ARTICLE

ARBITRATORS, PARTIES AND COMPLIANCE WITH THE DUTY TO DISCLOSE

Litigation - Arbitration - White Collar Crime | 31/07/17 | Marie Danis Marie Valentini

In a judgment dated 17 June 2017,[1] the French *Cour de cassation* specified the legal regime applicable to the arbitrators' duty to disclose. The Court held that the mere fact that such disclosure was incomplete was not sufficient to have an award set aside, as long as the facts on the basis of which an objection could have been raised against the arbitrator had been disclosed, be it by the opposing party.

The party who failed to raise any such objection based on the facts thereby disclosed is deemed to have waived its right to do so; the award cannot be set aside because the tribunal was allegedly not properly constituted.

During arbitration proceedings, the president of the tribunal, who had been appointed by the International Chamber of Commerce ("ICC"), stated in his declaration of independence and impartiality that he had nothing to disclose that could reasonably be considered as grounds for disqualification. Yet one month later, a party disclosed in a letter to the arbitral tribunal and to the opposing party that the president had, in fact, sat in another arbitral tribunal four years before, in the context of arbitration proceedings involving its mother company. It was further explained that, back then, the president had also been appointed by the ICC (and not by the parties) and that the markets, types of contracts and substantive questions of law in the first arbitration were very different from the instant case.

Pursuant to the ICC Rules, the opposing party was allowed 30 days from receipt of this letter to challenge the arbitrator on the basis of the facts and circumstances thereby disclosed, but no challenge was submitted and all parties and arbitrators signed the Terms of Reference two months later. Notably, those Terms stipulated that "*the parties [had acknowledged] that the arbitral tribunal [had been] duly constituted and that there was no objection against the arbitrators at the time of signature*".

The party who received the letter finally challenged the president of the tribunal 5 months after disclosure was made and alleged that it had only just discovered the exact circumstances in which the first arbitration took place, which it investigated only after receipt of a procedural order issued by the tribunal which it claimed was partial. The challenged was ruled to be inadmissible by the ICC and an action to set aside the award was later started on the grounds, *inter alia*, that the arbitral tribunal had not been properly constituted.

The *Cour de cassation* upheld the decision of the Court of Appeal denying the motion, arguing that:

_The factual elements raised to support the challenge of the arbitrator were easily accessible by the applicant, if not notorious, within the 30-day period following disclosure;

_The applicant had waived its right to object to the arbitrator's lack of independence and impartiality by failing to challenge him in due time and by declaring, in signing the Terms of Reference after disclosure had been made, that no objection could be raised against the arbitrators.

First, the *Cour de cassation* applied strictly the wording of Article 1466 of the French Code of civil procedure, pursuant to which '*a party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity*'.

The requirement that such waiver be made '*knowingly*' is interpreted in an extensive way, with the *Cour de cassation* giving a broad understanding to Article 1456 al. 2 of the French Code of civil procedure which provides that '*Before accepting a mandate, an arbitrator shall disclose any circumstances that may affect his or her independence or impartiality*'. By stating that disclosure can be made not only by the arbitrators (as Article 1456 provides) but also by the parties, it appears that this obligation would be complied with as long as the litigious facts are known by the parties, irrespective of who they were disclosed by. A close solution had previously been adopted by French courts, which held that when the facts and circumstances considered to be potential grounds for disqualification were deemed to be notorious, that is to say public or easily accessible by the parties, the arbitrators need not disclose them.**[2]**

This decision illustrates how crucial it could be for a party to disclose facts that had not been disclosed by the arbitrator. It also highlights that the parties need to be very careful in deciding what position to take when information, be they notorious or not, is disclosed by an arbitrator or a party.

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[1] French Supreme Court (*Cour de cassation*), First Civil Section, 15 June 2017, n°16/17108

[2] Paris Court of Appeal, 16 December 2010, n°09/18535