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by
Alexandre Malan

BELOT MALAN & Associés
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Commentary

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Alexandre Malan

[Editor's note: Alexandre Malan is a member of the Paris Bar, founding partner of BELOT MALAN & Associés, a boutique law firm located in Paris specialized in international arbitration and litigation. *Responses are welcome.]*

Independence of arbitrators is certainly one of the most commented topics of current International Arbitration. Some authors have accurately stressed the significance of cultural background to this issue: cultural and social factors have obvious impacts on the expectations one may have regarding the role of arbitrators and their independence as regards to the parties. In France, practitioners and authors have focused anew on this issue after a recent decision rendered in the case *Apax v. Tecnimont*. It has led to renewed efforts to redefine constraints in order to be able to understand how and what arbitrators should disclose to the parties in order to comply with independence requirements. Arbitrators should be particularly cautious when conducting arbitrations if the seat of arbitration is in France or if the award is to be recognized in France.[1]

1. *Apax v. Tecnimont* and the background

In *Apax v. Tecnimont*, the Cour of Appeal of Paris annulled an award on the grounds that the arbitrator had failed to properly disclose relevant facts which could cast doubts on his independence in time.

After this decision, which the *Cour de Cassation* quashed, the case was deferred to the Court of Appeal of Reims to be reviewed.[2] The Court of Reims like the Court of Paris annulled the award. Both the decisions of the Paris and Reims Courts have been strongly criticized by some authors, especially outside of France, who considered that such evolution would undermine Paris as a reliable place of arbitration.[3]

In this case an arbitrator was challenged by one party before the ICC Court, which rejected the challenge and confirmed the arbitrator. The challenge occurred at the end of the arbitration proceedings, while the Arbitral Tribunal was about to render its award. However, as documented during the annulment proceedings, it appeared that the challenging party had been aware at an early stage during arbitration of the facts put forward for the challenge but had decided to wait until the very end to bring them forward in a challenge. The arbitration had begun in 2002 between Avax and Tecnimont, and the Chairman of the Tribunal had then disclosed that the law firm in which he was a partner had been the counsel of one of Tecnimont's parent company until 2001. Questioned by Avax in 2007, the Chairman made new disclosures, by revealing that the Chinese branch of the same law firm had advised a consortium of Tecnimont - Sofregaz in 2005 which was a client of this firm for a long time. It was also shown afterwards that Sofregaz was a subsidiary company entirely owned by Tecnimont. In September 2007, Avax challenged the Chairman before the ICC Court but this challenge was rejected. In December 2010, a partial award was rendered the validity of which was contested by Avax before the French Courts. Even after the award was rendered, Avax continued to question the Chairman and new elements appeared from this scrutiny, especially the fact that the law firm had continued to advise Tecnimont and Sofregaz during the course of the arbitration proceedings. According to Avax, the arbitrator had failed to spontaneously disclose these facts, making it parcimoniously and only after having been

questioned by Avax in several instances, and each time without sufficient precision. According to Avax, the arbitrator's behaviour cast some doubt on his independence. On the other side, Tecnimont mentioned that Avax had failed to file its challenge within 30 days of knowledge of the facts, as requested by the ICC Rules of Arbitration, and added that the arbitrator had not failed to disclose the information, as this information was unknown to him until it was fully revealed by Avax.

The Court of Appeal of Reims ruled, going even further than the Court of Paris, that the Judge was not bound by the decision of the ICC Court. Indeed the Court explained that the challenge before the ICC Court and the judicial scrutiny or control of the award by the Judge were separate issues as *'they have different objects and are not submitted to the same authority'*. It was also pointed out that the arbitrator revealed new facts after the ICC Court had rendered its decision on the challenge. The Court considered that the arbitrator had failed to reveal all relevant information, especially as it had not released information at once, but only after having been questioned by Avax on several occasions. According to the Court, the arbitrator's behaviour could cast legitimate doubt as to his independence.

