

The Netherlands, District Court of The Hague, Challenge no. 13/2004, Petition no. HA/RK 2004,667, first instance, 18 October 2004.

Member State

 The Netherlands

Topic

Independence and impartiality of arbitrators, with a special focus on the lack of impartiality or equidistance from the parties (internal aspect).

Deciding Court Original Language

Rechtbank 's-Gravenhage

Deciding Court English translation

District Court of The Hague

Registration N

N/A

Date Decision

18 October November 2004

National Follow Up Of (when relevant)

Not applicable

EU legal sources and CJEU jurisprudence

Not directly mentioning EU law but relevant to it in light of Opinion 1/17 and the ECJ's case law on the independence and impartiality of judicial organs.

ECtHR Jurisprudence

Not applicable

Subject Matter

In this dispute, the internal aspect of independence is at stake. In particular, the arbitrator is thought to have a potential bias against one of the disputing parties.

Legal issue(s)

The case is related to impartiality.

Request for expedited/PPU procedures

Not applicable

Interim Relief

Not applicable

National Law Sources

Not applicable

Facts of the case

The disputing State party (Ghana) challenged the impartiality of one of the arbitrators on account of his simultaneous involvement as counsel in a parallel dispute between different parties, namely an Italian investor and Morocco, based on a different BIT. The lack of impartiality was allegedly due to the inability of the arbitrator to be unbiased against the State action in question while at the same time arguing as counsel against the same State action, even though perpetrated by another State (i.e., expropriation).

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 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 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 arbitration proceedings followed under the UNCITRAL rules. The formal place agreed upon for the arbitration between the parties is The Hague. The arbitration is administered by the Permanent Court of Arbitration. The Secretary General to the Permanent Court of Arbitration has been designated "appointing 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 Professor 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 Professor 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 of 5-15 July 2004, it became clear that the petitioner among other things based its allegations upon a judgment concerning a dispute between the Consortium RFCC and the Kingdom of Morocco. After the petitioner had made reference to the award in the matter of the Consortium RFCC versus Morocco, Professor Gaillard made a statement which should be characterised as a "disclosure" within the meaning of article 9 of the UNCITRAL rules. Professor 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 Professor 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, Professor 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.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The District Court of The Hague reasoned as follows: "[t]his attitude is incompatible with the attitude Professor 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."

Relation of the case to the EU Charter

The case relates to the impartiality standards applicable in the EU to judicial organs as resulting from the Charter and the ECJ's case law.

Relation between the EU Charter and ECHR

Not applicable

Use of Judicial Interaction technique(s)

The District Court of The Hague makes no reference to existing arbitral case law, but it does refer to the IBA Guidelines on Conflicts of Interest in International Arbitration, as well as to Dutch law applicable to the dispute (namely, the Dutch Civil Code).

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

Not applicable

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

Not applicable

Strategic use of judicial interaction technique (purpose aimed by the national court)

Not applicable

Impact on Legislation / Policy

This case, as with other cases analysed above, has certainly played a role in the shaping of those provisions of EU investment agreements relating to the issue of double hatting, which can take many different forms (as the variety of situations commented upon in this casebook clearly demonstrates).

Notes on the national implementation of the preliminary ruling by the referring court

Not applicable

Impact on national case law from the same Member State or other Member States

Not applicable

(Link to) full text

https://www.italaw.com/sites/default/files/case-documents/ita0857_0.pdf

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