CIV. 1
COURT OF CASSATION

CM

Vincent LENOIR
Traducteur
Expert près
la Cour d'appel
de Versailles
en langues
français-anglais
Vincent LENOIR

Public hearing of **16 December 2015**

Dismissal

Ne vanitur
687

Ms. Batut, President

Decision No. 1433-D F

Appeal No. D 14-26.279

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

THE COURT OF CASSATION, FIRST CIVIL DIVISION, decided as follows:
Ruling on the appeal lodged by:

1°/ company Columbus acquisitions INC, a company incorporated in Barbados, having its registered office located Suite 205-207 Dowel House CR Rocebuck and Palmeto sts, Bridgetown WI (Barbados),

2°/ company Columbus Holdings France, a French *société par actions simplifiée*, having its registered office located 38 rue de Berri, 75008 Paris,

against the decision of 14 October 2014 by the Court of Appeal of Paris (pole 1, division 1), in the dispute between:

1°/ the company Auto-Guadeloupe Investissement (AGI), a French *société anonyme*, having its registered office located SECID Tower, 8th Floor, Place de la Rénovation, 97110 Pointe-à-Pitre,

2°/ Mrs Marie-Agnès Dumoulin, domiciled 66 rue du Morne Ninine La Marina, 97190 Le Gosier, as representative of the creditors of company Auto-Guadeloupe investissement,

3°/ company Bauland Carboni Martinez & associés, a French *société d'exercice libéral à responsabilité limitée*, having its registered office located 40 rue de Bonnel, 69484 Lyon cedex 3, represented by Charles-Henri Carboni, as Commissioner to the Implementation of the Safeguarding Plan of company Auto-Guadeloupe investissement,

4°/ Company Bauland Carboni Martinez & associés, a French *société d'exercice libéral à responsabilité limitée*, having its registered office located 40 rue de Bonnel, 69484 Lyon cedex 3, represented by Eric Bauland, as Commissioner to the Implementation of the Safeguarding Plan of company Auto-Guadeloupe investissement,

5°/ Company Caribbean Fiber Holdings LP (CFH), having its registered office located 529 East South Temple, 84102 Salt Lake City, Utah (USA),

defendants in the cassation;
The claimants give, in support of their appeal, the sole ground of appeal attached to this decision;

Considering the communication made to the Attorney General;

THE COURT, in public hearing of 17 November 2015, where were present: Ms Batut, President, Mr. Matet, reporting counselor, Ms. Bignon, senior counselor, Ms. Nguyen, division clerk;

Given the report of Mr. Matet, counselor, the observations of SCP Delaporte, Briard et Trichet, counsel of company Columbus acquisitions INC and company Columbus Holdings France, of SPC Ortscheidt, counsel of company Auto-Guadeloupe investissement company, Ms. Dumoulin, of company Bauland Carboni Martinez & associés, and company Bauland Carboni Martinez & associés, of SCP Rousseau et Tapie, counsel of company Caribbean Fiber Holdings LP, and after deliberations in accordance with the law;

Regarding the sole ground, attached to this decision:

Whereas, according to the appealed decision (Paris, 14 October 2014), the French company AGI, the American company Caribbean Fiber Holdings (CFH), the capital of which is fully owned by the American company Leucadia National Corporation, and the companies Columbus Acquisitions, from the Barbados, and Columbus Holdings (Columbus), from France, concluded an agreement on the planned sale by the first two companies to the others of the capital of the French company Global Caribbean Fiber (GCF); company AGI having decided not to proceed with the sale, the Columbus companies implemented the arbitration procedure under the agreement's arbitration clause; by an award rendered in Bridgetown (Barbados), on 27 March 2011, the sole arbitrator, Mr. Alvarez, decided that company AGI had breached the agreement and referred to a subsequent award the requests related to damages and legal costs; company AGI and its agents, in that capacity, appealed the order which declared the exequatur of the award;

Whereas the Columbus companies complain that the decision reversed this order;

