitral award rendered under the auspices of the International Chamber of Commerce, initiated by a Greek company J&P Avax SA against an Italian company Société Tecnimont SPA. Tecnimont had concluded a subcontract agreement with Avax for the construction of a propylene factory located in Greece. A dispute between the parties arose and Tecnimont instituted ICC proceedings in Paris pursuant to the arbitration clause contained in the subcontract agreement.

At the time of his appointment in 2002, the Chairman was 'Of counsel' at a global law firm with an office in Paris. In his declaration of independence, the Chairman disclosed that the Washington DC and Milan offices of his firm had previously worked with the parent company of Tecnimont in a concluded matter in which he had never been involved.

During the proceedings, Avax's counsel became aware that the Chairman's law firm was assisting a company that was later acquired by the parent company of Tecnimont. Avax then unsuccessfully challenged the Chairman's appointment before the ICC Court of Arbitration in September 2007. The ICC dismissed the challenge for undisclosed reasons and Avax continued to participate in the arbitration while reserving its rights. A partial award on liability was rendered in favour of Tecnimont on 10 December 2007, with further information regarding the links between the Chairman's law firm and Tecnimont's affiliated companies coming to light thereafter.

Subsequently, Avax filed an application to set aside the award with the Paris Court of Appeal.

On 12 February 2009, the Paris Court of Appeal annulled the award and held that the arbitrator was under a continuing obligation to inform the parties of any matter that could cast reasonable doubts on his/her impartiality and independence. The Paris Court rejected Tecnimont's argument that Avax's application to set aside was inadmissible because it had already unsuccessfully challenged

the Chairman before the ICC on the same grounds and that such challenge was in any event waived as it was made beyond the time limit of 30 days required by the ICC Rules on challenging arbitrators. The Paris Court of Appeal found that Avax had only been notified of relevant facts and circumstances after it challenged the award and after the partial award was delivered. They left open the questions of whether the ICC Rules bind the court and whether the party had waived its right to challenge the award by failing to adhere to the time limitation imposed by the ICC Rules.

The *Cour de cassation*[3)] reversed this decision, holding that almost all of the grounds for challenge were already included in the request for challenge filed with the ICC in September 2007. The *Cour de cassation* considered that the Paris Court modified the terms of the dispute by relying on facts that came to light after the partial award rather than relying on those submitted by the parties, a breach of Article 4 of the Code of Civil Procedure. Consequently, the Supreme Court remitted the case to the Reims Court of Appeal to decide on the validity of the award.

The Reims Court of Appeal first considered that the setting aside application was admissible because the failure to challenge the Chairman within the ICC time limitation did not prevent Avax from applying for the award to be set aside. The Reims Court of Appeal then annulled the award due to the Chairman's failure to spontaneously and comprehensively disclose that his law firm had advised Tecnimont and related companies during the time of the proceedings.

This decision confirms: (I) the inapplicability of the ICC Rules at least for challenging arbitrators before French courts once an award is rendered and (II) the French courts' attitude of broadening the scope of the arbitrator's duty to update and disclose conflicts of interests.

I. The Inapplicability of the ICC Time Rules for Arbitrator's Challenge

Article 11 of the ICC (1998) Rules provides that challenge of arbitrators must be brought within 30 days from when the party became aware of facts and circumstances giving rise to the challenge. The reasons for the ICC decisions on arbitrators' challenges are not provided or published. That rule has not been modified by the recent revision of the ICC Rules, despite discussions on the benefits of publishing decisions concerning challenges of arbitrators.

As the *Cour de cassation*'s decision that the Paris Court of Appeal modified the terms of the dispute was of a procedural nature, the Reims Court of Appeal's view on the admissibility of the application to set aside was much anticipated.

Indeed, some commentators argued that the only motive that could justify the *Cour de cassation* putting forward this procedural flaw is that its correction would have an impact on the admissibility of Avax's claim. The *Cour de cassation* therefore has ruled on a technical issue only to enable a future reversal of the Paris Court of Appeal's decision. It is probably not by coincidence that the designated court is chaired by Dominique Hascher, former general counsel of the ICC Court of Arbitration and previous judge at the 1st Chamber of the Paris Court of Appeal.

On this occasion, the Reims Court of Appeal was expected to provide some explanations as to the consequences of not filing the application within the time limit set forth in the ICC Rules.

Both the Reims Court of Appeal and the Paris Court of Appeal accepted that some facts were revealed after the ICC decision on Avax's challenge. Thus, the *ratio decidendi* of the case stands in its analysis of the consideration given by French courts to the ICC Rules.

The Reims Court of Appeal's conclusions are straightforward: challenges before the ICC Court and review of an award by a judge are separate proceedings and do not serve the same purpose; the two applications are before different authorities; and the judge that deals with the award is not required to abide by the ICC time limit to challenge arbitrators. The ICC decision is of an administrative nature and does not have *res judicata* effect. Furthermore, the appellate judges found that the party has not waived its right to challenge the award as the party raised the issue and reserved its rights whenever possible during the arbitration proceeding. This decision means that, once an award is rendered and notwithstanding the ICC's decision or the failure of the parties to comply with the ICC Rules on challenges during the proceeding, the judge has full liberty to decide whether arbitrators' independence may be called into doubt provided the party shows that it did question the independence of the arbitrator and therefore did not waive its rights to challenge.

Although many commentators support efforts to ensure impartiality and independence, this case has already been criticised by some commentators for the court's lack of consideration as to the ICC Rules with respect to time limits for challenges of arbitrators. Some view that ICC Rules should not have been so easily bypassed given that they represent contractual obligations that bind the parties and arbitrators. Another concern is that allowing the challenge to go forward means the party receives an opportunity to re-litigate the same issue before different bodies.

