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Tecnimont Saga: Episode V – The Paris Court Strikes Back

Clement Fouchard (Reed Smith) · Wednesday, August 3rd, 2016 · Linklaters

On 12 April 2016, the Paris Court of Appeal rejected the request for annulment brought by the Greek Company S.A.J. & P. Avax ("Avax") against an ICC partial award on the ground that the chairman of the tribunal lacked independence. This is the fifth decision rendered in this case by French courts and in all likelihood not the last.

The Tecnimont "saga" raises two issues that have been at the heart of a fierce debate for years, the binding force of the rules chosen by the parties to govern the proceedings, and the extent of the arbitrators' duty of disclosure. The "saga" has affirmed the binding force of the rules of procedure chosen by the parties. As to the scope of disclosure required, no clear standard seems to have emerged yet.

Every aspect of the Tecnimont decisions cannot be discussed thoroughly in this post. Reference is therefore made to earlier posts related to the three first decisions, namely the Paris Court of Appeal decision dated 12 February 2009, the *Cour de cassation* decision dated 4 November 2010 and the Reims Court of Appeal decision dated 2 November 2011.

As to the background of the case, in a nutshell, Société Tecnimont SPA ("Tecnimont") and Avax entered into an agreement for the construction of a plant in Greece. A dispute arose between the parties and Tecnimont initiated ICC proceedings in Paris. During the proceedings, in July 2007, Avax's counsel came across a conference program that allegedly raised doubts as to the impartiality of the chairman of the tribunal, due to undisclosed dealings between the chairman's –large- law firm and Tecnimont. Avax filed a challenge against the chairman before the ICC Court on 14 September 2007. This challenge was filed after the time limit for challenges of arbitrators under the ICC rules (30 days from the date the fact giving rise to a doubt was known) had lapsed. In October 2007, the ICC dismissed the challenge and Avax continued to participate in the arbitration while reserving its rights. A partial award on liability was rendered in Tecnimont's favour on 10 December 2007, against which Avax initiated annulment proceedings in Paris. Meanwhile, further information regarding links and dealings between the Chairman's firm and Tecnimont's affiliated companies came to light. And the saga began…

Episode I: the Paris Court of Appeal quashed the partial award. The Court stated that the chairman had a continuing obligation to disclose relevant facts and that Avax became aware of certain of these facts only after the ICC had dismissed its challenge in October 2007. This much-debated judgment was deemed by many to establish the principle of an *extended* duty of disclosure.

Episode II: seized by Tecnimont, the *Cour de cassation* reversed this decision for a rather

'technical' reason, considering that most of the facts raised by Avax had been obtained prior to the initial challenge and had already been invoked before the ICC.

Episode III: the Reims Court of Appeal (to which the case was remitted) set aside (a second time) the award on the ground that arbitrators must disclose, *at any time during the arbitration proceedings*, all circumstances which could raise a reasonable doubt as to their impartiality and independence, a duty that the chairman had breached. The court also stated that the ICC decision on the challenge was administrative in nature and had no *res judicata* effect. The Court was therefore not bound by the ICC's decision. Moreover, the fact that Avax, upon discovering new facts calling the chairman's independence into question, had not brought a fresh challenge before the ICC, did not bar it from bringing an application to set aside the award. This decision gave rise to criticisms as offering a rather loose interpretation of the binding force of arbitration rules and failing to recognize the *res judicata* effect of ICC International Court of Arbitration decisions.

Episode IV: the *Cour de cassation* reversed (again) on 25 June 2014 the Reims Court of Appeal's decision, but only on the question of the *res judicata* of the ICC Rules. It should be noted that the Supreme Court did not rule on the second question addressed to it, which concerned the scope of the arbitrator's duty of disclosure, to the frustration of many commentators. As to the issue of the *res judicata* of the ICC Rules, the Supreme Court decided that a party that fails to challenge an arbitrator on the ground of circumstances related to his or her alleged lack of independence or impartiality within the time period required by the arbitration rules is deemed to have waived the right to invoke the same circumstances before the domestic courts in charge of the annulment proceedings. Accordingly, the Reims Court of Appeal should have verified for each of the facts and circumstances raised by Avax, whether the 30-day time limit provided by the Rules had been complied with. The decision was appraised positively as restoring the binding force of arbitration rules chosen by the parties and providing instructions on assessing a challenge when the circumstances that justify the challenge are discovered progressively. This was a useful lesson of methodology, signalling that parties and counsel should raise forthwith the circumstances which could question an arbitrator's independence and impartiality.

Episode V: On 12 April 2016, the Paris Court of Appeal (to which the case was remitted) rendered a judgment upholding the award, considering that (1) the relevant facts Avax allegedly discovered *after the 30-day time limit had expired* were public knowledge and easily accessible; (2) the relevant facts Avax allegedly discovered only *after bringing the challenge* (in particular the amount the chairman's firm billed to Tecnimont, and the number of cases it managed for one of Tecnimont's wholly owned subsidiaries) did not have the effect of significantly aggravating the doubts on independence and impartiality; (3) the mere fact that EDF (which took control of Tecnimont's parent in 2005) was among the clients of the chairman's firm in 2005 did not raise any reasonable doubts as to the chairman's independence; and (4) the first challenge before the ICC international Court of arbitration was filed after the expiration of the relevant deadline.

The main points to take away from this latest decision are the following:
(1) The ruling may be seen as shifting, at least partly, the burden of verifying the arbitrator's ties with the parties and third parties onto the parties' shoulders. It may indeed be seen as requiring the parties to react to the information they discover by doing further research.
(2) The court chose to follow the objective approach of independence and impartiality and the duty of disclosure, i.e. only the relevant facts which are capable of reasonably raising doubts in the mind of the parties have to be revealed and may lead to an annulment if they are not revealed (which was not the case here, the arbitrator not being required to disclose the information himself). In addition,

the decision seems to introduce a (new) requirement of 'intensity': to be relevant, the new evidence must "significantly" aggravate the doubt.
(3) The 30-day time limit set out under the ICC rules for bringing a challenge for lack of independence and impartiality has to be complied with, otherwise the parties are considered to have waived their right to request the setting aside of the award on this basis.

This ruling is a strong message to parties and practitioners: the French judge will give effect to the rules of procedure chosen by the parties, and will not allow the parties to circumvent their agreement. This does not mean, however, that the judge, when reviewing the award, is bound by a decision of the ICC Court under the ICC Rules (in the present case, a decision whether or not to uphold the challenge to an arbitrator). It is only a party's failure to comply with the ICC Rules themselves, i.e. a breach of the contract between the parties, which the French judge is not entitled to rectify. Last but not least, this decision makes a (good) point that time periods in arbitration are no less mandatory than in any state court procedure. This reinforces the overall efficiency of arbitration and helps arbitration institutions in their effort to make arbitration quicker and prevent dilatory tactics.

The saga is not over; Avax's lawyer (Emmanuel Gaillard) has made it known that a new recourse before the Supreme Court would be introduced. According to him, the decision is flawed as it will encourage *"piecemeal revelations by arbitrators, each of which may or may not suffice to justify a challenge but which, in the aggregate, may prove problematic" and "as a result, litigants will have to be very mindful of the timeframe prescribed by the applicable rules to lodge a challenge and may be compelled to file successive challenges."*

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