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Arbitration and impartiality of the arbitrator: The French Cour de cassation defines the criteria applicable to the arbitrator's disclosure obligation

In a noteworthy decision rendered on February 1st, 2012, the Cour de Cassation (French Supreme Court) reinforced the arbitrator's obligation to disclose to the parties any fact or circumstance that could affect his or her impartiality. Said decision was followed by another one rendered on July 4, 2012, under the terms of which the Cour de Cassation sets limits to this transparency requirement, at times perceived as excessive by practitioners.

The decision of February 1st, 2012 also reminded arbitrators of their obligation to explicitly render decisions in consideration of equity whenever the arbitration clause provides so.

Said solutions were handed down in application of the articles of the French Code of Civil Procedure ("CPC") then into force, prior to the arbitration law reform carried out by the Decree of January 13, 2011. However, the solutions put forward in these decisions are still fully applicable under the new text.

A mandatory reference to equity

In its decision of February 1st, 2012, the Cour de Cassation reaffirmed its earlier case law relating to the arbitrator's duty, and not mere faculty, to rule as an amiable compositeur if the parties have entrusted him with such mission.

In this case, the parties had developed a purely legal argumentation before the arbitral tribunal, and the arbitrators therefore rendered their decision only with regard to the rules of law. However, the arbitration clause provided that the Tribunal had to rule as an amiable compositeur, also called *ex aequo and bono*.

The Court of Appeal of Bordeaux, before which an action for annulment was initiated, first upheld the award, stating that it had not been demonstrated that it violated equity.

The Cour de cassation dismissed this decision and underlined that the arbitrator, vested with the power to rule on an equitable basis, has an obligation to "show in his award that equity has been applied".

This solution conforms with a decision handed down on September 17, 2008. It is now legalized by the provisions of the new Article 1478 of the CPC. Obviously it shall not be understood as preventing the arbitrator, who is invested with the power to rule on an equitable basis, from ruling also with regard to the rules of law. However, as the Supreme Court reminded, the latter is bound to give a ruling in conformity with the mission as defined by the arbitration clause: hence the award has to show that equity has been taken into consideration. It should be noted that, in practice, the state judge before whom an action for annulment is initiated only operates a purely formal control that reference was made to "equity" in the award.

The arbitrator's transparency: a more accurate and extended definition of the disclosure obligation

The definition of the arbitrator's obligation of transparency as well as its perimeter was the object of many recent decisions in France, giving rise to heated debates among practitioners.

As part of the facts underlying the decision handed down on February 1st, 2012, a party had entrusted a company operating in energy price-setting with the mission to negotiate its electricity tariffs with EDF, the French main energy company. A dispute arose between them and arbitration proceedings were initiated, to which EDF was not a party. Yet, it appeared that the president of the arbitration tribunal, who had been appointed by the arbitration institution and then accepted by the parties, had been the counsel of EDF in several disputes in the past. However the arbitrator had not revealed to the parties this particular fact, which did not constitute a "classical" relationship giving rise to conflict of interests between arbitrator and party, or between arbitrator and counsel.


The appeal decision, rendered by the Bordeaux Court of Appeal, first rejected the action for annulment of the award for lack of independence and impartiality of the arbitrator. It is however dismissed by the Cour de Cassation, which thus extends the arbitrator's obligation of disclosure to its relationships with third parties.

Even if certain practitioners worry about an extension of the perimeter of the arbitrator's obligation of transparency, this judgment seems however to comply with the principles set in French law or in the UNCITRAL arbitration rules.

Indeed, Article 1456 paragraph 2 of the CPC provides for no restriction to such an obligation, in stating, reflecting in part the UNCITRAL rules, that "it is up to the arbitrator, before accepting his mission, to reveal any situation that is likely to be seen as affecting his impartiality in order to briefly carry out, if necessary, its right to challenge".

Said obligation is summarized in similar terms by most arbitration institutions. The disclosure obligation is therefore not expressly restricted to the arbitrator's relations with the parties or their counsels only.





For example, Article 11 of the ICC Arbitration Rules requires the arbitrator to disclose to the Secretariat of the institution, at the time of his appointment and during the term of his mission, "any event or circumstance that could, in the minds of the parties, call into question his independence as well as the circumstances that could give rise to justifiable doubts as to his impartiality". This requirement is also found in Article 11 of the UNCITRAL arbitration rules, Article 9 of the Swiss Rules of International Arbitration (2012 version), Article 5.2 of the arbitration rules of the London Court of International Arbitration (LCIA), Article 10.4 of the arbitration rules of the Singapore International Arbitration Center (SIAC) and Article 29 of the China International Economic and Trade Arbitration Commission arbitration rules (CIETAC).

By dismissing the judgment of the Court of Appeal, the decision of February 1st, 2012 corresponds to a large interpretation of the arbitrator's obligation of transparency, maybe excessively large for certain practitioners. It indeed expressly states that the arbitrator's obligation is not limited to his or her relationships with the parties or their counsels, but should also include third parties who are close to the parties involved in the proceedings. In the present case, even if EDF was not a party to the arbitration, it is its relationship with one of the parties in connection with the object of the contract which gave rise to the arbitration. The arbitrator's relationships with EDF were therefore relevant and should have been disclosed to the parties, as they were sufficiently close to the facts of the case. Therefore, by not revealing that he had been EDF's counsel for a long period of time, the arbitrator failed to meet his obligation of disclosure.

However, further identification of third parties that have to be disclosed in order to fulfill the transparency requirement, still needs to be carried out by case law. In the future, courts will also have to define more precisely the types of relationships that need to be disclosed. Failing to do so would excessively extend the disclosure obligation imposed on the arbitrator and would certainly render it meaningless.

The Cour de cassation brought a partial answer to the above on July 4, 2012. Undoubtedly with regard to vehement protests from critical practitioners, the Cour de Cassation firmly dismissed the fact that the undisclosed participation of an arbitrator to a meeting organized by a party to the proceedings and during which the adverse party and its counsel were present, could be considered as a violation of his or her obligation of transparency.

Certain commentators may see in this decision the acknowledgement of the Supreme Court that a too broad obligation of transparency imposed on the arbitrator could paralyze the arbitration proceedings, as certain parties could try to use any fact or circumstance to call into question the performance of his or her mission by the arbitrator and consequently the validity of the award, when in fact no real difficulty has been characterized.

This interpretation may not be accurate though as the multiplication since 2008 of decisions dealing with the arbitrator's independence and impartiality seems to prove rather the contrary. In our view, the limit that has been set up recently is merely a reasonable backstop measure, and not, in our opinion, a step towards any limitation of the arbitrator's obligation of transparency.

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