

ARBITRATION UNDER THE UNCITRAL RULES

PCA CASE NO. 2010-18 / BCB-BZ

BRITISH CARIBBEAN BANK LTD (CLAIMANT)

v.

THE GOVERNMENT OF BELIZE (RESPONDENT)

ORDER NO. 12

20 February 2015

CONSIDERING:

- (A) The Arbitral Tribunal's Order N° 1 of 6 September 2010, which provided in paragraph 13.1 as follows:

The Tribunal adheres to the nowadays generally accepted principle of transparency of investment treaty arbitration, it being understood that each Party is at liberty to apply for measures regarding confidentiality and privacy of the proceedings as well as the publication of the award.

- (B) The Arbitral Tribunal's adjournment of the proceedings until further notice on 13 December 2010, at the Claimant's request;
- (C) The Claimant's communication of 27 June 2013, referring to a judgment of the Caribbean Court of Justice and requesting that the Arbitral Tribunal schedule a procedural meeting with the Parties in order to determine the further steps in these arbitration proceedings;
- (D) The Respondent's communication of 2 July 2013, indicating that in light of the judgment of the Caribbean Court of Justice, the Respondent had decided to participate in these arbitration proceedings;
- (E) The procedural telephone conference held between the Tribunal and the Parties on 10 July 2013 in which the question of confidentiality was discussed in the following terms:

Prof. Albert Jan van den Berg (Tribunal): Are both Parties agreeable that decisions – the orders, decisions, and awards – are being published on the website of the PCA? Mr. Gearing. . . . No other documents, otherwise we are not in Vienna discussing these things. Mr. Basombrio, that's a reference to UNCITRAL discussing these things.

Mr. Matthew Gearing (Claimant): Sir, can I take instructions on that and respond with our agreement, or if we object? I don't anticipate that, but if we do, can I set that out when I respond tomorrow? I just simply don't have instructions on that this evening.

Prof. Albert Jan van den Berg (Tribunal): I understand. Mr. Basombrio.

Mr. Juan Basombrio (Respondent): We are agreeable to the orders and ultimate decision of the Tribunal being published. However, there could be issues of confidentiality as we go along, over documents, etc., but I assume that we can deal with that as we go along and if there is some redaction that's required of the final award as published, I guess that we could address that as we go along as well.

Prof. Albert Jan van den Berg (Tribunal): You're absolutely right in that. And we will do that if a sensitive commercial or political issue is . . . and the Parties identify that, we will see to it that it remains confidential.

Mr. Juan Basombrio (Respondent): With that proviso, we would be agreeable.

Prof. Albert Jan van den Berg (Tribunal): Thank you. Mr. Gearing, hopefully you can also give us that news tomorrow.

Mr. Matthew Gearing (Claimant): Yes.

- (F) The Claimant's e-mail communication 11 July 2013, providing in relevant part as follows:

With respect to the issue of transparency, we understood the Tribunal's suggestion to be that, whilst the arbitration proceedings would be confidential, the Procedural Orders, Decisions and Awards may be published on the PCA's website, provided the parties agree. The Claimant agrees to such publication.

- (G) The Respondent's e-mail communication of 12 July 2013, providing as follows:

I believe the suggestion discussed during the hearing was that the Procedural Orders, Decisions and Awards could be published on the PCA website subject to redactions based on confidentiality of commercially or politically sensitive or privileged matters. I do not believe that we discussed whether the arbitration proceedings themselves would be confidential.

GOB suggests the following, in that regard: In the interests of transparency, the arbitration proceedings also should not be confidential. However, if information is produced or discussed during the arbitration proceedings that a party considers to be commercially or politically sensitive or privileged, then that party can request that the Tribunal deem it confidential.

The reason is that there are parallel court proceedings in Belize. Those court proceedings are not confidential, and thus this Tribunal can be informed about the same. The courts likewise should be able to be informed about these arbitration proceedings. This will maintain a balance of transparency in all parallel proceedings, and is necessary because of the overlapping and/or related issues in the arbitration and the court proceedings.

Finally, given that this is an action against the GOB, the people of Belize have an interest in the arbitration proceedings being public, of course with the indicated proviso regarding commercially or politically sensitive or privileged matters.