Whereas the decision observed that, in September 2009, the sole arbitrator had made a statement of independence stating that the Fasken Martineau law firm, in which he was a lawyer, did not currently advise company Leucadia National Corporation; it observed that on 15 December 2010, the law firm's website published a news, repeated in January 2011 by a business magazine for lawyers, that company Leucadia National Corporation sold its interest in a Canadian copper mine and that it was counseled in this transaction lasting since 2005 by a team of three lawyers from the Fasken Martineau law firm and that the debates, before Mr. Alvarez, were closed since August 2010 and that the case was being deliberated on the date the existence of this role as counsel was made public; it emphasized that the arbitrator did not state this fact in his statement of independence, that the fact was not known to company AGI before the beginning of the arbitration, that during the arbitral proceedings, company AGI did not have the obligation to investigate Mr. Alvarez's independence, given the guarantees he provided in his statement, and that he had not disclosed a clearly significant transaction for the firm, in view of the wide publicity given by the latter; the Court of Appeal duly concluded that, these circumstances, unknown to AGI, being such as to reasonably cause a doubt regarding the independence and impartiality of the arbitrator, the arbitral tribunal was unduly constituted; the ground of appeal which, in its first part, targets an erroneous but unnecessary ground of the decision, cannot be accepted;

FOR THESE REASONS:

DISMISSES the cassation appeal;

Condemns companies Columbus Acquisitions and Columbus Holdings France to pay the legal costs;

Having regard to Article 700 of the Code of Civil Procedure, dismisses their request and orders them to pay to AGI and its agents, in that capacity, the overall sum of 5,000 euros;

Done and decided by the Court of Cassation, First Civil Chamber, and delivered by the President in its public hearing of 16 December 2015.

GROUND OF CASSATION APPEAL attached to the decision

Ground of cassation appeal submitted by SCP Delaporte, Briard et Trichet, lawyers admitted to the Court of Cassation, for company Columbus acquisitions INC and company Columbus Holdings France

The appealed decision is criticized for having dismissed the order of the Deputy President of the Paris *Tribunal de Grande Instance* dated 19 June 2013 declaring exequatur of the award between the parties dated 29 March 2011 after having, in its legal grounds, cancelled the arbitration award made by Mr. Alvarez on 29 March 2011;

On the grounds that "AGI invokes a conflict of interests of the sole arbitrator with one of the parties which was not disclosed during the constitution of the arbitral tribunal;

On 10 November 2008 was concluded between AGI, CFH and the COLUMBUS companies a memorandum of understanding, renewed on 3 March 2009, regarding the planned sale by the first two companies to the others of the entire share capital of GCF; AGI having decided not to proceed with the transaction, COLUMBUS initiated against it, on 10 July 2009, an arbitration procedure of which CFH became a party on 12 August 2009; Mr. Alvarez, sole arbitrator, has accepted his assignment on 15 September 2009; the investigation of the case took place until August 2010; the award dated 27 March 2011 was subject to an exequatur order on 19 June 2013, which was appealed by AGI; AGI claims that the arbitrator concealed the reality of the relations between the Fasken Martineau law firm, of which he is a partner, and Leucadia National Corporation company, which undisputedly holds 100% of CFH's share capital; under Article 1456 of the Code of Civil Procedure applicable to international cases under Article 1506 of the same Code: "Before accepting his assignment, the arbitrator has to disclose any circumstance that may affect his independence or impartiality. He also has to disclose without delay any circumstance of a similar nature that may arise after accepting his assignment"; the fact that the arbitrator's name was proposed by AGI did not exempt him from his obligation to provide information in respect of that party; this obligation must be assessed in the light of the knowledge of the targeted situation and its impact on the decision of the arbitrator; Mr. Alvarez made in September 2009 a statement of independence in which he stated: "I wish to disclose that a partner in my firm's Toronto office has represented Leucadia National Corporation in Canada in respect of Canadian based matters over a number of years. I understand that at present there are no matters in respect of which my firm is currently providing advice to Leucadia National Corporation"; the parties disagree as to whether, in the first quoted sentence, the verb "has represented" must be translated into French in the present or past tense and if that sentence must be understood as a statement that a partner of the law firm, in which the arbitrator is a member, "represents Leucadia National Corporation in Canada for several years" or "represented Leucadia National Corporation in Canada for several years"; whereas, however, with the second sentence, the arbitrator states unambiguously that the firm does not currently provide advice to Leucadia; it appears in reality, with the news published by Fasken Martineau on its website on 15 December 2010, and repeated by Lexpert, a business magazine for lawyers, in January 2011, that on 15 December 2010 Leucadia completed the sale of its stake in the copper mine Cobre Las Cruces to Inmet Mining for approximately USD 575 million, and that a team from Fasken Martineau which included Stephen Erlichman and Aaron Atkinson (corporate law, securities) and Christopher Steeves (tax), assisted in this operation which started in 2005; firstly, if public and easily accessible information, that the parties were bound to consult before the commencement of the arbitration, are likely to characterize the public knowledge of a conflict of interests, however, the parties cannot reasonably be required to engage in a systematic study of the sources which may include the name of the arbitrator and persons related to him, or to continue their research after the start of the arbitration

