

## 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.

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**DISTRICT COURT OF THE HAGUE**

civil law section – provisional measures judge

challenge number: 17/2004  
petition number: HA/RK 2004.778  
date of decision: 5 November 2004

**DECISION**

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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. On 6 September 2004 the petitioner filed a motion challenging *prof.* Gaillard with the provisional measures judge. A defence was submitted by the respondent on 27 September 2004. The motion concerned *prof.* Gaillard's role as arbitrator in a dispute between the petitioner and the respondent. After an oral hearing of 27 September 2004 the provisional measures judge by decision of 18 October 2004 – hereinafter to be referred to as: "the previous decision" – ruled that legitimate doubt will exist concerning *prof.* Gaillard's impartiality if he does not cease his activities as an attorney in the annulment action of RFCC versus Morocco. The challenge would be upheld if *prof.* Gaillard should fail to declare



expressly and unreservedly within 10 days from the date of the decision that he would resign as attorney in the RFCC versus Morocco case. *Prof. Gaillard* has meanwhile stated that he has expressly and unreservedly ceased his activities in the RFCC versus Morocco case.

2. Further to the previous decision the petitioner has again requested that *prof. Gaillard* be challenged as arbitrator in the case against the respondent. Briefly summarized its arguments to this effect are as follows. Implied in the previous decision is not only that *prof. Gaillard*'s playing of the dual role referred to therein should be avoided, but also the assumption by the provisional measures judge that *prof. Gaillard* had *not yet* fulfilled that dual role as a result of his not yet having taken part in the tribunal's decisions. This assumption was incorrect however. Various decisions have already been taken by the tribunal since the middle of 2004 concerning which it has to be assumed that *prof. Gaillard* played a part in them, in particular Order no. 13 of 27 August 2004. Within the context of a challenge such as the present one for that matter, distinguishing between mere procedural decisions on the one hand and material decisions on the other hand is irrelevant. The petitioner invokes ground (U) of Order no.13: *"having regard to the written and oral submissions of the Parties, including the written and oral evidence, the Tribunal has reached the conclusion that it is not in a position to render a decision...to date..."*
3. The petitioner also argues that the provisional measures judge's previous decision should be characterized as a surprise decision to the extent that the challenge was only declared conditionally. The petitioner believes that for that reason the present request should also be considered admissible by analogy with article 37 (4) Code of Civil Procedure.
4. The respondent has given reasons for contesting the petitioner's arguments.
5. In response to this new challenge the following is held.
6. In itself the respondent was right in observing that it is not inconceivable that a challenge is accepted only in the event of subsequent non-compliance with a particular condition. However, this element was never discussed during the hearing of the previous decision nor did the petitioner, in our view, have to be prepared for this within that context. To that extent a new element is now up for discussion. At the same time we take the view that the petitioner cannot be reproached with not having anticipated the possibility of a conditional challenge as declared on the occasion of the previous decision. On these grounds this second motion is also deemed admissible by the court.

7. The previous decision ruled that legitimate doubts exist about *prof.* Gaillard's impartiality as an arbitrator as long as he also acts as attorney in the RFCC / Morocco case. This view is endorsed by this court, as are the grounds for that decision, which, briefly summarized, are as follows: that account should be taken of the appearance of *prof.* Gaillard not being able to distance himself to the fullest extent from the part played by him in the annulment action against the arbitral award in the RFCC / Morocco case. This appearance is not altered by the fact that from a legal point of view the grounds for an annulment of an arbitral award are as a rule limited. Moreover, also – or perhaps particularly – in international arbitrations, avoiding such appearances is an important prerequisite for the confidence in, and thereby the authority and effectiveness of, such arbitral jurisdiction.
8. The petitioner has meanwhile been given, and has made use of, the opportunity to explain its objections against the conditional character of the previous decision. We are of the opinion that these objections – also in combination with the objections that were raised earlier – are not of such nature that an unconditional challenge should be granted this time. The following serves as reasons therefore.
9. It has neither been argued nor has it become evident that the decisions rendered by the Tribunal since mid July 2004 should be considered to be prejudicial to the petitioner or even lacking in logic. As the chairman of the Tribunal stated in his letter dated 27 October 2004, those decisions are entirely of a procedural nature, which view was not or not sufficiently rebutted by the petitioner. Moreover ground (S) of Order No. 13 was referred to on behalf of the petitioner, appealing to: "*Respondent's letter of 24 August 2004, informing the Tribunal that the parties have agreed to an extension of time to file the Reply Post-Hearing Briefs until 31 August 2004*". Viewed also against this background, the cited text of consideration (U), in our opinion, mainly has the character of a "clause de style". In our opinion, that Order, in which amongst other things the term for the submission of said Briefs is postponed until 31 August 2004, cannot simply be viewed as a decision on the merits of the case.
10. The fact that there have been no adverse consequences for the petitioner, together with the mere procedural and logical character of these decisions of the Tribunal, are relevant here, because the above-mentioned appearance relates solely to a *material* aspect of the debate in the arbitration, viz. the reference that petitioner made to the arbitral award in the RFCC/Morocco case. Against that background, there is no ground for an assumption or appearance of partiality or prejudice of Professor Gaillard with regard to his contribution to these non-material decisions of the Tribunal.

11. In other respects too we see no more ground for challenge, particularly not in the fact that *prof. Gaillard*, until recently, was actually involved as an attorney in the said annulment action and, thereby, adopted a position as a lawyer that was contrary to that of petitioner in the pending arbitration. After all, it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore, it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had *not* defended such a point of view before. Therefore, in such a situation, there is, in our opinion, no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration.
12. In view of the above, the current request will be rejected and petitioner will be ordered to pay costs.

### **DECISION**

The provisional measures judge rejects the challenge and orders the petitioner to pay the costs of these proceedings, estimated thus far on the part of the respondent at nil in out-of-pocket expenses and at € 780 in procurator's fees.

This decision was rendered on 5 November 2004 by *mr. Punt*, in the presence of the clerk of the court.