

DISTRICT COURT OF THE HAGUE

civil law section – provisional measures judge

challenge number: 13/2004
petition number: HA/RK 2004.667
date of decision: 18 October 2004

DECISION

in respect of the written challenge pursuant to article 1035 (2) Code of Civil Procedure in the matter of:

The Republic of Ghana

petitioner

electing domicile in The Hague, at the office of:

mr. P.J.M. von Schmidt auf Altenstadt, procurator *litis*,

versus

Telekom Malaysia Berhad,

respondent,

electing domicile in The Hague, at the office of:

mr. E. Grabandt, procurator *litis*,

for the purpose of challenging:

Prof. E. Gaillard

arbitrator of the international tribunal

1. Background and the course of the proceedings

In 1996 Telekom Malaysia Berhad (hereinafter to be referred to as “TMB”), a Malaysian telecommunication company, invested a sum of USD 38 million in Ghana Telecommunications Company Limited and as a result thereof acquired 30% of, as well as the control over and the management of, Ghana Telecommunications Company Limited. The Republic of Ghana hereinafter to be referred to as: Ghana) and the Republic of Malaysia are parties to a “*Bilateral Investment Treaty* (BIT), the purpose of which among other things is the protection of each other’s residents who have made an investment in the other state. In the spring of 2001 a dispute arose between TMB and the

petitioner concerning TMB's interest in Ghana Telecommunications Company Limited. After it had become clear that the parties were unable to settle said dispute, TMB invoked the dispute settlement scheme as provided for in the BIT. Subsequently TMB initiated arbitration proceedings under the UNCITRAL rules. The formal place of arbitration agreed upon between the parties is The Hague. The arbitration proceedings are administered by the Permanent Court of Arbitration. The secretary general to the Permanent Court of Arbitration has been designated "*appointing authority*" within the meaning of the UNCITRAL rules. Arbitration proceedings were started on 10 February 2003. TMB appointed Mr. Blackaby as the first member of the arbitration tribunal. Subsequently *dr. Asante* was appointed as the second member of the arbitration tribunal by Ghana. On 15 May 2003 these two arbitrators appointed *prof. mr. A.J. van den Berg* as arbitrator, who subsequently accepted his appointment as chairman of the arbitration tribunal.

On 10 August 2003 Mr. Blackaby was challenged by Ghana whereupon *dr. Asante* was subsequently challenged by TMB on 12 August 2003. Both challenges were allowed by the PCA's Secretary General. On 24 September 2003 TMB appointed *prof. E. Gaillard* as substitute arbitrator, while on 8 October 2003 the PCA's Secretary General appointed Mr. Layton as arbitrator, at the suggestion of Ghana, who had omitted appointing another arbitrator within the time set for that purpose. During the hearings which took place on the legal and substantive aspects in the period 5-15 July 2004, it became clear that the petitioner among other things based its allegations upon a judgment concerning a dispute between consortium RFCC and the Kingdom of Morocco. After the petitioner had referred to the award in the matter of consortium RFCC versus Morocco, *prof. Gaillard* made a statement which should be characterized as a "disclosure" within the meaning of article 9 of the UNCITRAL Rules. *Prof. Gaillard* stated that he had been instructed to act as one of RFCC's counsel in an action whose purpose was the reversal of the judgment rendered in the RFCC versus Morocco case.

On 11 July 2004 Ghana challenged *prof. Gaillard*. TMB protested against this on 12 July 2004. After the parties had been heard with respect to the challenge, the arbitral tribunal decided on 12 July 2004 that the arbitration proceedings should be continued. On that occasion *prof. E. Gaillard* stated that he would not withdraw.

On 30 July 2004 the petitioner filed a challenge with the Secretary General of the Permanent Court of Arbitration. This challenge was rejected by the Secretary of the Permanent Court of Arbitration, after all parties had put forward their views. On 6 September 2004 the petitioner filed a challenge with the Provisional Measures Judge of the District Court of The Hague.

On 24 September 2004 TMB filed a defence.

