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International Arbitration Report

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A commentary article reprinted from the February 2016 issue of Mealey's International Arbitration Report

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Commentary

Impartiality And Independence Of Arbitration Institutions In French Case Law: From Goals To Means

By
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Independence and impartiality of arbitration institutions are rarely focused on by specialized literature, although it should be seen as a main concern to any person who is not well-versed in arbitration. The reasons why it is not so much focused on by specialists are mainly explained by three factors: the first is that national laws are most often silent about the independence of arbitration institutions; the second reason is that this concern is anticipated by the parties when they choose the arbitration institution: they usually opt for one which they tend to consider to be independent of the parties, and consequently is able to administer their case with the minimum required guarantees of independence and impartiality; the third reason is that Courts tend not to sanction it directly, but only through the control of the independence of the arbitrators.

Although scarce in case law, this question was recently focused on in several judgments rendered by French Courts.

In the first decision, in *Société Nykcool AB v. Helvetia* rendered on 8 April 2014, the Court of Appeal of Paris rejected a claim from a party contesting the validity of the arbitration award on the grounds that the arbitration centre was not independent of the other party[1]. The Court held that *'the arbitration institution having no judicial function, the conflicts that can oppose this institution to one of the parties, does not constitute an obstacle to the organization of the arbitration, as the difficulties arising out of the constitution of the arbitral tribunal can be solved by the judge'.*

In this case, Nykcool, a Swedish company had contracted with several consignees, in October 2007, a charter-party on three ships for shipping a cargo of litchis between Madagascar and the ports of Marseille and Dieppe. The goods were damaged upon arrival, and the consignees initiated an arbitration against Nykcool on the basis of the charter-party under the CMAP (Centre de Médiation et d'Arbitrage de Paris). Having been condemned by the arbitral tribunal, Nykool contested the award before French Courts. It held, amongst other arguments, that the arbitration clause could not be applied, and therefore could not constitute the basis of arbitration, since the arbitration centre was not impartial. The argument raised to discuss the lack of impartiality was somewhat strange. Nykcool had, in a parallel arbitration held between the same parties, sued the CMAP before French Courts, to obtain from the judge the decision to declare the arbitration clause invalid and to declare that the case should be decided on an ad hoc basis.

Therefore, Nykcool considered that, because of this prior litigation and claim against the CMAP, the CMAP could not administrate the arbitration with the required impartiality. Unsurprisingly, the Court rejected this argument, which was rather artificial. Inapplicability of the arbitration clause was not due to the clause itself (which would have been the case for instance, if the clause revealed that the parties had not intended to have recourse to arbitration). According to the contesting party, it was based on an external factor

(i.e a pending dispute between this party and the arbitration institution pending before another judge) which had not existed prior to the arbitration but revealed by the arbitration itself. Therefore, the Court considered that *'the dispute that opposes Nykool to the CMAP in another instance does not impact the validity of the arbitration clause concerning the ship Southern Harvest'.* The Court also considers that the CMAP '*having no judicial function, the conflicts that can oppose this institution to one of the parties, does not constitute an obstacle to the organization of the arbitration, as the difficulties arising out of the constitution of the arbitral tribunal can be solved by the judge'.*

This reference to the functions of the arbitration institution was set for the first time in the case *Cubic Defence System*, in which the French High Court made a clear distinction between the jurisdictional functions – assigned to the arbitrators - and the organizational functions, assigned to the arbitration centre[2]. In this case, a dispute opposed a claimant against the ICC, where the claimant considered that the ICC had violated article 6.1 of the European Convention of Human Rights on several aspects during the course of an arbitration dispute held under the auspices of the ICC. Inter alia, the claimant pleaded that the ICC was liable to propose an arbitrator that was independent from the parties, failing which this institution was liable towards the parties. He also considered that the Rules of Arbitration, by setting a standard of control by the ICC Court of Arbitration over the awards before their release to the parties, were contrary to the principle of fair justice set by article 6.1 of the European Convention of Human Rights, because the modalities of this control were not disclosed to the parties, and were not subject to discussion. The Court rejected this argument, and held that the ICC had only organizational functions, whereas only arbitrators had judicial functions, and were therefore submitted to the standards set for judicial processes. Along the same lines, the Cour de cassation considered that the European Convention of Human Rights does not apply to international arbitration *'as it concerns only States'.*

