

**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.  
  
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.