



AD HOC ARBITRATION

Case No. UN122260

TELECOM ITALIA SPARKLE SINGAPORE PTE, LTD. V. PHOENIX TELECOMMUNICATIONS  
GROUP, INC.

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FINAL AWARD

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23 December 2013

Tribunal:

[Michael Lee](#) (President)

[Nicholas Gould](#) (Appointed by the Appointing Authority)

[Ray Werbicki](#) (Appointed by the Appointing Authority)

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# Final Award

## INTRODUCTION

1. The Claimant in this arbitration is Telecom Italia Sparkle Singapore Pte Ltd of 6 Temaseak Boulevard, # 230/01 Suntec Tower Four, Singapore, 038986. ("the Claimant")
2. The Claimant is represented by Salem Ibrahim, LLC 79 Robinson Road, #16-06, CPF building Singapore 068897.
3. The Respondent is Phoenix Telecommunications Group Inc. with a registered office at 5480 HWY60 East, Plant City, FL33567, United States of America. ("the Respondent")
4. The Respondent is not represented in these proceedings.
5. This arbitration arises in respect of a claim by the Claimant for non-payment of fees alleged to be due by the Respondent under an Agreement dated 1 May 2007 ("The Agreement") between the Claimant and the Respondent under which the Claimant provided IP Internet Protocol/Data services to the Respondent.
6. Clauses 16 and 17 of the Agreement provide as follows: -

*16.1 Any disputes controversy or claim of or on [sic] connection with this Agreement, or breach, termination or validity thereof, shall first be settled through friendly discussion or negotiation between the parties, but failing such efforts shall first be settled by final and binding arbitration in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) as presently in force.*

*16.2 The seat of arbitration shall be in London and the Arbitration proceeding shall be conducted in English.*

*16.3 The cost of Arbitration, including fees and expenses of the arbitrators, shall be shared equally by the Parties. The parties shall each bear the cost of preparing and presenting its own case.*

*16.4 During the Arbitration proceeding the Parties shall continue to perform their obligations under this Agreement until final resolution of the issue.*

*17.1 A notice, consent or other communication under this Agreement is only effective if it is:*

*a. in writing; and*

*b. either (1) delivered personally or (2) sent by pre-paid post, facsimile or in electronic form (such as e-mail), in which case a copy of the electronic notice will be sent by facsimile as soon as possible*

*afterwards;*

*to the person and the address listed below, or as notified by the relevant Party.*

*In the case of TISS:*

*Personal delivery:*

*Nurui Ali Gan*

*Post:*

*#37-01A Suntec Tower Three,*

*8 Temasek Blvd. 038988 Singapore*

*Facsimile:*

*+ 65 6235 8131*

*E-mail:*

*Nurai. aligan@telecomitaliasparkle.com*

*Copy to:*

*TELECOM ITALIA SPARKLE SINGAPORE PT LTD*

*#37-01A Suntec Tower Three,*

*8 Temasek Blvd. 038988 Singapore*

*Fax: + 65 6235 8131*

*In the case of PHOENIX:*

*Personal delivery:*

*Mr John D.Gill*

*Post:*

*5480 HWY 60 East,*

*Plant City FL 33567*

*Facsimile:*

*+ 1 888 231 3527*

*E-mail:*

*john@phoenix-tel.com*

Copy to:

Phoenix Telecom

5480 HWY 60 East,

Plant City FL 33567

Fax: + 1 888 231 3527

17.2 The notice, consent or other communication is deemed to be received:

a, if delivered personally, on delivery;

b. if sent by prepaid registered post, seven (7) days after the date of posting unless actually received earlier;

1) if sent by facsimile, on production by the machine from which the facsimile is sent of a transmission report which confirms that the facsimile was sent in its entirety to the facsimile number of the recipient; and

2) if sent in an electronic form, on the date on which the recipient's e-mail system logs the e-mail message as being received.

## PROCEDURAL HISTORY

7. By a Notice of Arbitration dated 20 July 2012, the Claimant demanded that the alleged disputes existing between it and the Respondent concerning "*outstanding amount to the Claimant's tax invoices arising out of or in connection with [the Agreement] be referred to arbitration under the UNCITRAL arbitration rules in accordance with the arbitration clause applicable thereto*" The amount claimed in the Notice of Arbitration was US\$ 1,965,776.83 plus interest and costs.
8. According to the Claimant, the Notice of Arbitration was served on the Respondent by way of facsimile and email on 20 July 2012 and by courier on 23 July 2012. The Notice of Arbitration served by courier is said by the Claimant to have been received by the Respondent on 26 July 2012.
9. The Notice of Arbitration proposed that the matter be adjudicated by a single arbitrator appointed by the Secretary-General of the Permanent Court of Arbitration ("the PCA").
10. No response having been received from the Respondent, on 26 September 2012 the Claimant requested the Secretary-General of the PCA to designate an appointing authority pursuant to Article 6 of the UNCITRAL Arbitration Rules 2010.
11. Having invited the Respondent by letters on 12 and 23 October 2013 and by email on 5 November 2012 to comment on the Claimant's request, and having received no response, on 12 November 2012 the Secretary-General of the PCA designated the London Court of International Arbitration

("LCIA") as appointing authority.