2. The oral hearing of the challenge

On 27 September 2004 the challenge was heard before the provisional measures judge. On behalf of the petitioner there appeared *mr. O.L.O. de Witt Wijnen* and *mr. Arthur L. Mariott QC*, attorney of

England. The challenge was explained by *mr. de Witt Wijnen* on the basis of a memorandum of oral pleading submitted by him. In addition thereto a statement was made by *mr. Mariott*. On behalf of Telekom Malaysia Berhad there appeared *mr. J. Fleming* and *mr. J. Kortman*. On the basis of the memorandum of oral pleading submitted by him *mr. Fleming* requested that the challenge be denied. *Prof. Gaillard* did not appear. He expressed his point of view by letter of 19 August 2004.

3. The petitioner's point of view

The petitioner takes the view that that *prof. Gaillard's* role as counsel to the RFCC consortium in the reversal proceedings of the RFCC/Morocco judgment is incompatible with the role he has undertaken as an impartial and unbiased arbitrator in the action between the respondent and the petitioner.

According to the petitioner the dispute between the petitioner and the respondent is similar to the RFCC/Morocco dispute.

Ghana is reproached with having expropriated TMB's rights in violation of the protection provision in the BIT between Ghana and Malaysia. The same accusation of expropriation was made in the RFCC/Morocco case. In that case the tribunal held that an expropriation provision in the treaty requires an "*act of puissance public*". In the reversal proceedings *prof. Gaillard* might argue that the tribunal's decision constitutes an excessive violation of his authority.

On the basis of the so-called "*third person test*" the petitioner takes the view that *prof. Gaillard*, who in his capacity of counsel opposes a specific notion or approach, cannot be unbiased in his judgement of that same notion or approach in a case in which he acts as an arbitrator. In that respect the petitioner has invoked the "*IBA Guidelines on Conflicts of Interest international arbitration*". With respect to the present challenge the petitioner regards *inter alia* the following numbers, contained in the IBA, as relevant, viz.:

"2. *Conflict of interests*

a) (...)

b) *The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).*

- c) *Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision*".

The petitioner furthermore argues that *prof. Gaillard* in his capacity of counsel to RFCC will of course advance all the arguments he can think of in order to plead the reversal of the judgment in the RFCC/Morocco case. By contrast *prof. Gaillard* in his capacity of arbitrator should be unbiased when judging the question whether or not the ruling in the RFCC/Morocco case is relevant to the examination of the case in the present arbitration proceedings. In this situation he will not be able as an arbitrator to be an unbiased participant in consultations with his fellow arbitrators, or appearances will at any rate be against him.

The respondent's point of view

Firstly the respondent has argued that the petitioner should have submitted the challenge with the provisional measures judge earlier. To that end it argued that *prof. Gaillard* had already acted as SGS's counsel in two other actions, viz. against Pakistan and the Philippines respectively. These actions also concerned a dispute between a national government and a foreign investor. In its arbitration proceedings against the respondent the petitioner gave a lot of attention to those actions, because the petitioner believes that its position is similar to that of Pakistan and the Philippines on major points. These actions did not cause the petitioner to challenge *prof. Gaillard*. In the respondent's view the petitioner might, as a result of those proceedings, have put *prof. Gaillard*'s independence up for discussion at a much earlier stage. By failing to do so, the petitioner has lost its right to challenge. The respondent has moreover argued that the facts in the RFCC versus Morocco judgment differ from the present arbitration. For that reason reliance on that judgment cannot benefit the petitioner. In addition thereto the legal and factual merits will be left out of account in the reversal proceedings, in view of the limited possibilities for reversal granted by article 52 of the ICSID convention. Moreover the respondent believes that the present disclosure by *prof. Gaillard* concerns a circumstance which according to article 4.1.1 of the "Green list" of the IBA Guidelines did not have to be disclosed. Article 4.1.1 after all states that "*the arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated)*"

Prof. Gaillard's view

When requested by the court to state his views with regard to the challenge, *prof.* Gaillard has by letter of 22 September 2004 referred to his letter of 19 August 2004 addressed to the Permanent Court of Arbitration. In this letter *prof.* Gaillard stated as follows:

“As far as I am concerned, I only wish to state that I believe to be perfectly impartial and independent to act as an arbitrator in the above-mentioned matter. The fact that I have been asked to act as counsel for an unrelated party in an unrelated matter does not, in my view, affect such impartiality and independence in any way. Experience shows that each case is different and that, in BIT arbitrations, the arbitrators’ primary task is to apply the relevant rules of law, first and foremost the treaty on the basis of which the arbitration is initiated – here the bilateral treaty between Malaysia and Ghana – to the facts of the case at hand. I consider myself as completely impartial and independent to do so (...)”