- (H) The Claimant's e-mail communication of 25 July 2013, providing as follows:

We agree with Mr Basombrio's recollection that during the procedural hearing of 10 July 2013 the parties' counsel were asked to confirm whether they agree to publication of Procedural Orders, Decisions and Awards on the PCA website (subject to the confidentiality issues identified which could arise in relation to the publication those documents). We understand this to be an agreed exception to the general position that this UNCITRAL arbitration is confidential absent further agreement to the contrary by the parties. As to the specific concerns raised by Mr Basombrio regarding Belize court proceedings and the public interest, we consider those to be adequately addressed by the parties' consent to publication of Procedural Orders, Decisions and Awards on the PCA website.

- (I) The Arbitral Tribunal's Order N° 4 of 25 July 2013, which recorded the foregoing procedural steps and provided in paragraph 4 as follows:

¶ 13.1 of Procedural Order No. 1 is supplemented as follows. For the time being the procedural orders, decisions and awards issued and rendered by the Tribunal shall be published on the website of the Permanent Court of Arbitration, subject to redactions based on confidentiality of commercially or politically sensitive or privileged matters as requested by either Party.

- (J) The Arbitral Tribunal's issuance of its Award on 19 December 2014;
- (K) The Arbitral Tribunal's letter of 7 January 2015, inviting the Parties to indicate any redactions to the Award that they wished to request;
- (L) The Respondent's e-mail communication of 13 January 2015, indicating that the Respondent intended to make an application pursuant to the provisions of the UNCITRAL Arbitration Rules relating to the interpretation or correction of the award or to the issuance of an additional award;
- (M) The Respondent's *Motion pursuant to 1976 UNCITRAL Arbitration Rules, Articles 36 and 37*, submitted on 16 January 2015, requesting as follows:

88. That pursuant to Article 36, the Tribunal correct the computation of Article 2(2) compensation in the Award and grant no compensation to the Claimant;
89. In the alternative, and pursuant to Article 37, the Tribunal adjudicate the Respondent's claim that, based on ADC Affiliate and like cases, the general rule in *Factory at Chorzów* does not apply, and grant no compensation to the Claimant under Article 2(2);
90. As such, the Tribunal hold that the Respondent is the prevailing party and correct the Award to delete any award of interest, attorney's fees or costs in favor of the Claimant, and instead award to the Respondent its attorneys' fees and costs incurred in these proceedings;
91. And requests such further relief as may be just and equitable.

- (N) The Arbitral Tribunal's Order N° 11 of 17 January 2015 which provided as follows:

1. The Parties' identification of any requests for redaction pursuant to the Arbitral Tribunal's Order N° 4 and the publication of the Award by the Arbitral Tribunal are stayed pending the resolution of the Respondent's *Motion pursuant to 1976 UNCITRAL Arbitration Rules, Articles 36 and 37*.

2. The Claimant is invited to provide its comments on the Respondent's *Motion* by Saturday, 24 January 2015.

(O) The Claimant's *Reply to Respondent's Motion pursuant to 1976 Arbitration Rules, Article 36 and 37* (the "**Reply**"), submitted on 19 January 2015, requesting that "that the Tribunal dismiss the Government's Application, with costs";

(P) The Respondent's e-mail communication of 20 January 2015, stating *inter alia* as follows:

Respondent will provide its comments in response to the Reply of Claimant as soon as possible and in no case later than five business days from today.

(Q) The Arbitral Tribunal's *Decision on the Respondent's Motion pursuant to 1976 UNCITRAL Arbitration Rules, Articles 36 and 37* of 21 January 2015, which noted, *inter alia*:

(U) That the Tribunal's decision to apply the *Factory at Chorzów* standard to the calculation of damages for the Respondent's violation of Article 2(2) of the Treaty formed part of the Tribunal's reasoned decision in its Award and is therefore not eligible for correction pursuant to Article 36;

[. . .]

(W) That the applicability of the *Factory at Chorzów* standard to the calculation of damages for the Respondent's violation of Article 2(2) of the Treaty was decided in the Tribunal's Award and is therefore not a matter eligible for an additional award pursuant to Article 37;

[. . .]