12. On 7 December 2012 the Deputy Registrar of the LCIA informed the parties that the LCIA Court was of the view that it was not sufficiently clear whether the 1976 or the 2010 UNCITRAL Arbitration Rules applied to the arbitration and that the LCIA Court was therefore minded to appoint a three member Tribunal. The Claimant, which had requested the appointment of a sole arbitrator, was invited to confirm its agreement to this course. On 10 December 2012 the Claimant confirmed to the LCIA that it had no objection to the LCIA appointing a three member Tribunal.
13. On 13 December 2012 the Deputy Registrar of the LCIA invited the Respondent to advise by 17 December 2012 at the latest, whether it was content for the LCIA to appoint all three members of the Tribunal. In the absence of the Respondent's agreement the Respondent was informed it would have 30 days from receipt of notification of the LCIA's appointment of the first arbitrator in which to appoint the second arbitrator pursuant to Article 7(2) of the 1976 UNCITRAL Rules and Article 9(2) of the 2010 UNCITRAL Rules.
14. On 18 December 2012 the LCIA Court appointed Mr Nicholas Gould of Fenwick Elliott LLP, Aldwych House, 71-91 Aldwych, London, WC2B 4HN UK on behalf of the Claimant as the first arbitrator on a panel of three in the arbitration. A copy of the notice of appointment was sent, inter alia, to the Respondent by email, fax and courier on 20 December 2012. By the same communication, the Respondent was invited to appoint its arbitrator, and advise that it had done so, within 30 days, pursuant to Article 7(2) of the 1976 UNCITRAL Rules and Article 9(2) of the 2010 UNCITRAL Rules. Delivery by courier was unsuccessful as the Respondent was apparently no longer at the address 5480 HWY60 East Plant City, FL, USA (the address for service in the Agreement). It was however transmitted successfully by email and fax.
15. On 5 February 2013, the Respondent having failed to nominate an arbitrator within the prescribed time, or at all, the LCIA appointed Mr Ray Werbicki of Steptoe & Johnson LLP, 99 Gresham Street, London EC2V 7NG UK as the second arbitrator.
16. The two appointed arbitrators were invited by the LCIA to appoint a third and presiding arbitrator by 7 March 2013.
17. On 13 February 2013 Mr Gould and Mr Werbicki appointed Mr Michael Lee of 20 Essex Street, London WC2R 3AL UK as the third and presiding arbitrator, The parties were so advised by a letter from Mr Werbicki sent by email, fax and post on 5 March 2013. The email and fax versions of the letter were transmitted successfully to the Respondent at the fax number and email address provided in clause 17.1 of the Agreement.
18. On 13 March 2013 the Presiding Arbitrator sent to the parties draft Terms of Appointment for agreement or comment by 1st April 2013 and directed the parties to deposit £25,000 each by way of an initial deposit for the Tribunal's fees with the LCIA. The letter also invited the parties to agree procedural directions and to revert to the Tribunal by 1 April 2013 with their agreement or an indication of the areas in which they were not in agreement. The letter also stated that if either party considered that for any reason the arbitration should not continue under the 2010 UNCITRAL rules it should state so by 27 March 2013. The President's letter was sent to both parties by email and fax and to the Respondent to its registered office by courier. Although the letter to the

Respondent was subsequently returned undelivered the Tribunal is satisfied that both the fax and the email were received by the Respondent as they were transmitted successfully. In the case of the Respondent the fax and e-mail communications (and all subsequent faxes and e-mails) were sent to the fax numbers and e-mail addresses provided for service of notices in Clause 17.1 of the Agreement.

