

THE FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 1 – Chamber 1

JUDGMENT OF 14 OCTOBER 2014

(no. , 7 pages)

Case number in the general register: **13/13459**

Decision referred to this Court: Order handed down on 20 June 2013 by the delegate of the President of the First Instance Court (“*Tribunal de Grande Instance*”) of Paris granting exequatur to the arbitration award issued by Mr Alvarez, sole arbitrator, on 27 March 2011 in Bridgetown (Barbados).

APPELLANTS

S.A. AUTO GUADELOUPE INVESTISSEMENTS (AGI)

Acting through its legal representatives

Tour Secid – 8^{ème} étage
Place de la Renovation
97110 POINT A PITRE
GUADELOUPE

represented by Me Luca De Maria of SELARL PELLERIN - DE MARIA - GUERRE, instructing counsel and lawyer at the Paris Bar, court pigeonhole (“*toque*”): L0018 assisted by Me Jean-Pierre Grandjean of the PUK CLIFFORD CHANCE EUROPE LLP law firm and Me Jacques Pellerin, pleading counsel and lawyers at the Paris Bar, court pigeonhole (“*toque*”): K0112 and L0018

VOLUNTARY JOINING THE PROCEEDINGS:

Me Marie-Agnès Dumoulin in her capacity as representative of the creditors of AUTO GUADELOUPE INVESTISSEMENTS

7 rue du Morne Ninine
La Marina
97190 Gosier

represented by Me Jérôme Marsaudon of SELARL REINHART MARVILLE TORRE, lawyer at the Paris Bar, court pigeonhole (“*toque*”): K0030

Me Eric Bauland, member of SELARL BAULAND GLADEL ET MARTINEZ, in his capacity as Administrator appointed to implement the safeguard plan of AUTO GUADELOUPE INVESTISSEMENTS (AGI)

7 rue Caumartin
75009 Paris

represented by Me Luca De Maria of SELARL PELLERIN - DE MARIA - GUERRE, instructing counsel and lawyer at the Paris bar, court pigeonhole (“*toque*”): L0018 assisted by Me Jean-Paul Poulain, pleading counsel and lawyer at the Paris bar, court pigeonhole (“*toque*”): R 179

Me Charles-Henri Carboni, member of SELAS SEGARD ET CARBONI, in his capacity as **Administrator appointed to implement the safeguard plan of AUTO GUADELOUPE INVESTISSEMENTS (AGI)**

Immeuble Marina
Center Blanchard
97190 Le Gosier

represented by Me Luca De Maria of SELARL PELLERIN - DE MARIA - GUERRE, instructing counsel and lawyer at the Paris bar, court pigeonhole (“*toque*”): L0018 assisted by Me Jean-Paul Poulain, pleading counsel and lawyer at the Paris bar, court pigeonhole (“*toque*”): R 179

DEFENDENTS

COLUMBUS ACQUISITIONS INC, a company incorporated under Barbados law

Suite 205-207 Dowel House
CR Roceback and Palmeto sts
Bridgetown
Barbados WI

represented by Me Phillipe Galland of SCP GALLAND-VIGNES, instructing counsel and lawyer at the Paris bar, court pigeonhole (“*toque*”): L 0010 assisted by Me Rémi Turcon, pleading counsel and lawyer at the Paris bar, court pigeonhole (“*toque*”): K 0037 and Me Fabien Peyremorte, pleading counsel and lawyer at the Paris bar, court pigeonhole (“*toque*”): B34

S.A.S. COLUMBUS HOLDINGS FRANCE (“CHF”)

Acting through its legal representatives

38, rue de Berri
75008 Paris

represented by Me Phillipe Galland of SCP GALLAND-VIGNES, instructing counsel and lawyer at the Paris Bar, court pigeonhole (“*toque*”): L 0010 assisted by Me Rémi Turcon, pleading counsel and lawyer at the Paris Bar, court pigeonhole (“*toque*”): K 0037 and Me Fabien Peyremorte, pleading counsel and lawyer at the Paris bar, court pigeonhole (“*toque*”): B34

CARIBBEAN FIBER HOLDINGS LP (“CFH”)