procedure; in this case, on the date the Cobre las Cruces transaction was made public, the debates before Mr. Alvarez were closed since August 2010 and the case was being deliberated; the disputed facts were therefore not known at the time of the constitution of the arbitral tribunal; secondly, even assuming that the amount of fees received by the Fasken Martineau law firm in connection with the Cobre las Cruces transaction was low, the magnitude of the transaction itself, the number of lawyers working on it and the publicity of the law firm's contribution demonstrated the importance it attached to this case; it thus appears that, contrary to what Mr. Alvarez's statement of independence implied, while the arbitral procedure was underway, three lawyers from the Fasken Martineau law firm advised Leucadia in a transaction that the firm considered as significant in terms communication; such circumstances, which were unknown to AGI when Mr. Alvarez was appointed, were such as to cause, in the mind of that party, reasonable doubt regarding the independence and impartiality of the arbitrator; that it is therefore appropriate to cancel the award because of the irregularity of the constitution of the arbitral tribunal" (decision, p 5 and 6);

While the provisions of Article 1456 of the Code of Civil Procedure as provided for by Decree No. 2011-48 of 13 January 2011 apply when the tribunal was constituted after 1st May 2011; after having found that the arbitrator had accepted his assignment on 15 September 2009 and that the partial award was made on 27 March 2011, so that the constitution of the arbitral tribunal was before 1st May 2011 and that Article 1456 from Decree No. 2011-48 of 13 January 2011 was inapplicable, the Court of Appeal, which still based its decision on this text, breached it by erroneous application, and Article 3-2° of Decree No. 2011-48 of 13 January 2011, together with Article 2 of the Civil Code;

In the alternative, firstly, the arbitrator's failure in his duty of disclosure may result in cancellation of the award when the undisclosed elements are likely to cause in the minds of the parties a reasonable doubt as to his independence and thus his impartiality; the actual research of a reasonable impact on the impartiality of the arbitrator is all the more necessary that the alleged interests do not directly relate to the arbitrator or a party but to the structure where the arbitrator works and a company of the group that owns one of the parties to the arbitration; by merely alleging that not having revealed that three lawyers, of the Toronto office of the international law firm Fasken Martineau, which counts 770 lawyers across Canada, Europe and South Africa, participated in a sale transaction of a stake in a Canadian mining company to the benefit of a company related to one of the sellers, company Fiber Caribbean, Mr. Alvarez, partner in the Vancouver office of the Fasken Martineau law firm, could cause a reasonable doubt as to his independence and impartiality in the mind of the AGI company in connection with the redemption of its interest in a construction and underwater telecommunication cable operating company in the Caribbean without explaining why and how these elements could effectively affect the decision of the arbitrator to cause such a doubt, the Court of Appeal has not legally justified its decision with regard to Article 1520-2° of the Code of Civil Procedure;

