

Kluwer Arbitration Blog

Paris Court of Appeal Sets Aside ICC Arbitral Award in a USD 15 Billion Dispute Due to the Irregular Constitution of the Arbitral Tribunal

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On 2 May 2024, the Paris Court of Appeal set aside an ICC award rendered on 1 September 2016 in Paris due to the existence of facts likely to cause, in the minds of the parties, a reasonable doubt as to the presiding arbitrator's independence.

This post will summarise and comment the judgment rendered by the Paris Court of Appeal, including the facts and proceedings leading up to the judgment.

Factual Background

The dispute originated in the 1990s and involved, on the one hand, a set of entities known as “Opportunity” and their founders, and on the other hand, telecommunication companies Telecom Italia S.P.A. and Telecom Italia Finance S.A. (together “Telecom Italia”). More specifically, the dispute arose out of the conclusion and performance of a settlement agreement signed by the parties on 28 April 2005, which was meant to resolve the parties' differences relating to their participation in a consortium established in the 1990s.

Proceedings

On 23 May 2012, Opportunity initiated an ICC arbitration in Paris, claiming that Telecom Italia had breached the settlement agreement and obtained it through fraud and duress.

On 1 September 2016, the arbitral tribunal rendered an award rejecting all of (i) Opportunity's claims and (ii) Telecom Italia's counterclaims.

On 5 December 2016, Opportunity filed an application before the Paris Court of Appeal to set aside the award based on the three following grounds:

- the tribunal was irregularly constituted ([article 1520\(2\) of the \(“FCCP”\)](#));
- there has been a breach of due process ([article 1520\(4\) of the FCCP](#)); and
- recognizing or enforcing the award would be contrary to international public policy ([article](#)

1520(5) of the FCCP).

In parallel to this application, Opportunity filed, on 22 October 2017, a request before the ICC for the revision of the award, raising procedural frauds committed by Telecom Italia. During this procedure, Opportunity discovered that Telecom Italia had close and ongoing business relations with the presiding arbitrator's law firm, in which she works as a partner. These relations already existed during the arbitration proceedings but had not been disclosed by the presiding arbitrator up until Opportunity's request for revision. Based on these newly discovered facts, the ICC upheld Opportunity's challenge of the presiding arbitrator.

Before the Paris Court of Appeal, Opportunity sought to set aside the award, based on an irregular constitution of the tribunal, by relying on the following facts:

- the presiding arbitrator's law firm has, since at least 2013, constantly worked for Vivendi (Telecom Italia's principal shareholder since 24 June 2015) and its subsidiaries, of which the presiding arbitrator had knowledge;
- the presiding arbitrator stressed the importance of Vivendi as a client of its law firm, given that the law firm wants to continue working for Vivendi; and
- at the date of the award (1 September 2016), Vivendi held 24,68% of Telecom Italia's share capital, making it economically interested in the outcome of the arbitration.

Opportunity concluded that the above facts were likely to cause, in the minds of the parties, a reasonable doubt as to the independence and impartiality of the presiding arbitrator, and added that this had been confirmed by the ICC which upheld Opportunity's challenge on 5 March 2018.

The Judgment of the Paris Court of Appeal

The Court set aside the award on the basis of article 1520(2) of the FCCP (which is one of the very rare times the Paris Court of Appeal set aside on award on that basis).

The Court began by recalling the well-established rules that:

- it must assess an arbitrator's independence and impartiality by identifying any circumstance likely to affect the arbitrator's judgment and create a reasonable doubt, in the minds of the parties, on the arbitrator's qualities;
- assessing an arbitrator's independence follows an objective approach, consisting of identifying specific and verifiable facts, external to the arbitrator, that could affect her/his freedom of judgment, such as personal, professional or economic ties with one of the parties; and
- an arbitrator's impartiality implies the absence of prejudices or biases that could affect her/his judgment, which may arise from various factors such as the arbitrator's nationality, social, cultural or legal background (see also the Paris Court of Appeal judgment dated 23 April 2024, 22/20058).

The Court then assessed the facts of the case.