Acting through its legal representatives

WITHDRAWAL

c/o LEUCADIA NATIONAL CORPORATION – 315 Park Avenue South
315 Park Avenue South
10010 New York
USA

represented by Me Matthieu Boccon Gibod, instructing counsel and lawyer at the Paris Bar, court pigeonhole (“*toque*”): C2477 assisted by Me Alexis Granblat, pleading counsel and lawyer at the Paris bar, court pigeonhole (“*toque*”): P 37 and Ana Vermal of the PROSKAUER law firm

COMPOSITION OF THE COURT:

The case was heard at a public hearing on 11 September 2014, a report thereof was presented to the Court composed of:

Mr Acquaviva, Presiding Judge
Ms Guihal, Judge
Ms Dallery, Judge

who deliberated

Clerk, during the proceedings: Ms Pate

JUDGMENT:

- IN THE PRESENCE OF ALL PARTIES

- Handed down through the Court Registry, the parties having been informed of this in advance in accordance with the terms of the second paragraph of Article 450 of the French Code of Civil Procedure.

- Signed by Mr Acquaviva, Presiding Judge and by Ms Pate, court clerk present when the judgment was rendered.

AUTO-GUADELOUPE INVESTISSEMENTS (“AGI”), a French public limited company (“*société anonyme*”) and subsidiary of the French Group, Loret, and CARIBBEAN FIBER HOLDINGS LP (“CFH”), a company registered in Delaware and subsidiary of the US company, Leucadia National Corp, respectively hold 60% and 40% of the shares in GLOBAL CARIBBEAN FIBER SA (“GCF”), a company incorporated under French law whose object relates to the construction and operation of a network of submarine telecommunication cables in the Caribbean. In 2008, AGI and CFH entered into negotiations for the purposes of transferring the entire share capital of GCF to COLUMBUS ACQUISITIONS INC. and COLUMBUS HOLDINGS FRANCE SAS (together “COLUMBUS”), subsidiaries of Columbus International Inc., a telecommunications company whose registered office is situated in Barbados.

Under an initial memorandum of understanding, the “Memorandum of Terms”, signed on 10 November 2008, the deadline for negotiating the final agreement was set at 31 December 2008. Given that this deadline was not met, the parties agreed to extend it until 31 March 2009 in the Renewed Memorandum of Terms signed on 3 March 2009. The Renewed Memorandum of Terms provided that the law of Barbados would apply and that any disputes would be submitted to arbitration by a sole arbitrator under the supervision of the International Centre for Dispute Resolution (“ICDR”), the international division of the American Arbitration Association.

On 20 May 2009, AGI, believing that the memorandum of understanding was not binding and after having consulted the President of the Regional Council of Guadeloupe, announced that it was abandoning the share transfer in light of the political and social situation in the French West Indies.

On 10 July 2009, COLUMBUS initiated arbitration proceedings primarily seeking performance of the transfer agreement that it considered valid, and in the alternative, payment

of compensation in the sum of USD 990 million. CFH joined as a party to such proceedings, also seeking punitive damages.

In an arbitration award issued in Bridgetown (Barbados) on 27 March 2011, Mr Alvarez, the sole arbitrator, essentially:

- found that the parties had entered into a binding agreement, which AGI had breached,
- dismissed the claims seeking specific performance and the transfer of the shares,
- dismissed AGI's counterclaims,
- deferred ruling on the claims for damages and the costs of the arbitration until a subsequent award.

This award was granted exequatur by order of 20 June 2013 of the delegate of the President of the First Instance Court of Paris, against which AGI lodged an appeal on 3 July 2013.