This case highlights a shift in the debate on the independence of arbitrators: from a fact-finding approach on the reality of such independence, it has become a debate on the obligation placed on arbitrators to reveal all the elements which might have an impact on their independence. In other words, the issue is not necessarily the arbitrator's effective independence from the parties or their counsels, but their obligation to reveal all factual information which could cast reasonable doubt on their independence, regardless of whether they are effectively independent or not.

Contrary to what some authors have considered[4], the afore-mentioned decisions in *Avax v. Tecnimont* do not fully reverse the traditional position of French Courts, although on one hand, they considerably reinforce control on the "obligation to reveal" imposed on arbitrators. In addition, the Courts' scrutiny for several years was on arbitrators' compliance with their obligation to reveal, rather than on a more subjective research of whether they were effectively independent in each individual case. It does not mean that the judges do not scrutinize the facts of the individual cases, but rather that the subjective review will take place only if a party is still contesting the independence of the arbitrator notwithstanding a regular and timely disclosure of relevant facts by the arbitrators. This subjective approach will take place only if all formal requirements on how and what the arbitrators should disclose have been satisfied. One can say that the formal control comes *in priority and before* the subjective approach, although one can find decisions giving priority to the subjective approach, which makes it somewhat difficult to generalise.[5]

2. How and what the arbitrator should disclose?

Several decisions rendered over the last 15 years have put forward the obligation for the arbitrator to *'reveal all circumstances which could affect his judgment and provoke in the parties' mind a reasonable doubt as to his qualities of impartiality and independence, which are the very nature of the arbitral function'*.[6] This legal obligation, which was contained in the former article 1452 al.2 *French Code de Procédure Civile*, is now stipulated in article 1456 al. 2 of the same *Code*, enacted in the Decree n°2011-48 of January 13th 2011.[7]

The first requirement is a formal one: the Court of Appeal of Paris recently considered that the failure to sign a **statement of independence** when requested to do so by one of the parties shall lead to annulment of the award, notwithstanding the fact that the applicable Rules of Arbitration did not require such statement of independence, or that there was nothing relevant to declare regarding possible lack of independence.[8] Here, although the counsel of a party had asked the Tribunal to send the signed statement of independence, no such statement was sent to him. The Court considered that this refusal of the Tribunal, for which no reason was given, could engender reasonable doubts in the mind of this party as to the independence of the members of the Tribunal. The idea behind this approach is that there should be no room for doubt, and the burden of proof of independence shall not be placed on the parties or the judge, but on the arbitrator. The approach is the same in cases where an arbitrator or the institution in charge of the arbitration does not communicate the declaration of independence to the parties despite the obligation to do so according to the rules of arbitration chosen by the parties (see for instance, article 11.2 of the ICC Rules (2011); article 7 (2) of the VIAC Rules), notwithstanding the fact that the parties did not formally ask the arbitrators or the institution for the said declaration.

The **content of such disclosure** is also controlled by the Courts. As summarised by a critic, *'it is not sufficient for an arbitrator appointed or approached to say that he knows one of the parties, he should also say if he knows its counsel (albeit this one only a representative of the party), if he was appointed in the past by this party or its counsel, how many times he was appointed, on what kind of disputes, and to say that from the start and without being so requested from time to time according to the questions raised by one party, if he has any link or private interest'*.[9] The judge's requirements as to the elements to be disclosed are therefore quite precise. The content of the disclosure made by the arbitrators encompasses several points: i) the relation with the parties and their respective counsels; ii) the direct and indirect links; iii) the precision of the statement.

First the disclosure should cover **not only the links between the arbitrators and the parties, but also those with their respective counsels**. The Court of Appeal of Paris ruled that the lack of independence can arise from relations between an arbitrator and the counsel of a party, if the relations were not purely occasional.[10] In this case, the arbitrator had been consulted in the past by the counsel of one party for other clients, and had neglected to reveal the amount of fees he had invoiced to the counsel and his clients in the past. It is clear that in this specific case the annulment of the award was not decided after a thorough analysis of the individual case as to the issue of independence, but was based on the fact that during the arbitration process, the arbitrator had failed to reveal all elements which could cast doubt as to possible conflicts of interests. Indeed, in this case the Court focused on the fact that the arbitrator had not spontaneously revealed this information, and had released partial information only a few days before the award was rendered. The Court considered that the timing was too short, and the information was given too late to enable the parties decide to challenge the arbitrator.

