Telecom Italia sees off Brazilian fraud claim

Sebastian Perry • Friday, 1 July 2016 *(2 days ago)*

An ICC tribunal has dismissed a fraud claim against a Brazilian mobile operator owned by Telecom Italia relating to a merger deal with a prominent Rio de Janeiro businessman.

The tribunal held a hearing in Rio last year (Credit: istockphoto)

In an award issued last week, a tribunal chaired by Dechert partner **Eduardo Silva Romero** rejected claims that US and Brazilian-listed TIM Participações had misrepresented its financial situation in a deal with businessman Nelson Tanure.

However, the tribunal refused to declare Tanure's companies liable for 467 million reais in alleged potential losses relating to the merger. It ruled that they must pay 5.8 million reais to the TIM group for actual losses, and that TIM can retain shares worth around 170 million reais as security for future losses.

Silva Romero, a Colombian-French national, heard the case alongside French arbitrator **Yves Derains**, appointed by TIM, and Brazil's **Carlos Eduardo Konder Lins e Silva**, appointed by the claimants. The proceedings were seated in Paris and conducted in English, with a week-long hearing in Rio last September.

The dispute arose out of a 2009 deal that saw TIM acquire control of long-distance carrier Intelig from the Tanure group. Under the deal, Tanure's company JVCO was issued a 5 per cent stake in TIM Participações – but a part of those shares were assigned back to TIM's controlling shareholder as security for obligations it had assumed in relation to Intelig's pre-closing liabilities. JVCO retained voting and dividend rights under the assigned shares.

In 2012, Tanure complained that he had been fraudulently induced to accept unfavourable terms in the deal and that TIM had failed to report US$3.3 billion in tax liabilities. JVCO and his holding company Docas filed complaints in that year with the US Securities and Exchange Commission and its Brazilian equivalent, the CVM, and also launched lawsuits in Brazil –

including one against Telecom Italia for alleged abuse of its rights as TIM's ultimate shareholder.

In 2013, Docas and JVCO also launched an ICC claim against the TIM companies under the arbitration clause in their 2009 merger agreement, alleging that they had committed contractual fraud by making false representations.

The claimants said TIM had avoided making provisions for several hundred millions of reais in liabilities and that a financial report produced by Merrill Lynch ahead of the merger did not accurately reflect the company's financial situation. They asked the tribunal to appoint an expert to examine alleged inconsistencies in TIM's financial statements. Their claims, though never formally quantified, are understood to have been worth around 500 million reais (US$150 million).

But the tribunal said it was not persuaded there had been any misrepresentation of TIM's financial situation at the time of the transaction. It held that the parties had freely agreed on the terms of the share-swap, and that the claimants had relied on the market value of TIM's shares rather than the Merrill Lynch report or TIM's financial statements. A tribunal-appointed expert would therefore be of no use in the case, it held.

In its counterclaim, TIM sought a declaration of Docas's liability for 467 million reais – representing alleged potential losses resulting from hundreds of pending Brazilian court actions lodged against Intelig in the wake of the merger. These included claims by tax authorities and former employees of two newspapers that Tanure formerly owned, *Gazeta Mercantil* and *Jornal do Brasil*. Brazilian law allows such actions based on a theory of joint liability for companies belong to the same group.

TIM argued that liabilities under these lawsuits meant it was entitled to enforce the security that JVCO had provided in the merger by taking full ownership of the assigned shares and selling them. Tanure's companies won an injunction from a São Paulo court in 2012 to stop TIM from enforcing part of the security, and asked the ICC tribunal to order the return of all the assigned shares to JVCO and to order TIM to pay a penalty of 120 million reais for its conduct.

In the award, the tribunal said TIM was only entitled to damages for actual losses but that its failure to comply with certain notification requirements meant the mobile operator should only receive 5.8 million of the 60 million reais it had sought for actual losses. TIM was ordered to return dividends paid on the shares up to April 2014 to JVCO.

The tribunal also ruled that TIM should retain its rights over the assigned shares up to an amount of 170 million reais as security for future losses.

It refused to grant TIM a declaration that Tanure's companies had breached the merger agreement and two related contracts.

The TIM companies were represented in the arbitration by a team from Milan disputes boutique Arblit – Radicati di Brozolo Sabatini Benedettelli led by partner **Massimo Benedettelli**, as well as members of his former firm Freshfields Bruckhaus Deringer in Rome and in-house counsel at Telecom Italia.

The Tanure companies relied on Brazilian firm Ferro Castro Neves Daltro & Gomide Advogados, including partner **Marcelo Roberto Ferro**.

Tanure is a well known businessman in Brazil, with investments in infrastructure, energy, electronics, real estate, agribusiness, media and financial markets. According to the *Financial Times*, he has recently been involved in a deal to acquire a minority stake in holiday group Club Med.

Last October, *GAR reported* on Miami court proceedings lodged by a Docas subsidiary to enforce a US$536,000 costs award against another Brazilian businessman, Paulo Marinho. Ferro Castro also acted for Docas in that arbitration, which concerned a shipbuilding investment, with Quinn Emanuel Urquhart & Sullivan handling the enforcement proceedings. Several filings in that case remain under seal.

Brazil's telecoms sector has been in crisis recently, in part as a result of the country's economic recession. Its fourth-largest mobile operator Oi filed for bankruptcy protection last week with 65 billion reais (US$19 billion) in debts. A proposed merger between TIM and Oi fell apart last year.

Docas Investimentos SA and JVCO Participações Ltda v TIM Participações Ltda, TIM Brasil Serviços e Participações SA and Intelig Telecomunicações Ltda

Tribunal

- **Eduardo Silva Romero** (Colombia/France) (president)
- **Carlos Eduardo Konder Lins E Silva** (Brazil) (appointed by the claimants)
- **Yves Derains** (France) (appointed by the respondents)

Counsel to Docas and JVCO

- Ferro Castro Neves Daltro & Gomide Advogados

  Partners **Marcelo Roberto Ferro**, **Luiz Gomide**, **Luciano Gouvêa Vieira** and **Marcos Pitanga** and associate **João Pedro Martinez Pinheiro** in Rio de Janeiro

Counsel to TIM Brasil, TIM Part and Intelig

- Arblit – Radicati di Brozolo Sabatini Benedettelli

  Partners **Massimo Benedettelli** and **Michele Sabatini** and associates **Fabio Santacroce** and **Lorenzo Sordi** in Milan

- Freshfields Bruckhaus Deringer

  Counsels **Lluis Paradell** and **Domenico Di Pietro** and associate **Ricardo Gardini** in Rome

- Telecom Italia in-house counsel **Francesca Petralia** and **Fabio Incutti** in Rome