

Background

- [4] Mr. Nelson is an experienced businessperson in the telecommunications industry. In 2010, he invested in Tele Fácil México, S.A. de C.V. (“Tele Fácil”), a corporation organized under the laws of Mexico. On May 17, 2013, Tele Fácil obtained a 30-year concession from Mexico’s Ministry of Communications and Transportation to operate a public telecommunications network.
- [5] Tele Fácil required interconnection rights with a Mexican carrier to allow Tele Fácil’s customers to communicate with customers on other networks. Tele Fácil approached Teléfonos de México and Teléfonos del Noroeste (which I will refer to jointly as “Telmex”), Mexico’s largest telecom providers.
- [6] On August 26, 2013, Telmex offered Tele Fácil a draft interconnection agreement for a period expiring on December 31, 2017. The proposed agreement included Telmex’s standard reciprocal interconnection rate that Tele Fácil would charge for incoming calls. The standard reciprocal interconnection rate proposed was USD 0.00975 per minute of use. Telmex made no provision for what is called “indirect interconnection” and proposed certain portability charges. Tele Fácil did not immediately respond to this draft offer.
- [7] Meanwhile, on March 6, 2014, the Federal Institute of Telecommunications (“IFT”) declared Telmex to be a preponderant economic agent in the telecommunications sector. Twenty days later, on March 26, 2014, the IFT issued specific asymmetrical regulations which included the obligation of Telmex to provide indirect interconnection and a special interconnection rate of approximately USD 0.00172. This was, obviously, a significant reduction from the standard reciprocal rate offered to Tele Fácil in the August 26, 2013 draft.
- [8] In a letter dated July 7, 2014, and sent the following day, Tele Fácil provided its comments on the draft standard interconnection agreement that Telmex had sent on August 26, 2013. Tele Fácil requested that Telmex include provisions allowing indirect interconnection and to eliminate portability charges. The language used in this letter is significant to the issues in the arbitration and in the award. In abbreviated form, the letter says:

Re: Comments on the draft interconnection agreement

In follow-up to the various negotiation meetings held at your client’s office... and in order to reach an agreement for the interconnection of the corresponding public telecommunications networks of both companies, attached please find Tele Fácil’s comments on the draft framework agreement...

We appreciate you taking into consideration our comments and modify the version we have received so that Tele Fácil may be in a position to sign the draft agreement.

- [9] On July 11, 2014, three days after providing its comments to Telmex, Tele Fácil initiated disagreement proceedings under Article 42 of Mexico’s Federal Telecommunications Law (“FTL”) before the IFT to resolve alleged “divergences” between Tele Fácil and Telmex over: (i) indirect interconnection; and (ii) portability charges.
- [10] In its response to Tele Fácil’s disagreement proceedings, Telmex submitted a different draft agreement than the one presented to Tele Fácil on August 26, 2013. This draft did not include portability charges and allowed indirect interconnection. Telmex also argued that the parties had a disagreement on the applicable rates and requested the IFT to determine the rates.
- [11] On November 26, 2014, the IFT, by unanimous decision, issued Resolution 381. In Resolution 381, the IFT:
- a) concluded that Telmex, in the course of the interconnection disagreement proceeding, had accepted the provision of indirect interconnection service and eliminated the portability clause;
 - b) dismissed Telmex’s argument in connection with an alleged disagreement on interconnection rates and concluded that these rates “were defined in the draft agreement for the provision of fixed local interconnection services and its exhibits, sent by Telmex to Tele Fácil on August 26, 2013; and
 - c) ordered the parties to “interconnect their telecommunications networks and initiate the provision of the corresponding interconnection services” and “execute the interconnection agreement of their telecommunications networks” within 10 business days following the notification of the resolution.
- [12] On December 10, 2014, Telmex sent to Tele Fácil a new draft agreement. Telmex took the position that, under the new regulatory framework, it could no longer lawfully offer the USD 0.00975 reciprocal rate. The new draft agreement included indirect interconnection and did not include portability charges, as directed by the IFT. It also included an annex specifying that the rate of USD 0.00975 would only be valid until December 31, 2014.
- [13] Tele Fácil refused to accept this limitation on the rate and, on December 19, 2014, requested the IFT to enforce Resolution 381. At around the same time, Telmex challenged Resolution 381, through an *amparo indirecto* before a specialized Mexican court called the First District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications. The *amparo* is a proceeding roughly analogous to judicial review in Canada. Both Telmex and the IFT’s Compliance Unit also sought “confirmation of criteria” from the IFT concerning the meaning and effect of Resolution 381 as it related to rates.
- [14] On April 8, 2015, the IFT, by a majority vote, issued Decree 77 in response to Telmex’s confirmation request. Decree 77 determined that the IFT’s powers were restricted to resolving only conditions not agreed upon by the parties which were, in the case of Tele Fácil and Telmex, indirect interconnection and portability charges. Therefore, Resolution