As underlined by some authors, this last assertion is highly arguable. In fact, the award is controlled by judges upon standards that are based, if not directly applicable, on the European Convention of Human Rights. Therefore, an award that would violate - either on its content or on the procedure followed – basic standards of due process of law, as stipulated by article 6.1 of the Convention, would be sanctioned by a refusal to enforce the award, with the exception of public order or defaults in the constitution of the arbitral tribunal (in France, articles 1520-2º and 1520-5º of the Code de Procedure Civile). The content of the European Convention of Human Rights is included in public order standards that are used for the control of international awards. Therefore, the violation of basic standards of impartiality and independence by an institution would be sanctioned through the award itself, therefore focusing on the procedure which gave rise to the award. According to one author[3], one could also focus on the contract existing between the parties and the arbitration centre, tacitly contracted when the parties include the arbitration clause in their contract, therefore agreeing on its rules. Along the lines of the *Cubic Defence System* case, which considers that arbitration institutions have an organizational function, it must be admitted that by virtue of contracting, the institution guarantees that it offers services which conform to basic principles of fairness and independence. The sanction would not only be relevant to the award rendered under these conditions, but also the potential contractual liability of the arbitration centre. This sanction would be postponed until after the control of the award itself, when the harm caused to the parties would effectively materialize. However, according to the same author, in certain situations one could imagine that the parties would not have to wait until the award is rendered. This would be the case for instance if an article of the rules of arbitration of the institution obviously violates fundamental rights of one party, and that this article is applied during the arbitration.

This said, it is doubtful that article 1456 of the French Code de Procedure Civile, which sets an obligation of independence of the arbitrators, can be extended to the arbitration institutions, precisely because they do not have any jurisdictional function.

In *GEMS/ Albana Group*, ICC's liability was triggered before the Court of Appeal Paris by the claimant in its quality of appointing authority, and the contesting of the award was therefore based on article 1520-2º of the French Code de Procedure Civile. The claimant pointed out that the Counsel appointed by the ICC to work on the file had been working in past years in the law firm which was the counsel of the other party, Albana. Therefore, the claimant considered that the appointment of the arbitrator by the ICC was biased,

and the award should be annulled. The argument is interesting, because it shows that the claimant was aware of the fact that independence is not a condition required, in article 1456 of the French Code de Procedure Civile, from the arbitration institutions. Therefore, he did not directly focus on this, but rather on article 1520 2º of the same Code, considering that appointing an arbitrator in such conditions was irregular, because it legitimately raised doubts on the independence of the arbitrator. The argument of independence (of the arbitrator, and not of the institution) is indirectly raised through the channel of the constitution of the tribunal, and not by itself.

Unsurprisingly the Court rejected the argument, not because it was unfounded, but because it was raised too late in the course of the arbitration:

'*On the alleged irregularity of the constitution of the arbitral tribunal (Article 2 of article 1520 of the Civil Procedure Code) GEMS contends it discovered in the course of the arbitration that the counsel in charge of the case at the Secretariat of the ICC Court, had served as an associate lawyer in the law firm counselling Albanna in this arbitration, a link which had not been disclosed either by the applicant or by the ICC -which was bound by the same obligation in its capacity of appointing authority -nor by Albanna's counsels, contends that this failure to disclose those links is likely to raise a legitimate doubt about the independence and impartiality of the arbitrator appointed by the ICC since the arbitration center of the Secretariat, in general, and his adviser, in particular, participate actively the process of appointment of the arbitral tribunal (. . .).*'

This is in line with requirements set by article 1466 of the French Code de Procédure Civile that procedural irregularities should be raised rapidly in the course of the arbitration, failing which they are considered to be waived by the parties. However, the case illustrates how the independence of the institution, although not sanctioned by itself, can be discussed. When raised during the course of the arbitration, the argument should be focused on the independence of the arbitrator himself, because he was appointed by an institution which the party considered not to be independent. In other words, the doubts on the independence of the arbitrator stem from his appointment by an institution whose independence is arguable. Therefore, it should be raised as a challenge of the arbitrator himself.

