

**TRANSLATION**

8 Feb. 2012

**Supreme Court (Cour de cassation)**

**Civil Chamber 1**

**Public hearing on February 1, 2012**

**Appeal No. 11-11084**

Published in the law reports

**Cassation**

**M. Charruault (President), presiding**

SCP Célica, Blancpain et Soltner, SCP Peignot, Garreau et Bauer-Violas, attorney(s)

**FRENCH REPUBLIC**

**IN THE NAME OF THE FRENCH PEOPLE**

THE SUPREME COURT, FIRST CIVIL CHAMBER, issued the following order:

Whereas, according to the decision under review, the company Les Papeteries de Gascogne, now named Gascogne Paper, conferred upon the company Energy Tariff Experts a mission of conciliation over its dealings with the EDF company; that when a dispute arose between the parties, the Gascogne Paper company initiated the arbitration proceeding contemplated in the dispute resolution clause, the arbitrators being charged to rule in amicable composition and final decision; that the arbitral tribunal presided over by M. Kappelhoff-Lançon, attorney, by award of February 8, 2009, ordered the Energy Tariff Experts company to pay the Gascogne Paper company the sum of 72,384.62 euros; that the decision rejected the appeal calling for nullification of the award;

On the sole argument, taken in its first branch:

In view of Article 1484, 2nd paragraph, of the Code of Civil Procedure in its text prior to the issuance of the decree of January 13, 2011;

Whereas, to reject the appeal for nullification, the decision reasoned that the fact, taken as proven, that the president of the arbitral tribunal had been retained to defend the interests

of the EDF company in various courts could not be taken to constitute a lack of impartiality on his part, given that the EDF company was neither a party to the dispute nor opposed to the interests of the Energy Tariff Experts company, so that the composition of the arbitral tribunal was in conformity with legal requirements;

That in so reasoning, while the fact that M. Kappelhoff-Lançon had been counsel to the EDF company was not contested and that it was the duty of the arbitrator, before accepting his mission, to reveal every circumstance susceptible of being seen as affecting his impartiality in order to permit the party to exercise, promptly, if appropriate, its right of recusal, the court of appeals violated the law referred to above;

On the sole argument, taken in its second branch:

In view of Articles 1474 and 1484, 3rd paragraph, of the Code of Civil Procedure in their text prior to the issuance of the decree of January 13, 1011;

Whereas, in order to reject the appeal for nullification the decision reasoned that the parties who had presented to the arbitrators essentially legal arguments could not complain at their having ruled on that basis, since the arbitral tribunal sitting as an amicable composer is empowered but not obligated to judge in equity, and that it is not proven that the result reached was inconsistent with equity, so that the tribunal fulfilled its mission;

That in so reasoning, since the arbitral tribunal, to which the parties had conferred the mission of sitting as an amicable composer, should have shown in its award that it had taken equity into account, the court of appeals violated the law referred to above;

**NOW, THEREFORE:**

**OVERTURNS AND NULLIFIES**, in all its provisions, the decision rendered on November 22, 2010, between the parties, by the Court of Appeals of Bordeaux; in consequence returns the matter and the parties to the status they were in before the said decision and, for further proceedings, remands them to the court of appeals of Paris;

Orders the Gascogne Paper company to pay costs;

In view of Article 700 of the Code of Civil Procedure, rejects the demand of the Gascogne Paper company and orders it to pay to the Energy Tariffs Experts company the sum of 3,000 euros;

Orders that the prosecutor general of the Supreme Court arrange to have this decision transmitted for transcription in the margin or following the decision overturned;

Thus done and judged by the Supreme Court, first civil chamber, and declared by the president in public hearing on the first of February two thousand twelve.

ARGUMENT ANNEXED to this decision.

Argument produced by SCP Peignot, Garreau et Bauer-Violas, lawyers for counsel for the Energy Tariff Experts company.

The appellant's argument complains that the appealed decision rejected the nullification of the arbitral award of February 8, 2008 in favor of the ENERGY TARIFF EXPERTS company and says that the award should be enforceable in full.