381 did not confirm or in any way establish the interconnection rate between the parties; nor did Decree 77. Decree 77 simply ordered the parties to interconnect their systems physically within ten business days and obligated the parties to execute the corresponding interconnection agreement without specifying any deadline for doing so.

- [15] Telmex offered a new interconnection agreement to Tele Fácil, which was declined. Accordingly, on June 16, 2015, Telmex submitted a new interconnection disagreement to the IFT, claiming that there was a disagreement on different terms, including the applicable interconnection rate for 2015.
- [16] On October 7, 2015, the IFT issued Resolution 127 deciding Telmex's interconnection disagreement proceeding. Resolution 127 held that the original interconnection agreement between Telmex and Tele Fácil was null and void because it was never signed by Telmex. The IFT found that the applicable interconnection rate for calendar 2015 would be USD 0.000253. Two of the five IFT commissioners dissented.
- [17] On November 11, 2015, Tele Fácil filed an *amparo* action against the IFT concerning Resolution 127 on the ground that it had illegally left without effect Resolution 381. The Mexican court dismissed Tele Fácil's *amparo* action. Tele Fácil filed an appeal of this decision which was also dismissed.
- [18] The Mexican court also dismissed Telmex's earlier *amparo* action. Both Tele Fácil and Telmex appealed this decision but those appeals were ultimately withdrawn.

The Arbitration

- [19] Tele Fácil decided that further challenges before the IFT and the local courts would be prolonged, costly and futile. Therefore, Mr. Nelson initiated the NAFTA arbitration against Mexico in 2016. In the arbitration, he alleged that Mexico's measures resulted in an expropriation of Tele Fácil's interconnection rights in violation of Article 1110 of NAFTA, and that he and Tele Fácil had been denied fair and equitable treatment by Mexico contrary to Article 1105 of NAFTA.
- [20] The applicant alleged that there were three measures that resulted in expropriation: (i) the "confirmation of criteria" proceedings initiated by Telmex and the Compliance Unit of the IFT that allegedly avoided the enforcement of Resolution 381; (ii) Decree 77 through which Resolution 381 was allegedly repudiated and; (iii) Resolution 127 that, contrary to Resolution 381, imposed a new interconnection rate detrimental to Tele Fácil but favorable to Telmex.
- [21] The process followed by the arbitration was as follows:
- On November 7, 2017, the applicant filed his statement of claim. The claim was 280 pages in length and was accompanied by 7 witness statements, 4 expert reports, 95 factual exhibits and 101 legal exhibits.

