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Challenges: Do Institutional Rules matter? The situation after Tecnimont II

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Amongst the many issues raised by the now famous *Tecnimont* case, which we analyzed in our 19 May 2009 blog , was the relevance in setting aside proceedings of institutional rules relating to challenges.

The ICC partial award had been quashed by a 12 February 2009 judgment of the Court of Appeal of Paris, because the chairman of the arbitral tribunal, a well-known international arbitrator who is part of one of the world's largest law firms, had failed to disclose certain links between his firm and one of the parties' group.

Tecnimont had however raised before the Court an estoppel argument based on the fact that the arbitrator had already been unsuccessfully challenged before the ICC Court of Arbitration for the very same grounds that were invoked before the Court of Appeal, and that such challenge was belated pursuant of Article 11(2) of the Rules for having been made more than 30 days after the date when the party making the challenge had been aware of the facts upon which it was based. According to Tecnimont, the consequence was that the challenging party (Avax) was precluded from objecting to the independence and impartiality of the arbitrator.

The Court of Appeal, however, did not accept this argument on the basis that the grounds for challenge would in fact not have been known to Avax before the award was rendered.

The French Supreme Court (Cour de cassation), in a judgment handed down on 4 November 2010, disagreed with such findings and held that "*almost all the adduced* [grounds for challenge] *were included in the request for challenge notified on 14 September 2007* [to the ICC]".

As a consequence, the Supreme Court held that the Court of Appeal had modified the terms of the dispute, in breach of article 4 of the French Code of Civil Proceedings.

Article 4 provides that "*the subject matter of the dispute is determined by the parties' allegations*"; the case law of the Supreme Court consistently holds, in this respect, that a Court of Appeal which bases its decision on facts different from those submitted by the parties violates Article 4. In this case, the annulment decision rendered by the Court of appeals of Paris is quashed, but the matter is remitted to the Court of appeals of Reims, which will have to decide on the validity of the award.

The Supreme Court does not express any view as to the existence of a bias such as to justify the setting aside of the award for lack of independence and impartiality of one of the arbitrators, which

constitutes in French law an irregularity in the constitution of the arbitral tribunal [Article 1502-2 of the French Code of Civil Proceedings].

As a consequence, the conclusion reached by the Court of Appeal of Paris, according to which the links between the arbitrator's law firm and one of the parties constitutes a conflict of interest, is not criticized as such. In this respect, certain authors have wondered whether the Court of Appeal's decision should be understood as implying that any failure to disclose relevant circumstances should as such justify a challenge (Th. Clay, *rev arb* 2009-3, p. 193). We do not believe that to be the case, and the reference by the court of Appeal to a "*conflict of interest*" simply means that the circumstances in dispute were such as to cast serious doubts in the eyes of a reasonable and informed third party as to the arbitrator's independence and impartiality. From this perspective, the Court of Appeal findings as to the existence of an appearance of bias is, in our view, consistent with previous case law as well as with the established international arbitration practice as embodied the IBA Guidelines on conflicts of interest in international arbitration (General Standard 2.b).

Neither has the Supreme Court expressed any views as to whether non-compliance with the procedure established by the applicable institutional rules should have any bearing in setting aside proceedings.

Nevertheless, by holding that all the grounds for the challenge in dispute were present in the application made to the ICC, the Supreme Court implies (as the ground for annulment of the Paris court decision would otherwise be deprived of any relevance) that the Court of Appeal should have examined and decided Tecnimont's argument that such challenge was belated and that Avax should therefore be considered as having waived its right to challenge.

The Court of Appeal decision, in this respect, was highly unsatisfactory. If the parties accepted institutional rules setting time-limits for challenges, why should such time-limits not be enforced by the judge? (see my 19 May 2009 blog; see also in the same sense, Th. Clay, case note *op. cit*., p. 196). Institutional rules accepted by the parties are incorporated in the arbitration agreement and are as such binding upon the parties. As a consequence, a breach of a provision such as the thirty-days time-limit provided in Article 11 (2) of the ICC Rules of arbitration should be treated as a waiver of the right to challenge, which waiver should prevent any later request to set aside the award on the same grounds.

It is equally unsatisfactory that the decision made by the institution on the challenge be thrown in the waste basket by the judge. Much time is devoted by the parties in arguing these matters before the institution, and institutions carefully weight the parties' arguments to decide the challenge in the most appropriate manner. In this respect, the IBA recommendation that equal standards be applied to challenges at all stages of the proceedings in order to determine whether grounds for disqualification of an arbitrator exist or existed should be recalled. The facts and circumstances alone are relevant to that effect, and not the current stage of the proceedings or the consequences of the withdrawal (IBA Guidelines, Explanation to General Standard 3(d)). As a consequence, there would be no impediment for the Court of Appeal in setting aside proceedings to give due consideration to the reasons why a challenge was rejected by the institution.

The problem is, of course, that the ICC, like other institutions, does not provide reasons for its challenge decisions. This matter is currently being discussed in the context of the ongoing revision process of the ICC rules of arbitration. Some institutions do provide reasoned decisions, including

ICSID, DIS, VIAC, LCIA, NAI and PCA. Reasoned decisions may certainly add to the burden of institutions, and in some instances slightly delay the process; they, however, add confidence in the arbitral process and, more importantly, provide the court in setting aside proceedings with useful information that it can rely on.

Going further, one can wonder whether it is satisfactory to re-litigate before the judge the same challenge discussed before the institution. Would it not be more appropriate to treat challenge decisions rendered by arbitral institutions as if they were awards? Institutional decisions on challenges are in theory of an administrative nature, and they therefore have no res judicata. The nature of those decisions can however be discussed for, at the difference other decisions made by arbitral institutions, they arguably meet the standard of jurisdictional decisions as adopted in many jurisdictions: they are made by a neutral third party (the arbitral institution) and they settle a dispute of a legal nature (whether grounds for disqualification of an arbitrator exist).

Certainly, admitting the jurisdictional nature of such decision would further increase the time and costs of the arbitration, as such an evolution would imply that the parties be granted a reasonable opportunity to present their views before the institution. However, it would spare the parties the burden of litigating twice the same issues. One could imagine that such "challenge awards" could be in turn be the subject of an immediate and expeditious judicial review. Such an evolution may require some amendments to the applicable arbitration laws, but the effort is probably worth making as it would avoid the risk, which is perfectly illustrated by *Tecnimont*, of having to throw away years of arbitral proceedings and millions of dollars in legal costs, which risk is even compounded when, as in *Tecnimont*¸ the annulled award resurrects like Lazarus out of its cave, until when it may again disappear if the Court of appeals of Reims decides that the award should be quashed anyway…

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