It is true that this case represents a rare disregard of the ICC Rules by the French courts. Nevertheless, it is the first time that the French courts deliberated the parties' agreement to abide by the ICC Rules with respect to that specific issue. The party could have also challenged the arbitrator by virtue of Article 11 after the new information was disclosed but did not do so. However, the Article 11 time-limit is internal to the ICC procedure for arbitrators' challenging and cannot be imposed on French courts once the award has been rendered. Moreover the party made clear that it reserved its right to challenge the arbitrator before the court. This does not imply that the Reims Court of Appeal has denied the will of the parties. Rather they deemed that failure to respect the ICC procedural time limit did not prevent recourse before national courts after the award is rendered.

II. The Broad Scope of the Arbitrators' Disclosure Obligations

The appellate judges concluded that information concerning the links provided by the Chairman had developed throughout the course of the proceedings. The relationship between the Chairman's law firm and one of parties to the arbitration went beyond the information disclosed in 2002 by the Chairman and was not revealed in due time.

In that respect, the Reims and Paris Courts of Appeal had similar interpretations. However, the Reims judges further elaborated on the meaning of the duty of disclosure. The Court found that arbitrators have a continuous obligation to disclose not only personal circumstances that may call their independence into question, but also factual circumstances involving the law firms to which they belong throughout the proceedings. Notwithstanding the arbitrator's position in the firm, the obligation to disclose covers other files handled by other branches of the law firm irrespective of the subject matter of the dispute or the amount of fees invoiced for these other files. Thus, a certain degree of objectivity was required from the arbitrator, beyond his/her personal connections. After reviewing each specific link, the Court concluded that the failure to inform the parties of these facts or the incomplete information given to the parties created reasonable doubts as to the independence of the Chairman.

The Reims decision demonstrates the importance of continuous and strict conflicts checks by arbitrators, after their appointment and throughout the proceedings. This ruling is in line with the French case law on the continuation of the duty of disclosure.[4)] Indeed, under the new Article 1456 of the French Code of Civil Procedure, an arbitrator is under the duty to 'disclose any circumstances that may affect his or her independence or impartiality' and 'also shall disclose promptly any such circumstance that may arise after accepting the mandate.'

This decision also confirms a current trend in French case law that broadens arbitrators' duty of disclosure, e.g. with respect to the number of appointments of an arbitrator by one of the parties as well as to the existence of a business relationship between an arbitrator and a party's counsel. However, this is the first time an award is annulled on the basis of connections with other offices of the arbitrator's international law firm, rather than the arbitrator's personal connections.

Arbitrators involved in proceedings seated in France are under a duty to continuously investigate potential conflicts and ensure that conflicts databases are regularly updated. As companies frequently change ownership and affiliates, clients should also be requested to clarify precisely their corporate structure and line of control and communicate any changes to their lawyers. Some commentators have criticised the lack of cost-efficiency of such refinement of conflict checks and updates system. The Reims Court of Appeal decision adds to the responsibilities of arbitrators but serves to ensure that arbitrators sitting in international arbitration tribunals in France remain independent and impartial throughout the proceedings. This development is crucial to maintain the credibility and quality of international arbitration.

The duty to disclose is also in harmony with the colour coded IBA Guidelines on Conflicts of Interest in International Arbitration, addresses the issue of an arbitrator's law firm's involvement with one of the parties. Arbitrators must disclose if their law firms are rendering services to one of the parties or affiliates without creating a significant commercial relationship and without the involvement of the arbitrator. While the rendering of services must be disclosed, it does not *per se* amount to a conflict of interest under the IBA Guidelines. The individual circumstance would have to be further examined.

The French courts' approach on this matter does not differ, as the Court of Appeal specified that the facts that the matters dealt with by the law firm were unrelated to the dispute submitted to arbitration and that the amounts billed by the firm with respect to the other files was nominal and did not create an impact. Specifically, the Court stated: 'Once a client relationship is established, that relationship is not only financial: the independence of an arbitrator is not judged depending on the scale of the fees received by his/her law firm from a party.'

Applying the IBA Guidelines, the arbitrator in the *Tecnimont* case would have been under the same duty to disclose his law firm's representations of affiliates of one of the parties. However, the law firm's representations may or may not lead to an annulment of the award as the facts would still have to be analysed under the IBA Guidelines to determine if they create a justifiable doubt as to the arbitrator's impartiality and independence. Similarly, the Reims Court of Appeal would not automatically annul the award for failure to disclose all this information but will also analyse each specific link between the law firm and the parties to arrive at its conclusion. As the judges indicated: '(…) the review court's responsibility is to assess the impact of the non-disclosure and to determine whether or not it could have caused a reasonable degree of doubt, in the minds of the parties, as to the alleged lack of impartiality.'

A *pourvoi en cassation* or recourse has been lodged against the Reims decision with the *Cour de cassation* and it is uncertain whether the *Cour de Cassation* will adopt the Reims Court of Appeal's view of the ICC Rules.

References

?1 CA Reims, 2 Novembre 2011, n°. 10/02888

See A. Mourre, 'Challenges: Do Institutional Rules matter? The situation after Tecnimont II' and
?2 A. Mourre, 'Conflicts of Interest: Towards Greater Transparency and Uniform Standards of Disclosure?'

?3 Cass., Civ. 1ère, 4 Novembre 2010, n° 09-12.716

A. Mourre, 'Conflicts of Interest: Towards Greater Transparency and Uniform Standards of
?4 Disclosure?', Kluwer Blog, 19 May 2009; Chronique de droit de l'arbitrage n° 5 (suite et fin), LPA, 21 juillet 2009, n° 144, p. 4

This entry was posted on Friday, November 25th, 2011 at 5:04 pm and is filed under Arbitrators, Bias, Disclosure, Enforcement, Europe, ICC Arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.