ON THE REASONING THAT a reading of the mission document signed by the parties to initiate the arbitration proceeding for the dispute between them shows that the constitution of the arbitral tribunal contemplated the designation of three arbitrators:

- Bâtonnier WICKERS selected by the Papeteries de Gascogne,
- Bâtonnier LATOURNIERE selected by the ETE company,
- Bâtonnier KAPPELHOFF-LANÇON selected by the committee for appointment of arbitrators of the BORDEAUX AQUITAINE arbitration center.

If the ETE company questions the independence of Bâtonnier KAPPELHOFF-LANÇON, it suffices to note at the outset that he was chosen by the BORDEAUX AQUITAINE arbitration center, an entity independent of the parties that are not opposed to his designation.

The only circumstance, here deemed to be proven, that Bâtonnier KAPPELHOFF-LANÇON had been retained to defend EDF's legal interests in various courts cannot form the basis for finding in him a lack of impartiality in the context of his examination of the dispute that was submitted to him.

It appears in fact that EDF is not a party to the dispute between the appellant and the respondent. Moreover, if the missions conferred upon the ETE company, like the one conferred on it by the GASCOGNE PAPER company, which give it the role of negotiator for pricing of energy from EDF, the said company is not at all entitled to oppose its interests with this entity for which it acts in the context of negotiations freely undertaken according to the laws of the marketplace and the regulations in effect.

So the independence of Bâtonnier KAPPELHOFF-LANÇON in his capacity as arbitrator cannot validly be put in question, due to the normal legal character of the composition of the arbitral tribunal.

On the arbitral tribunal's respect for the substance of the mission conferred upon it.

Under the terms of the mission given it, the arbitral tribunal was to conduct "the proceeding in an equitable and impartial manner."

It is clear from a reading of the arbitral award of February 8, 2008 that the arbitrators in justifying their decision relied upon the analysis of the contract between the parties noting both the context of its signature with regard to the role of each of the signing parties but also the scope of the latter and the reciprocal obligations created between the partners.

If it is incontestable that at the level of the motivation of the arbitral award the arbitral tribunal performed a legal analysis of the agreement between the parties to find in the ETE company an obligation for a result in which it did not provide evidence of having fully performed, it appears that it had been led to act in order to respond to the arguments developed before it expressly based as concerned the ETE company on the provisions of Articles 1442 and following of the Code of Civil Procedure and 1154 of the Civil Code as set out in the briefs filed with it.

Since an amicable composer has the authority and not the obligation to judge in equity, the parties that presented before it essentially legal arguments could not complain of its having ruled on those bases, it being also emphasized that no complaint was raised and a fortiori proven demonstrating that the approach adopted was not in conformity with equity.

So there is no basis for believing that the arbitral tribunal had not respected the substance of the mission conferred upon it.

SINCE ON THE ONE HAND an arbitrator who sees as to himself a cause for recusal must inform the parties of it and may, in such case, accept the mission only with their agreement; since in the present case the ENERGY TARIFF EXPERTS company pointed out, in support of its appeal for nullification, that it was, in its normal business, in permanent opposition to the EDF company, since the GASCOGNE PAPER company had as if by chance come to agreement with the EDF company during its intervention and in the course of a litigation assignment and that Bâtonnier KAPPELHOFF-LANÇON, member of the arbitral tribunal, had not disclosed the cause for recusal consistent with the fact that he was the habitual counsel for the EDF company to the point that, to assure the regularity of the composition of the arbitral tribunal, that Bâtonnier KAPPELHOFF-LANÇON had been designated by an entity independent of the parties, that his capacity as EDF's counsel could not be the basis for a lack of impartiality and that the ENERGY TARIFF EXPERTS company did not establish an opposition of interests with EDF, the Court of Appeals did not legally justify its decision under the former Articles 1452 and 1484 of the Code of Civil Procedure.

SINCE ON THE OTHER HAND the arbitrator resolves a dispute in conformity with the rules of law unless, in the arbitration agreement, the parties declined to confer upon him authority to rule as an amicable composer so that the Court of Appeals which, having ruled that the arbitral tribunal, sitting as an amicable composer, made its decision with reference solely to rules of law, noted that an "amicable composer has authority and not the obligation to judge in equity," violated the former Articles 1474 and 1484 of the Code of Civil Procedure. **Publication:**

**Decision appealed from:** Court of Appeals of Bordeaux of November 22, 2010.