19. The Claimant deposited £25,000 with the LCIA as directed. The Respondent has not made any payment of its share of the deposit.
20. All subsequent communications from the Tribunal to the parties were sent by fax and email to both parties and, in the case of the Respondent, additionally by letter addressed to Mr John D. Gill at the Respondent's Plant City Florida address, the designated mode of communication of notices under Clause 17.1 of the Agreement. Although in each case the letters to the Respondent have been returned undelivered, the Tribunal is satisfied that the faxes and emails were successfully transmitted and received by the Respondent and that the Respondent has been given due notice of these proceedings and the Tribunal's procedural directions.
21. On 8 April 2013 the Tribunal wrote to the parties pointing out that the Tribunal had not received a reply to its letter of 11 March 2013 and directing the parties to give their approval to the draft Terms of Appointment and to let the Tribunal know whether the parties had reached agreement on the procedural timetable by 12 April 2013.
22. On 18 April 2013 the Tribunal directed that the Claimant file its Statement of Claim by 9 May 2013 and the Respondent file its Statement of Defence within 21 days of the service of the Claimant's Statement of Claim. The Tribunal directed that in the case of the Statement of Claim it should be served by email and fax on the Respondent at the email address and fax number given in clause 17.1 of the Agreement and in the case of the Statement of Defence it should be served on the Claimant's lawyers and the Tribunal by email.
23. On 9 May 2013 the Claimant filed its Statement of Claim with the Tribunal and served it on the Respondent, in accordance with the Tribunal's directions.
24. On 19 June 2013 the Tribunal wrote to the parties noting that the Respondent had not filed its Statement of Defence and directing that unless the Respondent filed a Statement of Defence by 3 July 2013 the Tribunal would, in accordance with Article 30.1 (b) of the UNCITRAL Arbitration Rules, order that the proceedings continue without treating such failure in itself as an admission of the Claimant's allegations.
25. On 20 August 2013 the Tribunal wrote to the parties referring to the Respondent's failure to file a Statement of Defence by 3 July 2013 in accordance with the Tribunal's direction of 19 June 2013 and ordering that the proceedings continue without treating the Respondent's failure to file the Statement of Defence as an admission of the Claimant's allegations.
26. On 12 September 2013 the Tribunal gave the following directions:-
  - a. By 26 September 2013 the Claimant should file the evidence, together with copies of the

documents, on which it relies. This should include a witness statement from a responsible officer of the Claimant with knowledge of the matter and should set out the details of the amount claimed, the interest thereon, and the legal and other costs claimed by the Claimant together with supporting documentation.

b. By 10 October 2013 the Respondent should file a statement of evidence in reply and any documents on which it relies.

c. Thereafter unless either party required an oral hearing, in which case it should inform the Tribunal by 10 October 2013, the Tribunal would proceed to determine the matter and issue its award.

27. In accordance with the Tribunal's direction (as extended), on 30 September 2013 the Claimant filed with the Tribunal and served on the Respondent a witness statement of Dino Civitarese, the Managing Director of the Claimant, signed and affirmed before a notary public on 27 September 2013. The witness statement was accompanied by approximately 230 pages of exhibits.
28. Having considered Mr Civitarese's witness statement and exhibits, on 28 October 2013 the Tribunal directed that the Claimant file a further witness statement, setting out a detailed calculation of its interest claim and the costs which it was seeking, within 14 days, The Tribunal stated in its letter to the parties that it had not received a written witness statement from the Respondent and directed that if the Respondent wished to file any evidence, in response to the Claimant's evidence it should do so within 14 days of the filing of the Claimant's further statements.
29. On 18 November 2013 the Claimant filed an additional witness statement of Mr Civitarese, signed and affirmed before a notary public on 15 November 2013, in accordance with the Tribunal's directions of 28 October 2013. The witness statement was accompanied by 6 pages of additional exhibits.
30. On 21 November 2013 the Tribunal directed that if the Respondent intended to file any evidence in this arbitration it should do so within 14 days of receipt of the Respondent's additional evidence, i.e. by 2 December 2013, following which the Tribunal would produce its award.
31. No submissions or evidence having been filed by the Respondent either in accordance with the Tribunal's directions, or at all, the Tribunal, being satisfied that the Respondent has been given due notice of these proceedings, makes the following award.

## DISCUSSION

### Unpaid Invoices

32. The Claimant's claim is in respect of charges alleged to be due under the Agreement whereby the Claimant and the Respondent agreed to provide telecommunications services to each other

between their networks from their respective operating territories.

33. Pursuant to clause 7.7 of the Agreement the Claimant issued monthly statements in respect of the services it provided to the Respondent and also sent invoices to the Respondent from time to time. As at the date of the Statement of Claim (9 May 2013) the Claimant alleged that a total of US\$ 1,995,912.13 was due from the Respondent to the Claimant in respect of the invoices set out below.