In submissions served on 14 August 2014, AGI requested that the order be invalidated and that COLUMBUS and CFH be jointly and severally ordered to pay the sum of €250,000 to AGI pursuant to Article 700 of the French Code of Civil Procedure. It primarily alleged that the sole arbitrator's failure to disclose the links between the law firm in which he is a partner and two of the parties to the arbitration amounted to an irregularity in the composition of the arbitral tribunal and a breach of international public policy. It argued, in the alternative, that the scope of application of the arbitration clause, pursuant to which the arbitrator had been appointed, was limited to disputes relating to the negotiations and did not extend to any disputes which may have arisen as a result of the share transfer, in respect of which the parties had agreed to an arbitral tribunal consisting of three members, and therefore, that the sole arbitrator did not have jurisdiction to rule on the dispute in question. Finally, AGI claimed that enforcement of the award in France would breach the international public policy rules on collective insolvency proceedings and, in particular, the principle of suspending individual lawsuits given the safeguard proceedings that were commenced in respect of AGI by judgment of the joint commercial court ("*tribunal mixte de commerce*") of Pointe-à-Pitre on 10 May 2012 and the official receiver's ("*juge commissaire*") rejection – by way of three orders issued on 30 June 2013, against which an appeal was lodged – of the debts claimed by COLUMBUS and CFH on the basis of the award of 29 March 2011, due to the fact that said award was vitiated by the arbitrator's conflict of interest.

In submissions served on 26 August 2014, COLUMBUS HOLDINGS FRANCE asked the court to dismiss AGI's claims, to confirm the order granting exequatur to the award and order AGI to pay it the sum of €200,000 pursuant to Article 700 of the French Code of Civil Procedure. In essence, it argued, (i) on the one hand, that the relationships between the law firm to which Mr Alvarez belongs and the individuals or companies that are very indirectly linked to Columbus Holdings France were old and were not indicative of a flow of business and, (ii) on the other hand, that the arbitrator had disclosed the relationship between said firm and Leucadia and, in any event, that said relationship was public knowledge having been published on the website of said law firm.

COLUMBUS ACQUISITIONS INC served identical submissions on 26 August 2014.

In submissions served on 11 September 2014, CFH declared that it was abandoning its rights under the order granting exequatur and that it withdrew its application seeking confirmation of said order as well as all other claims and asked to be removed from the proceedings.

In submissions served on 30 June 2014, Mr Bauland, member of SELARL BAULAND, GLADEL & MARTINEZ, and Mr Carboni, member of SELAS SEGARD ET CARBONI, voluntarily joined the proceedings in support of the claims of AGI, in their capacity as administrators appointed to implement AGI's safeguard plan.

Ms Dumoulin did likewise through submissions served on 25 August 2014, in her capacity as representative of AGI's creditors.

WHEREUPON:

In respect of the first ground relating to the irregular composition of the arbitral tribunal (Article 1520.2 of the French Code of Civil Procedure):

AGI argues that the sole arbitrator had a conflict of interest with one of the parties and that said conflict of interest was not disclosed when the arbitral tribunal was constituted.

Whereas on 10 November 2008, AGI, CFH and the COLUMBUS companies entered into a memorandum of understanding, renewed on 3 March 2009, relating to the planned transfer of the entire capital of GCF by AGI and CFH to the Columbus companies; whereas given that AGI had abandoned this transaction, COLUMBUS initiated arbitration proceedings against AGI on 10 July 2009, to which CFH joined as a party on 12 August 2009; whereas Mr Alvarez, sole arbitrator, accepted his appointment on 15 September 2009; whereas the case was examined until August 2010; whereas the award issued on 27 March 2011 was the subject of an order of 19 June 2013 granting exequatur thereto, against which AGI lodged an appeal;

Whereas AGI alleges that the arbitrator concealed the truth regarding the relationship between the Fasken Martineau law firm (in which the arbitrator is a partner) and Leucadia National Corporation, which, as the parties do not dispute, holds 100% of CFH's capital;

Whereas pursuant to Article 1456 of the French Code of Civil Procedure, which applies to international arbitration matters pursuant to Article 1506 of the same code: *"before accepting appointment, the arbitrator shall disclose any facts that may affect his/her independence or impartiality. He/she also has a duty to disclose any facts of a similar nature that may arise after accepting appointment, in a timely manner"*;

Whereas the fact that the arbitrator's name was put forward by AGI did not relieve the arbitrator of his duty of disclosure vis-à-vis said party; whereas said duty must be assessed in light of the extent to which the contentious situation is public knowledge and the effect thereof on the arbitrator's judgment;

Whereas in September 2009, Mr Alvarez signed a declaration of impartiality and independence in which he indicated: *"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"*;