Secondly, for several years the Courts request that the arbitrator reveal not only **direct but also indirect links** with one party or its counsel. For instance, they consider as relevant the fact that the arbitrator's daughter works in a law firm assisting one party in the dispute.[11] Such factual situation is well illustrated in *Avax v. Tecnimont*. As stressed by many authors and pled by the counsels who were supporting the validity of the award, it is more than likely that in this case the arbitrator was unaware of the fact that the foreign branch of the law firm in which he was a partner had advised a sister company of Tecnimont at least until Avax revealed it to him, and did not wilfully conceal the information. The decision illustrates that the Courts are not willing to consider facts in each individual case to assess the independence of arbitrators. On this point, the decision is extremely severe. However, it clearly rejects intentional elements or motive as a possible condition of annulment, and releases the judge from any fact finding process to assess the reality of independence of the arbitrator. Information ought to be conveyed to the parties. If it is not, the award may be annulled, regardless of whether the arbitrator had knowledge or not of the information which places his or her independence at risk. In a way, the decision is sound, as it is aimed at reinforcing parties' confidence in the arbitration process, thus excluding any criteria based on a subjective analysis of the arbitrators' effective knowledge of the relevant facts at the time of arbitration. On the contrary, it obliges the arbitrators, when appointed, to go beyond their current knowledge of facts to investigate any potential conflict of interests. This might be felt as unreasonable and somehow naïve, overestimating the arbitrator's capacities and means to find out all relevant possible links with the parties. However, it is consistent with the recommendations of point 7 (c) of the IBA Guidelines which state that *'An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate'*. This is obviously aimed at giving parties maximum confidence in the arbitration process. What is sought is not the arbitrator's independence in itself, but rather the avoidance of any doubt in the mind of the parties as to such independence and impartiality, and enabling the parties to decide by themselves, once duly informed, if possible at the beginning of the arbitral process, whether or not to challenge the arbitrator.[12] It has been stressed however this can be a heavy burden especially for arbitrator(s) working in big international law firms, where conflict checks, even seriously processed, cannot be always accurate, especially when their clients' company charts' evolve continuously.[13]

Thirdly, **information** given by the arbitrator **shall be precise and not elusive**. In one case, the award was

annulled as the arbitrator, who had been "off counsel" of the law firm of one of the parties several years before the arbitration process, had released insufficient information, as he had mentioned that he had been consulted "two or three times" by the law Firm. The Court considered that the information was too partial and incomplete to correctly inform the other party, thus depriving it of its right to challenge the arbitrator. The Court ruled that the information provided by the arbitrator did not sufficiently reveal the existence of the ongoing relationship ("Courant d'affaires") which existed between this arbitrator and the law firm of one of the parties' counsel.[14] According to the Court, the same information should be conveyed regarding the arbitrator's appointment in past cases by one of the parties: *'shall be revealed the fact that the arbitrator was systematically appointed by companies of the same group, its frequency and regularity over a long period in similar contracts, which created conditions of a flow of business between this arbitrator and the companies of this group*'.[15] Once again, the Courts consider that such lack of information is likely to '*provoke in the parties' mind a reasonable doubt as to his qualities of impartiality and independence*'[16], and *'deprive the party of its right to challenge the arbitrator*'.[17]