First, the Court noted that, as part of Opportunity's request for revision of the award, Telecom Italia disclosed that it was subject to the direction and coordination of Vivendi. Following such disclosure, the presiding arbitrator declared that her law firm has regularly worked for Vivendi

since 2013 and may continue to do so in the future (specifying however that she had never, herself, worked for Vivendi).

Second, the Court examined the relations between Vivendi and Telecom Italia and held, in particular, that according to the evidence on record, Vivendi is a substantial shareholder in Telecom Italia since 2015 (held up to over 20% of Telecom Italia's shares while the arbitral proceeding was pending) and appointed members to Telecom Italia's board. The Court determined that Vivendi's (i) important shareholding in Telecom Italia and (ii) direct involvement in the governance of Telecom Italia demonstrates Vivendi's clear interest in the outcome of this proceeding, especially given the substantial amount (of several billion dollars) disputed.

Third, based on the presiding arbitrator's statement and the ICC's findings during Opportunity's request for revision, the Court noted that the presiding arbitrator's law firm had acted several times as counsel for Vivendi and its subsidiaries, before and during the arbitration, and intends on continuing to work with Vivendi in the future, thus attesting to the importance of the relationship between Vivendi and the presiding arbitrator's law firm.

The Court concluded that there exist ties between Vivendi, a third party interested in the outcome of the arbitration, and the presiding arbitrator's law firm. Although such ties do not put into question the presiding arbitrator's integrity, they "constitute an objective situation of conflict of interest likely to raise a reasonable doubt in the minds of the parties regarding the arbitrator's independence" (see also Paris Court of Appeal judgment dated 10 January 2023, [no. 20/18330](#)).

The Court therefore determined that the tribunal was irregularly constituted and set aside the arbitral award on this ground.

Commentary

The Court's decision to set aside the award may, at first glance, appear severe, considering that such decision was based on the existing ties between the presiding arbitrator's law firm (and not the presiding arbitrator herself) and a third (interested) party to the arbitration. However, a careful reading of the decision seems to suggest that the Court's reasoning is rather justified. The Court decided that the existing ties between a third party interested in the outcome of the arbitration and the presiding arbitrator's law firm "constitute an objective situation of conflict of interest likely to raise a reasonable doubt in the minds of the parties regarding the arbitrator's independence". Indeed, the importance of the relations between an arbitrator's law firm and a third (interested) party, for conflict of interest purposes, is reflected in the [Note to Parties and Arbitral Tribunals on the Conduct of Arbitration](#), paragraph 27 (this Note is often relied upon by the Paris Court of Appeal in set aside proceedings). With this in mind, the Court's reasoning seems coherent and justified.

The Court first assessed the relation between Vivendi, the third party, and Telecom Italia, the relevant party to the arbitration, and found that, from the beginning of and throughout the arbitration, Vivendi was an important shareholder of Telecom Italia and was directly involved in its governance, making it highly interested in the outcome of the arbitration. The Court then assessed the relation between Vivendi and the arbitrator's law firm and considered, based on the fact that the presiding arbitrator's law firm had consistently worked for Vivendi and decided that it would continue working with Vivendi in the future despite the existence of the arbitration, that the

two had strong economic ties which were clearly already established during the arbitration.

In its assessment, the Court also partly relied on the ICC decision which upheld the challenge of the presiding arbitrator. The Court's reliance on such decision does seem reasonable and well founded. Indeed, one can wonder whether the successful challenge of an arbitrator before an arbitral institution binds the Paris Court of Appeal or, at the very least, constitutes a presumption that there exist, in the minds of the parties, a reasonable doubt as to the arbitrator's independence and/or impartiality.

As a final point, it is interesting to note that the award was set aside based on the information disclosed by the presiding arbitrator (which would explain why the arbitrator's failure to disclose the relevant information is not discussed by the Court). This should encourage arbitrators to disclose information either at the outset of the arbitration or, if the arbitration has started, as soon as they are aware of the existence of the information. This will limit the risk of rendering an award which may be set aside on the basis of article 1520(2) of the FCCP, even if that implies being removed from the arbitration.

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