It is true that the challenge of appointed arbitrators, in most cases, will be submitted to the institution itself, therefore leading to a *circulus vitiosus* in situations where this arbitrator was appointed by the institution whose independence is contested. However, in the last instance, the Court will control the process, as stated by the Court of Paris in the *Nykcool* case: if the institution has only organizational functions, '*difficulties arising out of the constitution of the arbitral tribunal can be solved by the judge'*. In addition to this, French Courts have ruled that the decision of the institution concerning the challenge of an arbitrator is not binding for the judge who controls the award[4].

In both *Nykcool* and *Albana* cases, the question of independence of the institution is not considered by itself - as the institution has only organizational functions, and no jurisdictional functions - but through the channel of the control of the independence of the arbitrators, especially when they are appointed by the institution. In *Cubic Defence System* it is expressed that this can be potentially controlled not by itself, during the course of the arbitration, but together with the control operated on the award itself, precisely because institutions have a mere organizational function. In the case *République de Guinée v. CMAP*, the Court of Appeal of Paris rejected a claim in urgent matters introduced by a party who requested the judge to suspend the arbitration process, because it had doubts on the impartiality of the arbitration centre[5]. The Court considered that *'neither the impartiality, nor the neutrality, nor the objectivity of the appointed arbitrators (. . .) had ever been discussed by the parties'*, and therefore the judges were not entitled to intervene in the arbitration process. Here again, the Court reminds that the independence of the arbitration centre is to be analysed through the independence of the arbitrators, after the award is rendered.

Institutions are well aware of the risks. Most often, their internal organization reflects this concern so as to avoid conflicts of interests, especially when they intervene as appointing authorities or decide on the challenge of arbitrators. ICC is a good example of this. Article 13 (1) of the ICC (2012) Rules of Arbitration mention that the Court of Arbitration of the ICC must appoint or confirm the arbitrators, and will check, for that purpose, the effective independence of the arbitrator during this process. The Court has also to decide on challenges of arbitrators. The Rules of Arbitration develop a set of provisions to ensure that the Court be itself independent of the parties and their counsels.

Article 2(1) of the internal rules of the Court (Appendix II of the Rules of Arbitration) stipulates that the President and the members of the Secretariat of the Court may not act as arbitrators or as counsels in cases submitted to ICC arbitration. Similar provisions apply to the Vice President of the Court, and they cannot be appointed as arbitrators by the Court, but only confirmed after proposal by the parties. A member of the Court, if appointed as an arbitrator, must inform the Court without delay, and cannot take part in the decisions regarding the case he is involved in. He must also leave the Court room when the case is debated by his colleagues (article 2 (3) of Appendix II of the Rules of Arbitration)[6].

These rules seem to be basic precautions: as underlined by one author?'*Arbitration institutions have far-reaching decision-power and are for that reason a significant element of the judiciary authority with the alternative dispute settlement procedure. Therefore it is very important to have rules that guarantee the independence of the institutional body and its individual members who exercise their powers. Should the independence of the institution not be guaranteed, even though the arbitrators are independent, the question may arise whether the principle of independence has been fully adhered to in the case of the deciding body (comprising the arbitral institution as well the arbitral tribunal)*'[7].

The question is even more than sensitive in a situation where the institution is linked to one of the parties, or emanates from this party. An example of this is given in the US by the National Arbitration Forum (NAF), which was an organization set up by banks and credit-card companies[8]. The customers were invited to accept, on their banking and credit-card contract, the arbitration of the NAF arbitrators. It had been shown that the internal functioning of the NAF, as well as the decisions rendered, were clearly and systematically geared towards the interests of the banks and credit card companies.

Another good example of this is given in Russian Law by the two cases *Sberbank "Business-Lada" LLC & Ors and Lukoil – Energy lines company LLC v MK LLC*. In both cases, the arbitration institution was established by the company affiliated with the plaintiff and the plaintiff company approved the list of arbitrators that the parties could choose from. In neither case was the defendant given an opportunity to nominate arbitrators[9]. The defendants argued before the Supreme Commercial Court of Russia that the award rendered was not in conformity with fair and equitable treatment. The Court accepted this reasoning, in two decisions rendered on 24 May 2011 and 22 May 2012, and followed the European Court of Human Rights reasoning in Re *Hauschildt v Denmark*[10]:

'The existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality.'