4. The examination of the case

The provisional measures judge holds as follows with respect to the challenge to *Prof.* Gaillard as arbitrator.

It has been established that the formal place of arbitration agreed upon between the parties is The Hague. Pursuant to the provision of article 1035 (2) in conjunction with article 1073 of the Code of Civil Procedure, the provisional measures judge of The Hague is competent to hear the motion challenging the impartiality within the context of International arbitration. Since the Dutch provisional measures judge is competent in the present case, he will in his capacity as designated judge apply Dutch law in respect of the grounds for the challenge.

The respondent has argued that the motion was filed too late by the petitioner, because at a much earlier stage of the present action it has failed to file a motion challenging the impartiality on account of *Prof.* Gaillard’s actions as counsel in the proceedings between SGS against Pakistan and the Philippines. This is not a valid argument. In principle a motion challenging impartiality has to be judged on its own merits. If it is assumed that *Prof.* Gaillard’s actions in the SGS arbitration cases might have been a cause for a challenge, then the mere circumstance of Ghana not having relied thereon does not automatically mean that as a result thereof Ghana should have lost its right to still challenge *Prof.* Gaillard at a later stage of arbitration proceedings, as a result of his (future) role in another arbitration action.

The motion currently filed by the petitioner is not in breach of the provision of article 37 of the Code of Civil Procedure.

Moreover it has been established that the parties do not disagree on the dispute between the petitioner and the respondent which has been submitted to arbitration. It is the arbitrator's primary task in such matters to apply the legal rules of the BIT that has been concluded between Ghana and Malaysia on the basis of the facts of the present case. *Prof. Gaillard's* view is that his appointment as arbitrator will not affect his actual assignment and his independence.

In examining a plea of absence of impartiality or independence on the part of an arbitrator within the meaning of article 1033 of the Code of Civil Procedure, it has to be assumed that an arbitrator may be challenged if from an objective point of view – i.e. as a result of facts and circumstances – justified doubts exist with respect to his impartiality or independence. The examination of whether there are sufficient grounds for a challenge should also take account of outward appearance. (NJ 1994, 765)

It is stated first and foremost, contrary to what is alleged by the respondent, that practice in this court shows that a request for the reversal of an arbitral award is used for the purpose of putting forward all objections against the contested judgment, and including these objections in the admitted grounds for the challenge. This will not be different in the present case. This means that account should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the RFCC/Moroccan award.

This attitude is incompatible with the attitude *Prof. Gaillard* has to adopt as an arbitrator in the present case, i.e. to be unbiased and open to all the merits of the RFCC/Moroccan award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the reversal proceedings against the RFCC/Moroccan award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid the appearance of not being able to keep these two parts strictly separated.

For this reason there will be justified doubts about his impartiality, if *Prof. Gaillard* does not resign as attorney in the RFCC/Moroccan case. Consequently the motion to challenge will in that case be upheld. To avoid any uncertainty *Prof. Gaillard* should within ten days from this judgment have expressly and unreservedly notified the parties to this arbitration whether he will resign as attorney in the RFCC/Moroccan case.

There is no ground for an order for costs.

5. Decision

The provisional measures judge:

upholds the motion challenging *Prof. Gaillard's* impartiality, if he does not within ten days from this judgment expressly and unreservedly notify the parties to this arbitration whether he will resign as attorney in the RFCC/Moroccan case.

This decision was rendered on 18 October 2004 by *mr. Von Maltzahn*, in the presence of *mr. Jadoenathmisier* as the clerk of the court.
