

# Telecom Malaysia v Ghana Telecom

*AA De Fina*<sup>1</sup>

In late 2000 Telecom Malaysia bought a 30% stake in the government owned Ghana Telecom for USD 38 million. Some relatively short time later it paid USD 50 million for a further 15%.

Then the Ghanaian currency crashed compared to the USD and Ghana defaulted in obligatory payments.

Telecom Malaysia instituted arbitral proceedings pursuant to an arbitration clause in the contract between Telecom Malaysia and Ghana Telecom governed by the UNCITRAL Rules.

After some changes in relation to the Arbitral Panel, Professor Emmanuel Gaillard, an eminent international arbitration expert and partner in charge of the arbitration practice of Shearman and Stirling in Paris, was appointed Chairman of the Tribunal.

In November 2005 Ghana challenged Professor Gaillard.

The world of international arbitration is dominated and effectively controlled by a very small group of international lawyers who are academics, in private practice, or, as in the case of the specialist chambers in London, persons who practise both as counsel and arbitrators at differing times.

Professor Gaillard was at the time of appointment as Chairman in the Malaysia Ghana dispute, counsel of record in a similar but unrelated arbitration by an Italian construction company in an ICSID arbitration against Morocco. Professor Gaillard refused to stand down and Ghana pressed its objection before the Appointing Authority relying on the objective test in General Standard 2<sup>2</sup> of the IBA guidelines (Professor Gaillard was a member of the IBA working party which drafted the guidelines).

The Secretary General of the International Court of Arbitration in The Hague (the Appointing Authority) determined that there were no circumstances such as to give rise to justifiable doubts as to Professor Gaillard's impartiality or independence.

Ghana, dissatisfied with this decision, then applied to the district court in The Hague basing their challenge on the risk of a merits prejudgement by Professor Gaillard in his role as counsel in the Morocco arbitration.

Von Maltzahn J upheld the challenge citing reliance on an objective test including that of outward appearance.

Professor Gaillard was ordered to divest himself of his role as counsel in the Morocco arbitration or as chairman of the Ghana arbitral tribunal within 10 days. Professor Gaillard withdrew as counsel in the Morocco case.

Thereupon Ghana again challenged Professor Gaillard on the basis that he had already participated in decisions of the Tribunal in Ghana and as a result Ghana was prejudiced. Punt J in the District Court in The Hague dismissed the objection on the basis that there was "no ground for an assumption of partiality or prejudice in these non-substantive decisions.

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1 AA de Fina OAM, FIAMA, is a Past President of IAMA and Past President of Australian Centre for International Commercial Arbitration. He practices full time as an arbitrator in domestic and international disputes and has conducted some of the largest international arbitrations.

2 IBA General Standard (2) requires that an arbitrator decline or refuse to act or continue in circumstances which from a reasonable third person's view would give rise to doubts as to the arbitrator's impartiality or independence.