In all these decisions, the judges control that information is disclosed by the arbitrator and the completeness of the information given. However, as far as the judges consider that these conditions have not been satisfied, they do not proceed to any fact finding of the specific circumstances of the case to assess if there was an effective bias in the specific case. Clearly, this approach is not in line with the one adopted by the IBA Guidelines, which recommend that the relevance of facts or circumstances shall be *'reasonably considered in each individual case*'.[18] Many other countries have adopted the "facts finding" approach. In Italy for instance, courts have a "flexible approach"[19] to independence. For instance, the fact that an arbitrator shares the same office with a party's legal counsel would not necessarily be considered to interfere with the arbitrator's independence.[20] In Switzerland, the Federal Court makes a clear distinction between the obligation of independence and the obligation of disclosure. Swiss judges are quite flexible regarding the independence in the area of private arbitration because of undeniable existence of interconnections between the various legal practitioners.[21] In Russia the judges do scrutinize the facts to assess the effectiveness of the independence of the arbitrator.[22]

The European Courts of Human Rights ruled that *'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*'. [23]

However, there are limits to the formal approach adopted by French Courts, and failure to disclose information shall not necessarily lead to annulment. This is especially the case if the information **is of public knowledge or is irrelevant**. Thus, if it is of public knowledge that one of the arbitrators is the president of a professional federation, this may not lead to annulment, even if the arbitrator did not mention it during the arbitral process.[24] The difficulty may lie in identifying what ought to be known, what is effectively known by the parties and what is relevant. There shall be no annulment in cases where the arbitrators did not reveal information which is not relevant as to their independence, such as the fact that the arbitrator and the counsel of a party were both members of the advisory board of the same law review, or had been speakers at the same conference.[25] Along the same lines, in a recent case, the Court of Appeal of Paris decided that an article published by an arbitrator in which he expressed criticism against the US and Israeli policy in the Middle East could not be interpreted as support for or as evidence that he is in favour of Syria in a case in which this country was opposed to a Panamanian company. The Court considered that this opinion had nothing to do with the matter at stake, and was therefore irrelevant.[26]

The **timing of the disclosure** was also an important issue in the *Avax v. Tecnimont* case. Timing is imposed both on the arbitrator as well as the parties. Regarding the arbitrator, it is usually considered that the facts should be disclosed sufficiently early during the arbitral process, in order to give the parties time to challenge the arbitrators. The Court of Appeal of Paris ruled that the reluctance of the arbitrator to file the challenge raised by Avax, and the disclosure made only a few days before releasing the award, did not allow sufficient time for the parties to decide to challenge the arbitrator. Such concern is addressed by many rules of arbitration which state that the declaration of independence ought to be at the very beginning of the process while the arbitrators are being appointed or confirmed (see for instance

article 11.2 of the ICC Rules and 5.3 of the LCIA Arbitration Rules). The duty of the arbitrator is balanced by the obligation placed on the parties: they shall not unreasonably wait until the end of the arbitral process to raise a challenge. If this is done too late after the information has been revealed to them or after they have discovered it, they shall be considered as having waived their rights to challenge the arbitrator. This requirement is set forth, for instance in article 14.2 of the new ICC Arbitration Rules, which bar any challenge of arbitrator by a party if raised more than 30 days after the receipt by the parties of the notification of appointment or of confirmation of the arbitrators, or in cases where the arbitrators have already been appointed, challenge is barred if sought 30 days after the discovery of relevant factual elements by a party on which the challenge is to be based. This obligation is also set forth in article 1456 of the *French Code de Procédure Civile* which states that such action shall be undertaken within one month from discovery of the elements on which the challenge is based. The Court of Appeal of Paris recently decided that if the challenge of arbitrator could have been raised at the beginning of the arbitral process, the party should have done so without delay, failing which it is barred from so doing at a later stage.[27]