- On March 14, 2018, the respondent filed its statement of defence. The defence was 97 pages in length and was accompanied by 2 witness statements, 2 expert reports, 62 factual exhibits and 13 legal exhibits.
- On June 5, 2018, the applicant filed his reply. The reply was 256 pages in length and was accompanied by 2 witness statements, 5 expert reports, 18 factual exhibits and 53 legal exhibits.
- On September 10, 2018, the respondent filed its rejoinder. The rejoinder was 96 pages in length and was accompanied by 4 witness statements, 3 expert reports, 23 factual exhibits and 6 legal exhibits.
- Thus, at the close of pleadings, the tribunal had jointly received from the parties 729 pages of written submissions, 15 witness statements, 14 expert reports, 198 factual exhibits and 173 legal exhibits.
- The hearing on jurisdiction, merits and quantum was held in Washington, DC from April 22 to April 26, 2019. In total, sixteen witnesses and experts provided direct evidence and were cross-examined during the hearing.
- On August 15, 2019, both parties filed detailed post-hearing briefs. The applicant's post-hearing brief was 60 pages in length and the respondent's post-hearing brief was 52 pages in length.
- On June 5, 2020, the Tribunal delivered a lengthy and final award of some 117 pages, unanimously dismissing the applicant's claim in its entirety and declaring that the respondent did not breach any of its obligations under NAFTA.

[22] Among other things, the tribunal found that an essential, threshold question was whether the applicant had interconnection rights which it lost as a result of the respondent's impugned actions. These rights, the applicant had argued, derived from: i) the alleged agreement between Telmex and Tele Fácil on the terms of a standard interconnection agreement proposed by Telmex (via Tele Fácil's "acceptance" of the August 2013 draft interconnection agreement); and, (ii) the IFT's Resolution 381.

[23] Following a careful review of the events and circumstances leading up to July 2014 and the language of Tele Fácil's July 2014 letter itself, the tribunal found that nothing in the circumstances or in text of the letter suggested that Tele Fácil accepted the draft interconnection agreement, conditionally or unconditionally. The tribunal found, to the contrary, that the letter did no more than indicate that Tele Fácil was requesting modifications to the draft, that the agreement needed to be signed and that for Tele Fácil to be in a position to sign, the modifications would have to be included. Accordingly, the tribunal found that the July 2014 letter did not constitute a letter of acceptance but merely contained comments on the draft provided by Telmex, acknowledged that the agreement would still have to be signed and that Tele Fácil would sign if its proposed changes were made.

- [24] Based on these findings, the tribunal concluded that the applicant had not proven, for the purposes of its claim in the arbitration, that under Mexican civil and commercial law there was an agreement on interconnection rates between Tele Fácil and Telmex resulting from the draft submitted by Telmex in August 2013.
- [25] Further, after Telmex provided the August 2013 draft, the Mexican government and the IFT enacted significant regulatory changes to Telmex's status and to the rate regime applicable to Telmex. Under the new regime, Telmex could not charge a reciprocal rate of USD 0.00975 as proposed in the August 2013 draft. Because Telmex took the position there was no agreement on the applicable interconnection rates, Telmex submitted the rate issue in disagreement proceedings to the IFT. The IFT decided the disagreement on the applicable rates in Resolution 127 in Telmex's favour.
- [26] The tribunal concluded that Tele Fácil, rather than trying to conclude an agreement with Telmex in 2013/2014, saw an opportunity to steal a march when Telmex's status and rate regime was changed by regulation in March 2014. After almost a year of inactivity on the draft agreement offered by Telmex in August 2013, Tele Fácil submitted its "comments", assiduously ignoring the reciprocal rate issue, and almost instantly, before even hearing back from Telmex on these "comments", brought disagreement proceedings before the IFT.
- [27] The tribunal concluded that in the absence of sufficient evidence of the existence of an interconnection agreement between Telmex and Tele Fácil, the inevitable conclusion was "that Tele Fácil had no 'rights under the Interconnection Agreement' that could have been determined by Resolution 381."
- [28] Even if Tele Fácil had a valid and binding agreement with Telmex under Mexican law, the question remained whether Resolution 381 granted interconnection rights to Tele Fácil. The tribunal found that under Article 42 of the FTL, the IFT only had authority to resolve interconnection conditions that could not be agreed upon by the telecommunications network carriers. When Tele Fácil initiated disagreement proceedings under Article 42, it submitted only two disagreements: indirect connection and portability charges. Tele Fácil did not submit any disagreement on the rates. Although Telmex tried to submit rates as a disputed issue, the IFT held Telmex had not done so properly and that this dispute was therefore "inadmissible" in the Tele Fácil-initiated proceedings before them.
- [29] For this reason, the tribunal concluded that the IFT did not, and could not, decide the issue of the applicable rates in Resolution 381. Rather than making any finding on rates, the IFT in Resolution 381 merely assumed there was no dispute on rates because no party had put this issue properly before it. In effect, Resolution 381 did not decide a dispute on the rates because the IFT believed that there was no dispute. This was, effectively, the conclusion of the IFT in its decision in Decree 77.
- [30] Thus, Resolution 381 did not result in the conferral of any "rights" on Tele Fácil to interconnect and to charge a differential rate of USD 0.00975 when it was only paying Telmex (under the new laws and regulations which intervened post-August 2013 draft)