S/N	INVOICE NO.	INVOICE DATE	DUE DATE	AMOUNT (US\$)
1	167	14th April 2008	14th May 2008	199,563.58
2	634	12th November 2008	12th December 2008	279,651.68
3	695	12th December 2008	11th January 2009	179,979.25
4	214	14th April 2009	14th May 2009	274,222.52
5	574	7th September 2009	7th October 2009	234,829.17
6	37	7th January 2010	6th February 2010	258,024.84
7	97	5th February 2010	7th March 2010	195,327.32
8	157	5th March 2010	4th April 2010	218,391.39
9	218	7* April 2010	7th May 2010	155,787.08
10	686	7th December 2010	6th January 2011	135.30
11	Less: Payment received on 25th April 2009	(30,000.00)		
<b>TOTAL: US\$</b>				<b>1,995,912.13</b>

34. The witness statement of Dino Civitarese, the Managing Director of the Claimant filed on 30 September 2013 confirmed the outstanding amounts and exhibited, inter alia, copies of the relevant invoices. Mr Civitarese confirmed that, apart from the sum of US\$ 30,000 indicated in the particulars above the Respondent has not paid any of the outstanding invoices, and has not disputed the invoices but has instead made empty promises to make payment. Mr Civitarese pointed out that the amount of US\$ 1,995,912.13 claimed in the Statement of Claim incorporated a typographical error and that the correct figure should instead be US\$ 1,965,912.13.

## Interest

35. The Respondent has not challenged the amount due and the Tribunal is satisfied that the principal sum of US\$ 1,965,912.13 is due and owing to the Claimant and accordingly orders the Respondent to pay that sum to the Claimant.

36. The Claimant's claim is for the payment of undisputed invoices, together with interest on the sums due and owing at the contractual rate of 6% provided for under clause 7.10 of the Agreement, from the due dates until payment is made in full.

37. In his additional witness statement Mr Civitarese exhibited a detailed calculation of the interest claimed by the Claimant which, as at 11 November 2013, amounted to US\$ 497,547.69. The Respondent has not challenged the amount due or the interest claimed and the Tribunal is satisfied that the interest claimed is due and owing to the Claimant and accordingly orders the Respondent to pay that interest in full.

## Costs

38. The Claimant also claims payment of the costs of the arbitration from the Respondent and also payment of the Claimant's legal costs.

39. In respect of the costs of the arbitration, these total £17,520.96 made up as follows:-

Nicholas Gould £2,988.00

Ray Werbicki £6,475.00

Michael Lee £7,870.46

LCIA Administrative charges £187.50

£17,520.96

40. The Claimant also claims payment of its own legal costs and expenses incurred in relation to this arbitration totalling 44,209.82 Singapore Dollars.

41. The Claimant claims payment of the arbitration costs and the Claimant's own legal costs pursuant to the indemnity contained in clause 11.1 of the Agreement, the relevant part of which reads as follows:-

*11.1 Subject to limitations and exclusions contained in Clause 10, each party ("the indemnifying party") indemnifies the other ("the other party") against any damages, losses, claims, costs and expenses (including reasonable legal costs) arising out of or otherwise based upon:*

*(a) a breach by the indemnifying party of any provision of this Agreement.....*

42. The Tribunal notes that clause 16.3 of the Agreement (quoted above) provides that the costs of the arbitration, including fees and expenses of the arbitrators, should be shared equally by the parties and that the parties shall each bear the costs of preparing and presenting its own case.

43. Prima facie, therefore, the parties agreed to split the costs of the arbitration and to pay their own legal fees. However, Section 60 of the English Arbitration Act 1996, which governs this arbitration, provides as follows:-

*"An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen."*

44. This provision is mandatory and has the effect that an agreement such as that set out in clause 16.3 of the Agreement is invalid, unless made after the dispute has arisen.<sup>1</sup> That being so the Tribunal considers that the Claimant is entitled to claim the whole of the arbitration costs and its reasonable legal costs under clause 11.1 of the Agreement.

45. Section 61(2) of the Arbitration Act 1996 provides that unless the parties agree otherwise the tribunal shall award costs on the general principle that costs should follow the event, except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the case.

46. Similarly, Article 42(1) of the 2010 UNCITRAL Arbitration Rules provides that the costs of the arbitration (including the legal costs incurred by the parties) shall in principle be borne by the unsuccessful party.

47. The Tribunal sees no reason in this case to depart from the general principle and accordingly determines that the Respondent should pay the whole of the arbitration costs and the Claimant's reasonable costs.

48. As regards the Claimant's legal costs, the Claimant's claim of 44,209.82 Singapore Dollars is supported by copies of detailed invoices from the Claimant's solicitors which Mr Civitarese has confirmed in his witness statements relate to this arbitration.

49. The Tribunal is satisfied that the fees and expenses claimed by the Claimant are reasonable and awards them in full.

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<sup>1</sup> See Russell on Arbitration, 23rd Edition, 6-134, page 323.

## AWARD

For the reasons given above the Respondent is ordered to pay to the Claimant

(i) US\$ 1,965,912.13 in respect of the principal amount claimed;

(ii) interest totalling US\$ 497,547.69 up to 11 November 2013;

(iii) interest at the rate of 6% per annum on the principal sum of US\$ 1,965,912.13 from 11 November 2013 until payment;

(iv) £17,520,96 in respect of the costs of the arbitration;

(v) 44,209.82 Singapore Dollars in respect of the Claimant's legal costs and expenses.