The question of the influence on the judges of the decision rendered by the arbitral institution on the challenge of the arbitrator is one of interest in the same context. In *Avax v. Tecnimont*, the Court of Appeal of Reims ruled that the decision of the ICC Court to reject the challenge raised by Avax was not binding on the annulment judge. The Court considered that the decision of the ICC Court is only an "*administrative*" decision and that *'the challenge before the arbitration institution and the process of control of the awards by the judge are distinct in their object and are not submitted to the same authority'*. Hence, the judge could very well decide to annul the award on this basis, notwithstanding the fact the arbitration centre would have rejected the challenge of the arbitrator. This decision is interesting in several regards. First of all, the Court considers that the judge is not bound by the arbitration rules upon which the arbitration was based: in this case, the defendant argued that the other party had failed to challenge the arbitrator within the notice period set forth in article 14.2 of the ICC Rules (2011). Secondly, the Court considers that the judge is not bound by the decision of the arbitration centre itself. This decision has been criticised for not taking into account that the rules of arbitration are contractually binding for the parties as they are supposed to be accepted by them in the contract.[28] Although this analysis is perfectly true, the decision of the Court of Appeal of Reims was preceded by several others, some of them rendered by the *Cour de Cassation.*[29] The specificity of the facts of the case may have had an influence on the Court, which may have expressed its concern by the fact that some of the elements had been disclosed by the arbitrator upon being questioned by Avax *after* the ICC Court had dismissed the challenge, thus creating a new case for challenging him or contesting the award.

3. Concluding remarks

The trend followed by French Courts is coherent: they require that disclosure be formalised in writing, cover direct as well as indirect links with the parties or their counsels, be accurate and timely. The Courts reject any research of the subjective intent of the arbitrators. The idea which underlines this trend can be understood as follows: the judges do not want to be involved in a subjective and factual inquiry on effective independence; neither do they want to be reviewing a new challenge of arbitrators. The means to avoiding this is perfectly well adjusted: a formal control on the disclosure conditions and content. No more, no less. In a sense, this is also in line with the tendency of French case-law on arbitration, which has progressively transformed the control of the awards to make it as light and as formal as possible. The consequence is a heavy burden placed on the arbitrator, whose obligations of disclosure have increased considerably as to their form, content and timing. But it is certainly the price to pay to reinforce credibility in arbitration as a reliable alternative to classical dispute resolution.

Endnotes

1. J. Fry, S. Greenberg, '*Le Tribunal arbitral: application des articles 7 à 12 du Règlement d'arbitrage de la CCI dans les affaires récente*', Bulletin de la Cour internationale d'arbitrage de la CCI – Vol. 20/2 – 2009, p. 13.

2. The Cour de cassation quashed the decision rendered by the Court of Appeal of Paris (CA Paris, February 12, 2009, SA *J&P Avax c/ Tecnimont SpA*, Rev. Arb., 2009, p. 186, commentary by Clay) for reasons

which are not relevant for this article. The case was sent back to the Court of Appeal of Reims for its review (Cass. civ.1, 4 November 2010, Rev. Arb., 2010, p. 824; CA Reims, November 2, 2011, Gaz. Pal., 22 and January 24, 2012, p. 15, with a commentary by Bensaude, Combe and Cochery).

3. A. Crivellaro, *'The Arbitrator's failure to disclose conflicts of interest: Is it per se a ground for annulling the award?'*, in M.A. Frenandes Ballesteros and David Arias (eds). Liber Amicorum Bernardo Cremades (La Ley, 2010), pp. 309 – 326: *'the partial award was almost 500 pages long and witnessed by itself and complexity of the proceedings. Annulling it without any fact finding is not something that practitioners of international arbitration who arbitrate in Paris would expect'.*

4. A. Crivellaro, *'The Arbitrator's failure to disclose conflicts of interest: Is it per se a ground for annulling the award?'*, op. cit., pp. 309 – 326.

5. D. Cohen: *'Indépendance des parties et conflits d'intérêts'*, Rev. Arb., 2011, p. 611, spéc. n°59.

6. CA Paris, March 23, 1995, *Société Maec*, Rev. Arb., 1996, p. 446; see also CA Paris, April 2, 2003, *Société Fremarc*, Rev. Arb., 2003, p. 1231.

