In Digitelcom, Ltd. v. Tele2 Sverige AB, a federal district court in New York recently sanctioned the losing party’s counsel for filing what the court deemed to be a frivolous application to set aside an arbitral award.\(^1\)

The Digitelcom decision is significant for international arbitration practitioners because it represents another decision in a trend that has emerged in US federal courts to sanction parties and/or their counsel for asserting improper challenges to arbitral awards.\(^2\)

**Background**

In 2009, DigiTelCom, Ltd. commenced an arbitration in New York against Tele2 Sverige AB before the International Centre for Dispute Resolution (ICDR). In the arbitration, DigiTelCom alleged that Tele2 had breached various agreements between the parties relating to the expansion of mobile phone services in Russia.

In September 2011, the tribunal issued an award rejecting DigiTelCom’s claims and awarding attorneys’ fees and costs to Tele2 of approximately US$2 million.

In December 2011, DigiTelCom and its affiliates filed a motion under chapter 1 of the Federal Arbitration Act (FAA) to vacate the award. DigiTelCom’s motion to vacate, which was brought pursuant to 9 U.S.C. § 10(a),\(^3\) alleged that the tribunal:

- imperfectly executed its powers by misinterpreting the contracts at issue
- manifestly disregarded the law regarding contract interpretation and the award of attorneys’ fees and
- rendered a decision that was so inconsistent with the facts that it created a strong inference of partiality or bias

In response, Tele2 filed a cross-motion to confirm the award and moved for the court to impose sanctions on opposing counsel under 28 U.S.C. § 1927 for asserting a meritless and improper challenge to the award. Although parties in US litigation generally bear their own costs, 28 U.S.C. § 1927 provides that “[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”

**Decision in the enforcement proceeding**

In July 2012, the federal district court: (1) denied DigiTelCom’s motion to vacate the Award; and (2) granted Tele2’s motion to confirm the Award, as well as Tele2’s request for sanctions. The court granted sanctions because it found that the motion to vacate served “only to cause the parties to incur unnecessary expense” and merely “delay[ed] the implementation of the Award.”
First, the court rejected DigiTelCom's assertion that the tribunal's interpretation of the contracts was a sufficient basis under 9 U.S.C. § 10(a)(4) to find that the tribunal had imperfectly executed its powers. Instead, the court found that when an arbitration involves contract interpretation, so long as the arbitrators “even arguably” construe or apply the contracts and do so within the scope of their authority, a court's determination that the arbitrator has committed serious error in resolving the disputed issue will not suffice to set aside an award.

Second, the court rejected DigiTelCom's assertion that the tribunal manifestly disregarded the law in the award. The court noted that vacatur on the grounds of manifest disregard of the law is justified only by “some egregious impropriety on the part of the arbitrators,” which is “more than error or misunderstanding with respect to the law.” Here, the court found that DigiTelCom's assertions were insufficient to establish a manifest disregard of the law because the Award was supported by “colorable interpretations” of the agreements at issue.

Third, the court rejected DigiTelCom's assertion that the tribunal rendered a decision that was so inconsistent with the facts that it created a strong inference of partiality or bias. The court found that DigiTelCom failed to establish grounds to vacate the award under 9 U.S.C. § 10(a)(2) because DigiTelCom failed to allege any relationship or interest that would even suggest bias or impartiality, and solely grounded their evident partiality challenge on the basis that the tribunal supposedly made factual and interpretation errors.

Notably, after rejecting all of DigiTelCom's bases for challenging the award, the court sanctioned DigiTelCom under 28 U.S.C. § 1927 and ordered DigiTelCom's counsel to pay the costs and attorneys' fees that Tele2 incurred to defend the motion to vacate. While the court noted that sanctions must not be imposed lightly to avoid deterring parties' good faith challenges to arbitration awards, it nevertheless sanctioned DigiTelCom's counsel because DigiTelCom failed to identify any legal principle the tribunal allegedly ignored and instead based its challenge on “pure speculation” that the tribunal was not fair and impartial. The court noted that sanctions were particularly appropriate in the context of a challenge to an arbitration award because “litigants must be discouraged from defeating the purpose of arbitration by bringing such petitions based on nothing more than dissatisfaction with the tribunal's conclusions.”

Confirming the trend to sanction unmeritorious confirmation defenses

Digitelcom provides further proof of the trend that has been developing in US courts to sanction parties and/or their counsel for lodging unmeritorious confirmation defenses that unnecessarily increase the costs of enforcement proceedings. The decision sends a clear message that frivolous challenges to arbitration awards will not be permitted in US courts. The decision also signals the US courts' continuing deference to arbitration and their desire to ensure that arbitration remains a more efficient and cost-effective alternative to litigation.


3 9 U.S.C. § 10(a) provides four instances under which a court may vacate an arbitral award: “(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” See 9 U.S.C. § 10(a)(1)-(4). In addition to the four statutory bases for vacatur, a court may also vacate an arbitral award if it finds that the tribunal acted in manifest disregard of the law. Porzig v. Dresdner, Kleinword, Benson, N.A. LLC, 497 F.3d 133, 139 (2d Cir. 2007).