(AA) That the Tribunal would not revise its Award as requested by the Respondent were it empowered to do so by the UNCITRAL Rules;

and decided as follows:

1. The Respondent's request that the Tribunal, pursuant to Article 36 of the UNCITRAL Rules, "correct the computation of Article 2(2) compensation in the Award" is denied.
2. The Respondent's request that the Tribunal, pursuant to Article 37 of the UNCITRAL Rules, "adjudicate the Respondent's claim that, based on ADC Affiliate and like cases, the general rule in *Factory at Chorzów* does not apply" is denied.
3. The Respondent's further requests concerning the prevailing Party, interest, and attorneys' fees and costs are correspondingly denied.
4. The Claimant's request for the costs incurred in responding to the Respondent's *Motion* is denied.

(R) The Respondent's e-mail communication of 21 January 2015, submitting the *Respondent Government of Belize's Response to Claimant British Caribbean Bank's Reply to Motion Pursuant to 1976 UNCITRAL Arbitration Rules, Articles 36 and 37* and stating as follows:

Respondent Government of Belize had requested an opportunity to respond to the Claimant's reply to the motion under Articles 36 and 37. Respondent requested five business days to submit its response, which was reasonable. Today, the Respondent received the Tribunal's decision denying its motion. The Tribunal did not provide Respondent with any opportunity to respond. Enclosed please find the Respondent's Response to the Claimant's Reply, which is submitted two days after receipt of the Claimant's response.

The decision (at paragraphs T-AA) again does not contain any discussion or analysis of ADC Affiliate or the other precedents cited by the Respondent which demonstrate the error under Article 36 in the Award's computation of compensation. The Award failed to address these controlling precedents and the arguments thereunder, and the decision on the motion fails to address them again. The failure to address controlling precedents does not amount to a reasoned decision. Paragraphs T-AA of the decision consist merely of a list of conclusions without analysis. Thus, the arguments raised pursuant to ADC Affiliate also remain a matter not decided under Article 37.

Respondent therefore requests, as it must in order to preserve its rights, that the Tribunal take into consideration the Respondent's Response to the Claimant's Reply and issue a reasoned decision on its motion squarely addressing the aforementioned controlling precedents.

(S) The Claimant's e-mail communication of 21 January 2015, providing as follows:

In light of the dismissal of the Respondent's motion, we understand from the Tribunal's Order No.11 that the suspension on the invitation to submit redactions is now lifted. As we confirmed in previous correspondence, the Claimant has no proposed redactions. Given that the original deadline set for redactions was 14 January, and the Tribunal only granted a suspension of that deadline on 13th January, the Respondent's counsel would no doubt have already taken instructions and identified what redactions if any the Respondent wishes to propose. We would therefore respectfully suggest that inviting the Respondent to submit any proposed redactions within 24 hours would be entirely reasonable and would cause no prejudice to the Respondent.

(T) The Arbitral Tribunal's e-mail communication to the Parties of 22 January 2015, providing as follows:

Reference is made to Respondent's email message of 21 January 2015, requesting "that the Tribunal take into consideration the Respondent's Response to the Claimant's Reply and issue a reasoned decision on its motion squarely addressing the aforementioned controlling precedents" and attaching a "Response to Claimant's Reply". Respondent's request is not contemplated by the procedure set by the Tribunal for addressing Respondent's Motion. As a consequence, Respondent's request is denied.

As regards Claimant's email of 21 January 2015, Claimant's understanding is correct that the suspension on the invitation to submit redactions under Tribunal's Order No.11 is now lifted. Accordingly, Respondent is invited to submit any proposed redactions to the Award of 19 December 2014 on Thursday, 22 January 2015, 5:00 pm PST.

(U) The Respondent's e-mail communication of 22 January 2015, providing as follows:

It is highly irregular for a tribunal not to provide the moving party with an opportunity to respond to what the opposing party has argued before ruling on an important motion such as this one. Article 15 (1) of the UNCITRAL Arbitration Rules imposes an obligation on the Tribunal to make sure that “at any stage of the proceedings each party is given a full opportunity of presenting his case.” Respondent requested an opportunity to respond to the Claimant’s comments precisely because Order No. 11 was silent on the issue (it only set a date for the Claimant to provide its comments on the motion). The Tribunal ignored the Respondent’s request and, instead, issued a hurried decision denying the motion. Thus, for the Tribunal to now point to Order No. 11 as the basis to deny the request is simply to ignore the request again.

