The Tapie saga : Paris successfully passed the test

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On 30 June 2016, the French *Cour de Cassation* issued a new decision (Cass. Civ. 1, 30 June 2016, N°15-13.755) in the long-running Tapie saga (or, as the French media has called it, "*l'affaire Tapie*"). This recent decision might not represent the end of the saga, however, it nonetheless gives us the opportunity to take a closer look at a very atypical arbitration case. It involved not only Bernard Tapie, the famous French businessman of the 80's and ex-politician, but also Christine Lagarde, head of the IMF and French ex-Minister of Finance, Crédit Lyonnais, a former state-owned bank, as well as an arbitral tribunal composed of three well-known personalities of the French legal scene (a former President of the Versailles Court of Appeal, a very famous lawyer, and a former President of the French Constitutional Council).

Although the facts of the case are relatively complex, they can be summarised as follows: Mr Tapie and his wife managed their assets through a group of companies, one of which was BTF GmbH. BTF GmbH in turn owned shares in the well-known sports company, Adidas. When Mr Tapie decided to cease his commercial activities, his group and the Société de Banque Occidentale ("**SDBO**"), a subsidiary of Crédit Lyonnais, entered into an agreement according to which BTF SA (holder of the industrial holdings of the group) would sell all its shares in BTF GmbH to any company designated by SDBO, for 2,085,000,000 French Francs ("**FF**"). BTF SA would then use the funds obtained from the sale to repay its loans. Pursuant to this agreement, SDBO would act as an agent to find the prospective buyers for BTF SA's shares in BTF GmbH. Clinvest, another subsidiary of Crédit Lyonnais, and Rice SA (a company based in Luxembourg owned by Robert Louis Dreyfus) were two of the eight buyers found by SDBO. Some of the buyers were offered loans by Crédit Lyonnais and agreed that, in the case of resale of the shares, they would give 2/3 of the added value to Credit Lyonnais. Ultimately, all the shares were transferred to Dreyfus for the price of 3,498,000,000 FF.

Mr Tapie and his wife were subsequently declared bankrupt and their companies were put into liquidation (except for BTF SA). The liquidators started proceedings against Crédit Lyonnais and SDBO for undue support (in French, *soutien abusif*) to Tapie's group and for having entered into a "secret" agreement with Dreyfus. Mr Tapie, his wife, and the liquidators, as well as CDR Créances (formerly SBDO) and CDR Consortium de réalisation (formerly Clinvest and together, the "**CDR companies**"), were simultaneously engaged in other disputes.

After years of judicial proceedings, in November 2007, the various parties entered into an arbitration agreement pursuant to which all outstanding disputes between them would be settled by arbitration. The arbitral award, dated 7 July 2008, found that the CDR companies had breached both their duty of

loyalty and the prohibition to become counterparties and ordered them to pay €240,000,000 plus interest to the liquidators. In addition, the arbitral tribunal also notably ordered them to pay €45,000,000 in respect of the moral damage suffered by Mr Tapie and his wife. This was a significantly high amount in the context of French courts' standard approach to such claims. Overall, the total amount awarded represented approximately €400 million.

Doubt was later cast on the independence and impartiality of the arbitral tribunal – in particular with regard to potential links between Mr Tapie, his counsel and one of the arbitrators. Consequently, in 2013, the CDR companies brought a motion for revision of the award before the Paris Court of Appeal, which was the only available recourse given that annulment proceedings had not been brought within the time-limit. On 17 February 2015, the Court held that the motion for revision was admissible since the arbitration was a domestic one and retracted the award as tainted by fraud (which is one of the grounds upon which such a revision can succeed). Consequently, on 3 December 2015, the same court issued its decision on the merits in which it ruled against Tapie's companies and notably ordered them to reimburse to the CDR companies €404,623,082.54. As explained below, by its decision dated 30 June 2016, the *Cour de Cassation* upheld the February 2015 decision of the Paris Court of Appeal and in particular confirmed the classification of the arbitration as domestic and the existence of fraud (the recourse against the second decision is currently pending before the *Cour de Cassation*).

