

# Insight: Arbitration

July 2014

## *Tecnimont SPA v. J&P Avax:* France's highest court reinforces the legal status of arbitration rules

Last week, the French *Cour de Cassation* issued its long-awaited decision in the Tecnimont matter.<sup>1</sup> It quashed a decision of the Reims Court of Appeal which had set aside an ICC award on the basis of lack of independence of the Chairman. This matter raises significant questions, notably the legal force of the arbitration rules chosen by the parties and the breadth of the duties of independence and disclosure incumbent on arbitrators. It has now been the object of four French judicial decisions (two by Courts of Appeal and two by the *Cour de Cassation*). This judicial saga, however, is not yet over as the matter has been remitted to the Paris Court of Appeal for factual determination.

### Background

The dispute between Tecnimont SPA ("Tecnimont") and J&P Avax ("Avax") arose in the context of the construction of a propylene plant in Greece. The outsourcing contract between the parties contained an arbitration clause referring to the Court of Arbitration of the International Chamber of Commerce ("ICC").

The Chairman was "of counsel" with a major law firm and was personally unaware of any links between his law firm and Tecnimont. The Chairman had not acted for Tecnimont or any related companies, but other lawyers at his law firm had acted as counsel and arbitrators in six different matters involving Tecnimont's parent company and subsidiaries. The Chairman had issued an inaccurate declaration of independence by failing to indicate the ties from the outset. He only acknowledged them reluctantly, after multiple requests from Avax over an eight-month period.

The Arbitral Tribunal issued a partial award against Avax in 2007, which Avax sought to set aside in the French Courts on the ground that the Chairman had breached his duties of disclosure and independence. Before the award, Avax had filed a challenge with the ICC asking that the Chairman be replaced, but it was dismissed by the ICC.

In 2009, the Paris Court of Appeal set aside the partial award, on account of the lack of independence of the Chairman. The Court agreed to hear the case despite the ICC's dismissal of the challenge to the Chairman, pointing to the discovery of new information by Avax since the ICC's ruling. The decision of the Paris Court of Appeal was, however, quashed by the *Cour de Cassation* in 2010 on the grounds that most of the information relied on by Avax had in fact been obtained by Avax prior to the initial challenge before the ICC.



White & Case LLP  
19, Place Vendôme  
Paris, 75001  
France  
Tel: + 33 1 55 04 15 15  
Fax: + 33 1 55 04 15 16

<sup>1</sup> White & Case LLP has not been involved in this arbitration case or court proceedings.

In 2011, the case was referred to the Reims Court of Appeal, which once more set aside the 2007 partial award. This was on the basis that the Chairman had failed to meet his duty of disclosure which, in itself, raised reasonable doubts as to his independence. The Reims Court of Appeal explicitly held that it was not bound by the ICC's dismissal of the challenge. It found that the links between the Chairman and Tecnimont were sufficient to constitute a breach of his duties of disclosure and independence.

## Admissibility

Tecnimont challenged the admissibility of Avax's action to set aside the award on the grounds that the ICC had dismissed the challenge to the Chairman, and that Avax had failed to bring a new challenge within the time limit provided by the ICC Rules, i.e. within 30 days of discovering new information relevant to the Chairman's independence. This argument was dismissed by the Reims Court of Appeal which deemed that ICC decisions are administrative in nature and lacking *res judicata*. Furthermore, it held that a challenge to an arbitrator before the ICC was a different procedure to an annulment proceeding before a court. The failure to file a new challenge at the ICC was no bar to the initiation of annulment proceedings. As Avax obtained the information concerning the ties between the Chairman and Tecnimont gradually, the annulment claim was admissible.

It is this reasoning that was quashed last week by the *Cour de Cassation*. It was held that a party which knowingly fails to ask for the recusal within the prescribed time period is deemed to have waived its right. According to the *Cour de Cassation*, the lower court erred by failing to consider whether Avax had complied with the 30-day time limit.

## Disclosure and Independence

Because it quashed the Reims Court of Appeal decision on the issue of admissibility, the *Cour de Cassation* did not address the other key issue at stake: the breadth of an arbitrator's duty to disclose facts or circumstances regarding his/her independence and impartiality.

Both the Reims and Paris Courts of Appeal held that the Chairman's ignorance of his firm's links with Tecnimont did not exonerate him, and that the duty of disclosure was ongoing and broad. The Reims Court of Appeal recalled that the duty of arbitrators to disclose extended to circumstances that may affect their judgment or cause a reasonable doubt to the parties with regard to the arbitrator's independence or impartiality. What is to be assessed is thus not the actual independence of an arbitrator, but his or her independence from the subjective point of view of the parties.

The decision of the Reims Court of Appeal broadened the duty of disclosure of the arbitrator under French law. Some commentators have warned that this decision risks conflating the duty of disclosure with the issue of the independence of the arbitrator – an arbitrator can be independent even if he/she has failed to disclose particular circumstances. It was hoped that the *Cour de Cassation* would shed some light on the matter, but it did not.

It remains that, through these successive decisions, the French Courts have reinforced the breadth of the disclosure duty and recalled its ongoing nature. An arbitrator must conduct extensive searches for any links with the parties including, for arbitrators who work in law firms, links with the firm. Questions remain as to the precise boundaries of an arbitrator's duty of disclosure, but they have been expanded significantly.

## Conclusion

The matter is now remitted to a differently-constituted Paris Court of Appeal. Beyond the factual determination of whether the 30-day time period was respected following Avax's discovery of any new information, it is possible that the issue of the breadth of the arbitrator's duty to disclose will be considered once more.

While not addressing the arbitrator's duty of disclosure in its decision of last week, the *Cour de Cassation* did send a strong message about the status of arbitration rules: they cannot be bypassed. By ruling that a failure to bring a challenge within the prescribed 30 days was a bar to an action to set aside an award, it deferred to the contractual procedure set by the parties. Despite this reinforcement of the legal status of arbitration rules, parties should still be wary of any rules of public policy that may limit the contractual procedure fixed by the parties, as long established by the *Cour de Cassation* in the *Dutco* case.<sup>2</sup>

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<sup>2</sup> *Siemens AG v. Dutco*, *Cour de cassation*, 1e civ., 7 January 1992, Bull. civ. I, No. 2..

**Philippe Boisvert**

**Associate, Paris**

+ 33 1 5504 5880

pboisvert@whitecase.com

**Michael Polkinghorne**

**Partner, Paris**

+ 33 1 5504 5800

mpolkinghorne@whitecase.com

**Matthew Secomb**

**Partner, Paris**

+ 33 1 5504 1554

msecomb@whitecase.com

**Christopher Seppälä**

**Partner, Paris**

+ 33 1 5504 1545

cseppala@whitecase.com

**John Willems**

**Partner, Paris**

+ 33 1 5504 1501

jwillems@whitecase.com

**Christophe von Krause**

**Partner, Paris**

+ 33 1 5504 1570

cvonkrause@whitecase.com

**Andrew McDougall**

**Partner, Paris**

+ 33 1 5504 1504

amcdougall@whitecase.com

**Charles Nairac**

**Partner, Paris**

+ 33 1 5504 1541

cnairac@whitecase.com