



Cour de Cassation quashes decision that disregarded ICC rule on time limits to arbitrator challenges – 2 takeaways

International Arbitration Newsletter

22 SEP 2014

By: Michael Ostrove | Maxime Desplats | Francisco-Xavier Paredes

In the latest installment of a seven-year saga that has captured the attention of the arbitration community, the French Supreme Court for civil matters recently quashed a Court of Appeal's decision that disregarded the provision in the ICC Rules which sets a time limit on challenges to an arbitrator.

By confirming the time limits for challenges in institutional rules as binding, with this milestone decision the French Cour de Cassation has further limited the scope for French courts to annul arbitration awards and reinforced the efficiency of arbitral proceedings seated in France.

The facts

In 1998, Tecnimont Spa and J&P Avax entered into a subcontract for the construction of a propylene factory. A dispute arose between the parties, and Tecnimont commenced an ICC arbitration against Avax.

On 16 July 2007, Avax wrote to the chairman of the arbitral tribunal requesting information about relationships between his law firm and Tecnimont. On 21 July, the chairman responded, providing for the first time information regarding some matters his firm handled for Tecnimont, while also specifying that he was not directly involved in these instructions. On 14 September 2007, some 55 days after the chairman's response, Avax challenged the independence of the chairman. On 26 October 2007, the International Court of Arbitration of the ICC rejected the challenge (without providing reasons). The proceedings continued, with Avax reserving its rights to challenge any award rendered by the tribunal.

On 10 December 2007, the arbitral tribunal handed down a partial award. On 27 December, Avax applied to the Paris Court of Appeal for this award to be set aside. Avax also continued to seek information about the chairman's independence and the chairman continued to provide further information until March 2008.

Tecnimont argued that Avax's challenge to the award should be rejected because Avax had gone beyond the time limit set by the ICC rules to challenge an arbitrator (30 days). The Paris Court rejected this argument on the basis that new details regarding the alleged conflict of interests were discovered in 2008, after Avax filed its initial challenge with the ICC. Therefore, the Court of Appeal annulled the partial award for lack of independence of the tribunal on 12 February 2009.

Tecnimont subsequently filed a petition before the Cour de Cassation and on 4 November 2010, the Supreme Court reversed the annulment. It held that the Court of Appeal had modified the subject-matter of the dispute as Avax was aware of virtually all of the facts when it filed its challenge with the ICC on 14 September 2007.

In accordance with the provisions of the French Code of Civil Procedure, the case was sent back down to a different Court of Appeal (in Reims) for a new ruling on the setting aside of the partial award. On 2 November 2011, the Reims Court of Appeal also upheld Avax's challenge to the award. However, to reach this conclusion, the Reims Court held the ICC Rules' time limit for challenges to an arbitrator could not prevent a judge from verifying the independence of the arbitral tribunal. The Court then, like the Paris Court of Appeal before it, set aside the award on the basis of a lack of independence of the Tribunal.

Tecnimont filed a second petition before the Cour de Cassation.

The decision

On 25 June 2014, the French Supreme Court again quashed the decision of the Court of Appeal. This time, it held:

"The party who knowingly fails to exercise, within the period prescribed by the applicable arbitration rules, the right to challenge [an arbitrator] on the basis of any circumstances likely to jeopardize the independence or impartiality of an arbitrator is deemed to have waived the right to rely on them before the judge [responsible for setting aside an award]."

In other words, if a party could have challenged an arbitrator within the time limit set by the rules applicable to the arbitration and failed to do so without a legitimate reason, it cannot subsequently request the setting aside of an award on the basis that an arbitrator lacked independence.

Why decision is a milestone: 2 takeaways

This long-awaited decision of the French Cour de Cassation is a milestone for two reasons. **First**, it confirms the binding nature of arbitration rules agreed by the parties. **Second**, pursuant to article 1464 of the French Code of Civil Procedure, applicable to international arbitration, this decision incentivises parties to be as efficient and proactive as possible during the arbitral proceedings, notably by challenging arbitrators as early as they can. Should they fail to fulfill these obligations, the parties may be prevented from exercising their rights before the French court, in particular by challenging an award at a later stage.

Although some will be displeased by a rule that will prevent annulments of awards for legitimate reasons on the basis of procedural technicalities, this recent decision will prevent parties from delaying action to address arbitrator independence – delays which can themselves cause prejudice and increased cost. This decision should consequently be seen as another improvement in the legal certainty of arbitration proceedings seated in France.

AUTHORS



Michael Ostrove

Partner

Paris | T: +33 1 40 15 24 00

michael.ostrove@dlapiper.com