The Tribunal’s repeated refusals, including in the Award, in the decision denying the Respondent’s motion and now again in the email below, to squarely address *ADC Affiliate* and the other controlling precedents cited by the Respondent constitute a manifest disregard of the law, which has materially affected the outcome of this arbitration to the prejudice of the Respondent. These are grounds to vacate or deny confirmation of the award, which would result in a massive waste of the parties’ time and resources. Respondent has repeatedly urged the Tribunal to correct this situation and rule on the precise issue presented by the Respondent’s motion (that under *ADC Affiliate* and the other controlling precedents cited by the Respondent the computation of Article 2 compensation was in error), but to no avail.

Accordingly, the Respondent exercises its right not to consent to the publication of the Award, because the business of this Tribunal is not finished. *See UNCITRAL Arbitration Rules, Article 32(5)* (“The award may be made public only with the consent of both parties.”).

(V) The Claimant’s e-mail communication of 22 January 2015, providing as follows:

We refer to the Government’s email of 22 January 2015.

This is a transparent attempt by the Government to manufacture a basis of challenge to the award and avoid its responsibility to compensate BCB for the treatment of its investment.

The Government’s application under Articles 36 and 37 of the UNCITRAL Rules was clearly without merit, a matter which was evident from the application itself.

The Government does not have a right to refuse to consent to the publication of the award. This matter is governed by paragraph 13 of the Tribunal’s Procedural Order No 1 as supplemented by paragraph 4 of Procedural Order No 4. This makes it clear that the Award will be published subject to redactions for commercially or politically sensitive information and privileged information. Procedural Order No 4 also makes it clear (in the heading on page 2) that this order on confidentiality was agreed by the parties. Therefore the Government has consented to publication of the Award on this basis.

The Government has not identified any grounds for redacting the Award despite being given ample opportunity to do so. This is not surprising given that: (a) much, if not all, of the factual background to this matter is already in the public domain; and (b) the Government has already referred to the Award and the key findings of the Tribunal in press releases to the Belize media. The Claimant does not believe that there is any such information in the Award.

We therefore respectfully request that the PCA proceed to publish the Award as soon as possible.

- (W) The Respondent's further e-mail communication of 22 January 2015, providing as follows:

Respondent withdraws any prior consent, assuming that the Tribunal would find any, for the reasons already stated. There is nothing in the Rules that prevents withdrawal of consent prior to publication of the award.

- (X) The Claimant's e-mail communication of 13 February 2015, providing as follows:

We maintain our request for the publication of the Award in this arbitration notwithstanding the last unfounded objection from the Government.

As noted in the Claimant's email of 22 January 2015, it is clear from Procedural Order No 4 that the Tribunal's order was based on party agreement. This agreement would, at the very least, amount to a variation of the UNCITRAL Rules. An agreement between the parties having been reached on the matter of publication of the Award, it is not open to the Government to unilaterally seek to renege on it.

Further, the terms on which the Award is to be published, and the parties' agreement on the same, were recorded in a procedural order of the Tribunal. The Government is obliged to comply with the terms of the Tribunal's procedural orders. As noted in Born "International Commercial Arbitration", 2nd Edition (2014), at p. 2230:

"Procedural orders are not (necessarily) consensual; they are decisions of the arbitral tribunal, often issued by a tribunal after considering the parties' submissions (written and/or oral) and they may reject all (or part) of one or both parties' positions. In some cases, procedural orders will record the parties' agreement, or be a product of a measure of negotiation between the parties (and tribunal). Nonetheless, an order remains a ruling by the tribunal with which the parties are required to comply; in many cases, a procedural order will not reflect the parties' agreement and will instead simply be the decision of the tribunal." [Emphasis added.]

For these reasons and the reasons previously given, we again respectfully urge the PCA to publish the Award. We further request that a decision is taken as to whether the Award will be published by the PCA as soon as possible.