In Re *Institute Neftegasproect JSC v Yamalgazinvest JSC*, the Supreme Commercial Court of Russia approved the rejection of the enforcement of an award rendered by an arbitration Court which was constituted by Gazprom, a parent company of one of the parties in the dispute. The context of the arbitration was somehow different from the one encountered in the *Business-Lada" LLC & Ors and Lukoil – Energy lines company LLC v MK LLC* cases because the parties were offered the opportunity to choose their arbitrator either from a list of arbitrators or outside this list. Nevertheless, the Supreme Commercial Court of Russia considered that although actual bias was not evidenced, the principle of objective independence was breached due to the close connection between the plaintiff and the arbitration institution.

One will not necessarily approve this decision, precisely because the claimant did not prove any actual bias in the decision rendered. As seen above in the *République de Guinée* case, French judges, for instance, focus on the independence of the arbitrators, which means the independence of the institution will be sanctioned *only* if it impacts on the independence of the arbitrators. A cautious approach should be adopted in this regard, because the requirement that arbitration institutions be independent is not self-evident: arbitration institutions specialized in a specific industry are widely spread, and should not be seen suspiciously per se. The members of these institutions are usually coming from the same industry, as well as from their lists of arbitrators,

companies and persons working in the same field of activity, knowing each other, sharing common interests, contracting together, etc. The French Cour de cassation considers that in those kinds of arbitration, where the institution is linked to a specific industry, and where the arbitrators come from the same industrial sector, a more «flexible» approach to the independence of the arbitrators should be adopted: the parties cannot ignore that the arbitrators, or at least some of them, can have professional links between them and/or with the parties; therefore if the parties have any concern regarding their independence, they should raise the issue without delay, and they are supposed to realize that the arbitrators might have a certain relationship with the parties, because they work in the same field of activity[11]. This applies also to the institutions.

It is not certain that this question of independence of institutions will be so much at the centre of the debates in the coming years, precisely because the control effected by the Courts over the arbitrators' independence as a strict condition to any valid arbitration has become stronger and stronger. In a way, this concern remains far behind the concern over the essential qualities of the arbitrators, because the latter is a good means to control the first. As the great French historian Jules Michelet wrote about the French revolution, goals are important, but the means used to reach them may be even more. But we are not precisely talking about revolution, are we?

Endnotes

1. Court of Appeal of Paris, 8 April 2014, Rev. Arb. 2015, p.118, with a commentary by P.Pic; Cahiers de l'Arbitrage, 1 June 2014, n°2, p. 366, with a commentary by P. Pedone and J. Fouret.

2. Civ.1, 20 February 2001, *Cubic Defense Systems v. ICC*, Rev.Crit. Dr. Int. Priv., 2002, p. 124, with a commentary by Ch. Seraglini.

3. Seraglini, footnote n°2.

4. Court of Appeal of Reims, 2 November 2011, *Avax SA v/ Tecnimont SpA*, Rev. Arb., 2009, Gaz. Pal., 24 January 2012, with a commentary by D. Bensaude; Rev. Arb., 2012, p. 112, with a commentary by M. Henry.

5. Court of Appeal of Paris, 18 November 1987 and 4 May 1988, Rev. Arb., 1988, p. 657, with a commentary by Fouchard.

6. *See* M. Bühler, L'ethique des centres d'arbitrage – l'exemple de la Cour internationale d'arbitrage de la Chambre de Commerce Internationale (CCI), Ed. Bruyland, 2012, p. 89-102.

7. « Arbitral Institutions under scrutiny », ASA special series, n°40, p. 37 (by Urs Weber-Stecher).

8. *See* « Arbitral Insitutions under scrutiny », above quoted.

9. Quoted by M. Samoylov, « Impartiality and independance of party affiliated arbitral institutions in Russia », article pulished on 7 April 2014 in http://blogs.lexisnexis.co.uk/dr/impartiality-and-independence-of-party-affiliated-arbitral-institutions-in-russia/.

10. *Hauschildt v. Denmark*, n°10486/83, Series A, n°154, 24.5.89, (1990) 12 EHRR 266; AFDI, 1991, p. 585, with a commentary by Cossurat-Coustène; JDI, 1990, p. 727, with a commentary by P.Rolland and P. Tavernier.

11. See for instance Civ. 1, 19 December 2012, *Sté Rocco Giuseppe E. Figli Spa v. Agralys*, JDI, 2013, p. 946, with a commentary of S. Sana Chaillé de Néré. ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Lisa Hickey
The Report is produced monthly by

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Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397