Whereas the parties disagree as to whether the verb “*has represented*” in the first sentence of the quoted text should be translated into French in the present or *passé composé* [perfect] tense and therefore whether such phrase should be interpreted as a declaration that a partner of the firm in which the arbitrator is a member “*représente Leucadia National Corporation au Canada depuis plusieurs années*” or “*a représenté Leucadia National Corporation au Canada depuis plusieurs années*”; whereas, however, in the second sentence of the quoted text the arbitrator unambiguously confirmed that such firm is not currently advising Leucadia;

Whereas in reality, it is clear from the information that was published by the Fasken Martineau law firm on its website on 15 December 2010 and repeated in “*Lexpert*”, a business magazine for lawyers, in January 2011, that on 15 December 2010 Leucadia completed the sale of its shareholding in the Cobre Las Cruces copper mine to Inmet Mining for around USD 575 million and that Leucadia was assisted in this transaction, initiated in 2005, by a team from Fasken Martineau, which included Stephen Erlichman and Aaron Atkinson (corporate and securities law) and Christopher Steeves (tax).

Whereas, on the one hand, while public and very easily accessed information that the parties could not fail to consult prior to beginning the arbitration constitutes the public knowledge nature of a conflict of interests, on the contrary, parties cannot reasonably be required to complete a systematic examination of all sources that may refer to the arbitrator or the individuals connected to the arbitrator or to continue their research after the arbitration proceedings have begun; whereas, in this case, on the date that the Cobre de la Cruces transaction became public knowledge, the pleadings before Mr Alvarez had already finished in August 2010 and the case had been adjourned for deliberation by the arbitrator; whereas therefore, the contentious facts were not common knowledge when the arbitral tribunal was constituted;

Whereas, on the other hand, even if the fees received by the Fasken Martineau law firm in respect of the Cobre de las Cruces transaction were modest, the size of the transaction itself, the number of lawyers involved and the publicity that the firm intended to give to its involvement shows how important this matter was to the firm;

Whereas, it therefore appears, contrary to what Mr Alvarez implied in his declaration of impartiality and independence, that while the arbitration proceedings were ongoing, three lawyers from the Fasken Martineau law firm were assisting Leucadia with a transaction which the firm regarded as matter for communication; whereas such circumstances, of which AGI was unaware when it nominated Mr Alvarez, were of a nature so as to give rise to reasonable doubt as to the independence and impartiality of the arbitrator in the eyes of AGI; whereas it is, therefore, necessary to annul the award given the irregular constitution of the arbitral tribunal;

In respect of Article 700 of the French Code of Civil Procedure

Given that the COLUMBUS companies, which have been unsuccessful, cannot benefit from the terms of Article 700 of the French Code of Civil Procedure; they will be ordered, jointly and severally, to pay €200,000 to AGI on such basis.

ON THESE GROUNDS:

Acknowledges CARIBBEAN FIBER HOLDINGS' withdrawal from the proceedings.

Invalidates the order of 19 June 2013 of the delegate of the President of the First Instance Court of Paris granting exequatur to the arbitration award rendered as between the parties on 27 March 2011.

Declares that this decision applies to Mr Bauland, member of SELARL BAULAND, GLADEL & MARTINEZ and Mr Carboni, member of SELAS Segard et Carboni, who voluntarily joined the proceedings in their capacity of administrators appointed to implement the AUTO GUADELOUPE INVESTISSEMENT safeguard plan, and to Ms Dumoulin, who voluntarily joined the proceedings in her capacity of representative of the creditors of said company.

Orders COLUMBUS ACQUISITIONS INC and COLUMBUS HOLDINGS FRANCE SAS, jointly and severally, to bear all costs to be collected in accordance with Article 699 of the French Code of Civil Procedure.

Orders COLUMBUS ACQUISITIONS INC and COLUMBUS HOLDINGS FRANCE SAS, jointly and severally, to pay AUTO GUADELOUPE INVESTISSEMENT the sum of €200,000 pursuant to Article 700 of the French Code of Civil Procedure.

Dismisses all other claims.

THE CLERK

THE PRESIDING JUDGE