USD 0.00172. And, for the same reason, Decree 77 and Resolution 127 (and the dismissal of Tele Fácil's *amparo* actions in the Mexican court) could not, by definition, take away rights that Tele Fácil never had.

Analysis

Jurisdiction

[31] The “seat” of this arbitration was designated to be Toronto, Ontario. Accordingly, the award is subject to review by the Ontario Superior Court of Justice under the Model Law.

Standard of Review

[32] Article 34 of the Model Law, as modified by s. 6(2) of the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5, provides that an arbitral award may be set aside on an application to the court if one of the specified grounds is established. This application seeks to set aside the award based on Article 34(2)(a)(ii) of the Model Law, which provides that: “the party making the application... was otherwise unable to present his case.”

[33] Article 34(2)(a)(ii) embodies well-established principles of fairness and natural justice. While decisions of an international arbitral tribunal generally attract a high level of deference, they are not immune from being set aside by the courts of the seat of arbitration if minimum standards of due process and substantive fairness are not met. Ontario courts have held that the standard of review for setting aside an award under Article 34(2)(a)(ii) is whether the tribunal’s conduct is “sufficiently serious to offend our most basic notions of morality and justice” and “that it cannot be condoned under the law of the enforcing State”: *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939, at para. 65, leave to appeal refused, 2018 CarswellOnt 17927 (S.C.C).

[34] In *Consolidated Contractors*, the Court also confirmed that a party may be said to have been “unable to present his or her case” under Article 34(2)(a)(ii) when:

(a) the award is based on a theory of liability that either or both of the parties were not given an opportunity to address, or based on a theory of the case not argued for by either of the parties;

(b) a party was not given an opportunity to respond to arguments made by an opposing party; or

(c) the tribunal ignored or failed to take the evidence or submissions of the parties into account.

[35] A party is not permitted to review the award on its merits under the guise of alleged breaches of Article 34(2)(a)(ii). Where a party merely disagrees with the outcome, the court should not permit reargument of the merits in the guise of a claim for breach of procedural

fairness: *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2016 ONSC 7171, at para. 89.

The Issues

- [36] The applicant makes two arguments for why the award should be set aside.
- [37] First, the applicant argues that, rather than considering and resolving the competing expert evidence advanced by the parties on the question of whether Tele Fácil obtained interconnection rights under Mexican law, the Tribunal instead decided the issue on a novel theory not advanced or argued by either party. This conduct violated the applicant's right to present its case and to be heard.
- [38] Second, the applicant argues that the tribunal failed to consider the applicant's expert evidence and submissions on the core issue in the arbitration. This, he argues, also offends minimum standards of procedural and substantive fairness and should result in the award being set aside.

Application

Did the Tribunal Decide the Case on A Basis not Argued?