In the further alternative, factors which may cause in the minds of the parties a reasonable doubt as to the independence and impartiality of the arbitrator may cause the cancellation of the award; the Court of Appeal noted that the AGI company knew, following the statement of the arbitrator Mr. Alvarez of 10 September 2009, that the Leucadia company was a client of the Fasken Martineau law firm, in particular in Canada; therefore, in the absence of request for recusal from AGI as a result of this disclosure by the arbitrator Mr. Alvarez, which made it clear that the Leucadia company being a client did not cause doubt about the independence of the arbitrator, the Court of Appeal could not simply, to cancel the award, note that this company was again assisted by another office of the Fasken Martineau law firm for the sale of a financial stake unrelated to the dispute before the arbitral tribunal, without explaining how the transaction for which that assistance was required could affect the arbitrator's independence and thus his impartiality, thereby depriving of legal basis the decision under Article of 1520-2° Code of Civil Procedure;

In the further alternative, again, assuming that without economic issue, the "significance in terms of communication" of a transaction that involved lawyers of the structure to which the arbitrator belongs, may affect the independence of an arbitrator and so raise a reasonable doubt in the mind of the parties as to his impartiality, the judge deciding the cancellation has to clarify how such significance is likely to affect the independence of the arbitrator, when the reasonable doubt does not arise from the parties themselves, whose relations with the arbitrator's law firm are known and accepted by the parties, or the transaction itself, unrelated to the dispute before the arbitrator; by holding, to cancel the award, that three lawyers from the Fasken Martineau law firm advised Leucadia in a transaction that the law firm regarded as "significant in terms of communication", without specifying how, regardless of participation in this transaction by Leucadia, which is a client of the law firm known as such to the parties to the arbitration, the arbitrator's independence could be affected by a sale transaction unrelated to the dispute submitted to arbitration in which the Leucadia company was assisted by lawyers from another office of the Fasken Martineau law firm, the Court of Appeal has not legally justified its decision with regard to Article 1520-2° the Code of Civil Procedure;

In the further alternative, the arbitrator's failure in his duty of disclosure when the undisclosed elements are likely to cause in the minds of the parties a reasonable doubt regarding his independence and his impartiality may result in cancellation of the award; the arbitrator only has a best-efforts obligation to collect information to transfer to the parties data that enable them to exercise effectively, if necessary, their right of recusal; by rendering this decision, after noting that the arbitrator proposed by AGI had spontaneously declared before his appointment that another office of his firm assisted Leucadia for several years, thus disclosing that Leucadia was a client of the Fasken Martineau law firm, so that a breach of his duty of transparency could not be claimed with regard to his duty of disclosure, the Court of Appeal violated Article of 1520-2° of the Code of Civil Procedure;

In the further alternative, finally, the arbitrator's failure in his duty of disclosure when the undisclosed elements are likely to cause in the minds of the parties a reasonable doubt regarding his independence and his impartiality may result in cancellation of the award; the decision of the arbitrator who, having no direct relation with any of the parties and only having a best-efforts obligation to collect information, cannot be affected by a circumstance which he legitimately did not know; after having noted that the arbitrator, having loyally searched for a conflict and declared to the parties that the Leucadia company has been a client of his law firm for several years, via another office than his, but that "according to him" his law firm had no pending case with this company, which resulted that he was unaware that Leucadia was assisted in the sale of a stake in a mining company and that his decision could not be affected by a circumstance he did not know, the Court of Appeal, which nevertheless considered that the assistance of the Leucadia company, which is a member of the same group as one party to the arbitration procedure, by lawyers from another office than the arbitrator, during this procedure, was likely to cause a reasonable doubt about the independence and impartiality of the arbitrator, breached Article 1520-2° the Code of Civil Procedure.

Je soussigné, Vincent Lenoir,
Traducteur Expert près la
Cour d'appel de Versailles,
certifie que la traduction qui précède
est conforme à l'original.
NE VARIETUR n°687
Fait à
Boulogne-Billancourt
le 22 December 2015

I hereby certify that this translation is
true to the original.
Vincent LENOIR
French translator