7. Article 1456 of Code de Procédure Civile states as follows: *'Le tribunal arbitral est constitué lorsque le ou les arbitres ont accepté la mission qui leur est confiée. A cette date, il est saisi du litige. Il appartient à l'arbitre, avant d'accepter sa mission, de révéler toute circonstance susceptible d'affecter son indépendance ou son impartialité. Il lui est également fait obligation de révéler sans délai toute circonstance de même nature qui pourrait naître après l'acceptation de sa mission'.*

8. CA Paris, March 10, 2011, *Société Nykcool*, Rev. Arb., 2011, p. 732, commentary by Cohen.

9. D. Cohen: *'Indépendance des parties et conflits d'intérêts'*, op.cit., spéc. p. 629.

10. CA Paris, September 9, 2010, *Allaire c/ SGS Holding*; Rev. Arb., 2010, p. 965.

11. CA Paris, December 18, 2008, *SARL Avelines Conseil c/ Mansuy*, Rev. Arb., 2011, p. 683.

12. CA Paris, March 10, 2011, *Société Nykcool c./ Société Dole France*, Rev. Arb., 2011, p. 732.

13. A. Crivellaro, *'The Arbitrator's failure to disclose conflicts of interest: Is it per se a ground for annulling the award?'*, op. cit., p. 324: *'by overvaluing the disclosure (. . .) the Court transforms the arbitrator into an inquirer on the capital moves of the parties who happen to appear before him. First, this is not at all his duty. Second, he is not staffed to discharge such a burden, unless he opens an intelligence agency and seeks information at regular time intervals'.*

14. CA Paris, March 10, 2011, *Tecso c/ Neoelectra Group*, Rev. Arb., 2011, p. 735.

15. Cass. civ. 1, October 20, 2010, *Somoclest Bâtiment c/ DV Construction*, Rev. Arb., 2011, p. 671.

16. CA Paris, March 10, 2011, *Tecso c/ Neoelectra* Group, op.cit.

17. Cass. civ. 1, October 20, 2010, *Somoclest Bâtiment c/ DV Construction*, op. cit.

18. IBA Guidelines, General Standard 5; see L. Trakman, "The Arbitrability and independence of arbitrators reconsidered", Int. A.L.R, 2007, p. 124, spec. p. 133.

19. P. Ferrario, '*Challenge of arbitrators: Where a Counsel and Arbitrator share the same office – The Italian Perspective*', Journal of Int'L Arb., 2010, vol. 27, n°4, p. 421.

20. Court of Busto Arsizio, July 18, 2000, Guit. Merito, 2002, p. 731.

21. Federal Court, Bull. ASA, 1998.634; Revue Suisse de Droit international Economique 1999, p. 579, c 3a.

22. Brounceva E.V., *'International Commercial Arbitration: Textbook for the top law schools'.* Spb.: 'Sentiabr', 2001. – C 150.

23. European Court of Human Rights, *De Cubber*, October 26, 1984, Series A no. 86, pp. 13-14, para. 24; European Court of Human Rights, *Hauschildt*, May 24, 1989, n° 10486/83.

24. CA Paris, December 16, 2010, *Nidera France c/ Leplatre*, Rev. Arb., 2011, p. 724, commentary by Cohen,

and Gaz. Pal., May 15-17, 2011, commentary by Bensaude.

25. CA Paris, July 1, 2011, *Sorbrior c/ ITM Entreprises*, Rev. Arb., 2011, p. 761, commentary by Cohen.

26. CA Paris, June 29, 2011, *Société Papillon Group Corporation*, Gaz. Pal., November 11-15, 2011, p. 15, commentary by Bensaude.

27. CA Paris, October 28, 2010, *Société Animatrice de la Franchise*, Rev. Arb., 2011, p. 691; Gaz. Pal., February 6-8, 2010, p. 19, commentary by Bensaude. See also CA Colmar, February 8, 2011, *Société Cevede*, Rev. Arb., 2011, p. 724, commentary by Cohen.

28. T. Clay, D., 2011, p. 3029.

29. Cass. civ. 2, October 7, 1987, *Opinter*, Rev. Arb., 1987, p. 479, commentary by Mezger; see also CA Paris, May 15, 1985, *Raffineries de Pétrole d'Homs et de Banias*, Rev. Arb., 1985, p. 141; CA Paris, May 4, 1988, Rev. Arb. 1988, p. 657, commentary by Fouchard. ■

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
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