- [39] The principle that a tribunal cannot decide a case on a basis that was not pleaded or argued is well established and not in doubt. The issue joined in this case is a question of fact – was the basis upon which the tribunal determined that Tele Fácil never had interconnection rights priced at USD 0.00975 pleaded or argued?
- [40] The applicant says he could not have anticipated that the tribunal would decide the case based on the form and content of Tele Fácil's July 2014 letter. That theory, he says, was not advanced by the respondent and the tribunal gave no indication to the parties that it considered this issue to be a determining one.
- [41] I am not able to accept this submission.
- [42] In its claim, Tele Fácil asserted that it accepted Telmex's offered rates, that there were no negotiations on rates and that rates had been agreed upon. Telmex took the position in its defence that no agreement was ever signed and that Tele Fácil never notified Telmex of any acceptance of the August 2013 proposal or any aspect of it.
- [43] The applicant's experts on Mexican civil and administrative law testified that there was consent from both parties about the rates, and therefore an agreement. The respondent's expert testified at length that, once Tele Fácil gave what may have been a conditional acceptance of Telmex's offer, that is, acceptance subject to two required changes before Tele Fácil would sign, Telmex was no longer bound by its earlier draft proposal. As a result, the consent of both parties to the rate, which was required for there to be an agreement, was never given.

- [44] Tele Fácil's fact witnesses were cross-examined on the meaning and effect of Tele Fácil's July 7, 2014 letter. One of Tele Fácil's legal experts was also cross-examined on whether the July 7, 2014 letter constituted an acceptance of Telmex's offer or was a counter offer.
- [45] After the completion of evidence, the tribunal expressly asked the parties to address the meaning and effect of the July 7, 2014 letter in oral submissions by answering the following question:
- Question Four: What are the most relevant legal and evidential materials on the record to help the Tribunal decide whether under Mexican law the July 7, 2014, letter (Exhibit C-0024) constitutes an acceptance of an offer by Telmex or a counter-offer from Tele Fácil to Telmex or a third category?
- [46] Both the applicant and the respondent addressed this question in oral submissions on the final day of the hearing. Moreover, both parties were invited to address this issue further in their written post-hearing briefs which were submitted more than 3 months later.
- [47] The respondent addressed the negotiations leading up to the July 7, 2014 letter, as well as whether the July 7, 2014 letter constituted acceptance of Telmex's previous offer, in its post-hearing brief. The applicant chose not to do so.
- [48] Thus, whether Tele Fácil's letter of July 7, 2014 created a binding interconnection agreement with Telmex was addressed in the parties' pleadings as well as the written reports prepared by the legal experts and was the subject of cross-examination and questions from the tribunal members during the hearing. Both parties put their positions squarely before the tribunal on this issue.
- [49] There was no failure of fairness or natural justice.

Did the Tribunal Fail to Consider Relevant Evidence?

- [50] The applicant submits that the expert evidence on Mexican civil and administrative law (two experts for the applicant, one for the respondent) addressed a core issue in the arbitration – whether the USD 0.00975 interconnection rate was agreed to by the parties and confirmed in law by the IFT in Resolution 381. Yet, the applicant argues:
- there is not a single reference to or acknowledgement of the position of the applicant's experts in the 117 pages of the award
 - the tribunal made some reference to views expressed in the respondent's expert report, but wholly failed to acknowledge or consider the evidence of the applicant's experts that supported the applicant's position, and
 - the tribunal acknowledged that to come to a determination as to the legal effect of Resolution 381, it must consider "the powers of the IFT under Mexican law", yet the award contains no reference whatsoever to the experts' evidence concerning the IFT's authority and powers.