Domestic or international: that is the question

Despite the distress it caused to the French arbitration community, the Tapie case highlighted a gap in French law. Under the law applicable to this arbitration, *i.e.* prior to the reform of the French arbitration law operated by *Décret n° 2011-48 du 13 janvier 2011*, a motion to revise an award (which is possible in very specific circumstances such as fraud) was only available in domestic arbitration. Although French case law had recognised this possibility for international arbitrations, it only did so in circumstances where the arbitral tribunal was still in place or could be reconvened. However, for domestic awards, the Court of Appeal, which has jurisdiction over the other recourses against the award, could re-examine the case on the merits. If the Tapie arbitration had been an international one, it would have been impossible for the same arbitral tribunal to revise the award given that it was the conduct of one of its members and its relation with one of the parties that was criticised.

Article 1492 (which has become Article 1504 following the aforementioned reform) of the French Code of Civil Procedure provides that "[a]*n international arbitration is one that concerns interests of international trade*". According to case law, an arbitration is characterised as international if the dispute concerns an economic operation taking place in different countries and involving the transfer of goods, services, funds, technologies or people across borders. Neither the nationality of the parties, the applicable law, nor the intent of the parties regarding the arbitration's classification as domestic or international are to be taken into consideration.

The Respondents put forward that the arbitration was international on the grounds that the dispute involved a mandate to sell shares of a German company and among the buyers were companies from Luxembourg and Belgium. However, the *Cour de Cassation* approved the Paris Court of Appeal's reasoning. The Court of Appeal considered the circumstances at the time at which the arbitration agreement had been entered into, finding that, at that point, the pending disputes only related to the relations between a French bank and its French clients in France. The disputes did not deal with the sale of the German company anymore – only with alleged breaches by the French bank of its obligations towards Tapie's companies. Further, the interests of international trade were not affected. The arbitration was therefore a domestic arbitration.

Fraud it is…

Fraud allegations were supported in particular by information revealed during the parallel criminal investigation which was launched in 2012 and that showed, according to the *Cour de Cassation*, that one of the arbitrators together with Mr Tapie and his counsel had wilfully dissimulated the extent of their past relationship "*as part of the overall plan, hatched by the arbitrator, together with Mr [Tapie] and his counsel to favour, in the arbitration, [Mr Tapie's] interest*". Approving again the Court of Appeal's reasoning, the *Cour de Cassation* stressed that "*concealment by an arbitrator of circumstances which could give rise to reasonable doubts in the parties' minds as to his impartiality or independence, in order to favour one of the parties, constitutes fraud and makes the retraction of the award possible once the decision is tainted by the fraudulent cooperation existing between the arbitrator and a party or its counsels*".

It is not over yet…

One of the reasons why this case has been in the media spotlight is the involvement of the then French Government, which authorised, on behalf of the CDR companies, the recourse to arbitration. This decision was firmly criticised by the opposition at the time, which considered it to be an attempt to increase Mr Tapie's chances of obtaining a favourable outcome. In this context, a criminal investigation into the conduct of Mr Tapie, his counsel, and the arbitrator in question was launched in 2012. Christine Lagarde, former French Minister of Finance, and now head of the IMF, was also subject to a specific criminal investigation with regards to her role in the decision to have recourse to arbitration in the first instance while state-owned companies, and therefore public funds, were involved. Christine Lagarde will be judged by the Court of Justice of the Republic, a special court for ministers for crimes committed while in office. On 22 July 2016, the French *Cour de Cassation* rejected her appeal of the order to stand trial. The date of her trial is not yet confirmed. She may incur liability for negligence which could eventually lead to one-years' imprisonment and a €15,000 fine.

… but Paris successfully passed the test

A lot has been written and said about the Tapie case and its implications for the reputation of Paris as a world-class arbitration centre. It is also regrettable that the public, whose interest has been attracted by the wide coverage of the case in general media, was introduced to arbitration through such an atypical case. However, a few years later and in view of the recent decisions of the highest Courts in France, it seems now safe to say that, facing these unrepresentative circumstances, Paris proved (if it ever had to) that it has all the necessary means – legal and judicial – to guarantee the integrity of the arbitral process. If it is true that there is a risk of losing confidence in arbitration every time that fraud, lack of transparency, lack of independence and impartiality are alleged, it has been rightly pointed out that it is ultimately for arbitration practitioners to explain such dysfunctions in order to preserve Paris' reputation. As one law professor remarked, the quality of a centre of arbitration has to be measured against its capacity to regulate itself.