- (Y) The Respondent's e-mail communication of 18 February 2015, providing as follows:

Article 32(5) of the UNCITRAL Rules provides that an award may be made public only with the consent of both parties. As Respondent has already explained, there is nothing in the UNCITRAL Rules that prevents withdrawal of consent prior to the publication of the award. Accordingly, the Respondent exercises its right not to consent, or to withdraw consent, to the publication of the award.

Claimant's argument that Respondent must yield to the Tribunal's Procedural Order No. 4 holds no weight. The Tribunal cannot order the parties to consent to publication of an award. Article 32(5) is very clear that an award may be made public only with the consent of both parties. It does not alternatively provide that the Tribunal may order the parties to consent to publication. Such an outcome would eviscerate the parties' right to grant or deny consent to publication.

As Respondent has previously explained in its email of 22 January 2015, the business of this Tribunal is not finished. Accordingly, Respondent does not consent, and withdraws any previous consent, to the publication of the award.

- (Z) The Claimant's further e-mail communication of 19 February 2015, providing as follows:

[. . .] we wish to briefly note that arbitration is a consensual process and it is open to the parties to agree the basis on which it is conducted, including agreements which may vary or supplement the UNCITRAL Rules. In this case that is what happened. The parties agreed that the arbitral award would be published by the PCA subject to certain limitations. This agreement, which was recorded in an order of the Tribunal, varies or supplements Article 32(5) the 1976 UNCITRAL Rules. A party cannot unilaterally seek to change an agreement once made.

- (AA) That the Arbitral Tribunal did not request the Respondent to comment on the Claimant's *Reply*;
- (BB) That the scope of submissions required to fully elucidate the parties' positions on any issue before an arbitral tribunal will necessarily depend on the nature of the issue and the action sought from the arbitral tribunal;
- (CC) That the requirement in Article 15(1) of the UNCITRAL Rules that "at any stage of the proceedings each party is given a full opportunity of presenting his case" does not empower a party to determine for itself the need for additional submissions on any matter before an arbitral tribunal;
- (DD) That the Arbitral Tribunal has fully considered the implications of the legal authorities presented by the Parties, including *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, whether or not such authorities were specifically discussed or referenced in the Award or in the *Decision on the Respondent's Motion pursuant to 1976 UNCITRAL Arbitration Rules, Articles 36 and 37* of 21 January 2015, such authorities in any event not constituting "controlling precedent" as argued by the Respondent;
- (EE) That Articles 32(2), 35, 36, and 37 of the UNCITRAL Rules do not afford a party the right to the reconsideration of decisions taken by an arbitral tribunal with which it may disagree, or to the elaboration of additional reasoning on a matter decided by an arbitral tribunal;
- (FF) That Article 32(5) of the UNCITRAL Rules provides that the "award may be made public only with the consent of both parties";
- (GG) That the Parties' agreement on the publication of the decisions, orders, and awards of the Arbitral Tribunal, subject to redactions based on the confidentiality of commercially or politically sensitive or privileged matters, as set out in the Parties' e-mail communications of 11, 12, and 25 July 2013 and recorded in the Arbitral Tribunal's

Order N° 4 (see recitals (F) to (I) above), constitutes an agreement to the publication of the Award, providing the consent required by Article 32(5), that is not unilaterally revocable by a Party;

THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:

1. The stay in Order N° 11 on the Tribunal's invitation for the Parties to identify any requests they may wish to make for the redaction of passages in the Award pursuant to the Arbitral Tribunal's Order N° 4 is hereby lifted.
2. The Parties are invited to indicate by **Friday, 27 February 2015** any requests they may wish to make for the redaction of specific passages of the Award, of the Arbitral Tribunal's *Decision on the Respondent's Motion pursuant to 1976 UNCITRAL Arbitration Rules, Articles 36 and 37* of 21 January 2015, of the Tribunal's Order N° 11, or of this Order. Any such requests should clearly identify the grounds of commercial or political sensitivity or of privilege for the redaction being sought.

On behalf of the Arbitral Tribunal,



Albert Jan van den Berg,
Presiding Arbitrator