- [51] It is generally accepted that a trier of fact cannot ignore or fail to evaluate relevant portions of the evidence. A similar concept has been applied in the context of international commercial arbitrations. For example, in *Oil Basins Ltd v. BHP Billiton LTD & Ors*, [2007] VSCA 255, the Victoria Court of Appeal in Australia affirmed a lower court judgement which had set aside an arbitral award on the grounds that the tribunal had failed to deal with extensive expert evidence. In that case, both parties had submitted expert evidence regarding the meaning of the term “overriding royalty,” which was a key issue in the proceeding. The award made no reference to the evidence of the losing party, beyond a bare statement that the tribunal preferred the evidence of the other party’s witness. The lower court found that since the submissions and evidence were neither peripheral nor obviously untenable, but instead were “at the heart of the matter,” the tribunal was obliged to give intelligible reasons for its rejection. The Court of Appeal affirmed the decision, finding that the reasons were inadequate because of the tribunal’s “failure to condescend to any analysis of the competing evidence and reasons for rejecting it”: at para. 40.
- [52] While it may be literally true that the applicants’ experts were not mentioned by name in the award, it must be understood that the parties submitted their respective expert evidence as exhibits to their pleadings and their pleadings addressed that expert evidence in detail.
- [53] Throughout the award, the tribunal cited extensively from the applicant’s claim and reply. Many of the paragraphs cited by the tribunal expressly address the applicant’s expert evidence.
- [54] For instance, in considering whether the respondent breached Article 1110 of NAFTA, the award cites paragraphs 381, 388-390, 394, 400, 408 and 424 of the statement of claim, and paragraphs 178-181 and 189 of the reply. All these paragraphs specifically address the applicant’s expert evidence as provided by Ms. Clara Luz Alvarez or Mr. Gerardo Soria.
- [55] Similarly, in considering whether the respondent breached Article 1105 of NAFTA, the Award cites paragraphs 494, 496-497, 503-504, 506, 509, 540-542, 544, 546-547, 549, 556-557, 561-563, 567 and 576 of the applicant’s statement of claim, and paragraphs 281, 299, 301-302, 305, 345 and 354 of the respondent’s reply. Once again, all these paragraphs address the applicant’s expert evidence as provided by Ms. Clara Luz Alvarez or Mr. Gerardo Soria.
- [56] In other words, the tribunal set out in great detail what the arguments of each party were and what those arguments were based on. The evidence was not repeated verbatim in the award but detailed and extensive citations were made referring to the parties’ positions and evidence on each issue and argument.
- [57] Importantly, the tribunal did not just stop there and go on to state a bald conclusion. In 23 pages of additional reasons, from paras. 221 to 284 of the award, the tribunal set out, again in great detail, its analysis and precise reasoning for why it rejected the applicant’s arguments on: a) whether there was an agreement between Tele Fácil and Telmex on rates; and b) whether Resolution 381 established Tele Fácil’s rates for interconnection.

[58] The tribunal’s analysis does not take the *form* of “Clara Luz Alvarez says X and we do not accept her evidence as conclusive on the point because...”. But the fact is that the experts’ arguments are fully referenced and the tribunal’s reasons for why it reached its conclusions are set out in detail. No one could reasonably be in any doubt about whether the tribunal considered the applicant’s evidence or why the tribunal decided the case the way it did.

Conclusion

[59] For the foregoing reasons, the application for relief under Article 34(2)(a)(ii) of the Model Law from the decision of the tribunal in this case is dismissed.

Costs

[60] The parties agreed that costs of \$100,000 (all inclusive) should be awarded to the successful party. The United States of Mexico is therefore awarded costs in that amount.

Penny J.

Released: February 16, 2022

CITATION: *Nelson v. The Government of the United States of Mexico*, 2022 ONSC 1193
COURT FILE NO.: CV-21-00663626-00CL
DATE: 2022-02-16

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

JOSHUA DEAN NELSON

Applicant

– and –

THE GOVERNMENT OF THE UNITED MEXICAN
STATES

Defendant

REASONS FOR JUDGMENT

Penny J.

Released: February 16, 2022