

S & T OIL EQUIPMENT AND MACHINERY LTD.

v.

ROMANIA

(ICSID Case No. ARB/07/13)

ORDER OF DISCONTINUANCE OF THE PROCEEDING

Members of the Tribunal

Professor Hans van Houtte, President

Mr. Horacio A. Grigera Naón, Arbitrator

Professor Brigitte Stern, Arbitrator

Secretaries of the Tribunal

Mr. Tomas Solis and Ms. Milanka Kostadinova

Date of Dispatch to the Parties: July 16, 2010

Background

1. On July 16, 2007, the Centre registered the arbitration request dated May 30, 2007, submitted by S & T Oil Equipment and Machinery Ltd. (the Claimant) against Romania (the Respondent).
2. The Arbitral Tribunal was constituted on November 2, 2007, its members being Professor Hans van Houtte, as President, Mr. John Savage and Professor Brigitte Stern, as arbitrators.
3. Following the constitution of the Arbitral Tribunal and in accordance with ICSID Administrative and Financial Regulation 14(3)(a)(i), the Centre drew up an estimate of the amount required to meet the direct expenses of the proceeding in its first three to six months.
4. By letter of November 7, 2007 the Secretary of the Tribunal, after consultation with the President of the Tribunal, requested advance payments from the Parties totaling an amount of USD 160,000 (USD 80,000 from each party). Pursuant to Administrative and Financial Regulation 14(3)(d), each party's advance payment was to be received within 30 days from the date of the request, *i.e.*, on or before December 7, 2007, and in any event before the first session of the Tribunal.
5. The Claimant paid its portion of the requested advances in the amount of USD 80,000 on December 4, 2007, as confirmed by the Secretary of the Tribunal's letter of December 11, 2007. The Respondent paid its portion of the advances in the same amount on December 11, 2007, as confirmed by the Secretary of the Tribunal's letter of December 14, 2007.
6. The first session was to be held, unless otherwise agreed by the Parties, within 60 days from the Tribunal's constitution pursuant to ICSID Arbitration Rule 13(1). The Parties agreed that the session could be held after the 60 day-period following the constitution of the Tribunal. In addition, the Parties agreed that the session could be held by telephone or by video conference. On November 9, 2007, the Parties were informed that the Tribunal intended to hold the first session on December 17, 2007, by telephone conference.
7. On December 17, 2007, the first session of the Tribunal with the Parties was held by telephone conference and a procedural calendar for the written submissions was agreed upon. No hearing dates were fixed at the first session.
8. On June 18, 2008, the Claimant submitted its Memorial on the Merits, accompanied by witness statements, expert reports and exhibits.
9. On December 8, 2008, the Parties proposed an amendment to the agreed procedural calendar for written submissions. The parties further proposed that the hearing on the merits commence on September 14, 2009. On December 9, 2008, the Secretary of the Tribunal informed the Parties that the Tribunal had amended

the procedural calendar accordingly and had set the hearing dates on September 14-22, 2009.

10. On December 23, 2008, the Respondent submitted its Counter-Memorial on the Merits with accompanying materials.
11. On March 9, 2009, counsel for the Claimant requested the production of certain documents. On March 10, 2009, the Respondent stated that it did not object to produce the documents, as far as they existed and could be located within the time-frame requested, subject to a confidentiality agreement, whenever necessary. The confidentiality agreement was signed on March 17, 2009, and the requested documents were produced on March 18, 20 and 27, 2009.
12. One of the documents thus produced by the Respondent in March 2009 was a Valuation Report, to which Claimant responded by a submission of July 15, 2009. On July 16, 2009, counsel for the Respondent objected to this submission, but indicated on July 29, 2009 that it did not object to making the Valuation Report part of the evidentiary record.
13. In the meantime, on March 31, 2009, the Claimant filed its Reply on the Merits with accompanying materials.
14. A few days earlier, on March 25, 2009, Mr. John Savage, a co-arbitrator, informed the Secretary-General of ICSID that he had been unaware that his law firm had been advising a foreign investor in a case against Romania, unrelated to the dispute submitted to the Tribunal. On April 9, 2009, counsel for the Respondent filed a proposal for the disqualification of Mr. Savage as arbitrator, and the proceeding was suspended. On April 17, 2009, Mr. Savage submitted his resignation from the Tribunal. Pursuant to his request, his fellow Tribunal Members consented to Mr. Savage's resignation, and informed the ICSID Secretary-General thereof on April 24, 2009.
15. On April 24, 2009, counsel for the Claimant informed the Centre that it appointed Mr. Horacio A. Grigera Naón as arbitrator. Mr. Grigera Naón accepted this appointment on April 28, 2009. The Tribunal was reconstituted on the same date and the proceedings resumed.
16. On June 24, 2009 the Secretary of the Tribunal, after consultation with the President of the Tribunal, requested a second advance payment of USD 300,000 under ICSID Administrative and Financial Regulation 14 to meet the costs to be incurred in the proceedings in the next three to six months, including the costs related to the hearing on the merits scheduled for September 14-22, 2009. Under ICSID Administrative and Financial Regulation 14(3)(d), each of the Parties had to make half the requested advance payment, *i.e.*, USD 150,000, within 30 days from the date of the request.

17. On July 23, 2009, the Respondent paid its part in the required advances.
18. On July 24, 2009, the Respondent submitted its Rejoinder with accompanying materials.
19. On August 5, 2009, counsel for the Claimant requested the Tribunal to postpone the September hearing to allow Claimant to address the new evidence submitted and the allegations made by the Respondent in the Rejoinder. On August 7, 2009 the Respondent suggested that the Tribunal maintain the hearing dates and allow the Claimant to address the issues in the post-hearing briefs. On the same date, the Parties held a teleconference to discuss the agenda of the forthcoming hearing.
20. On August 21, 2009, however, counsel for the Claimant asked for the postponement of the hearing because the Claimant was unable to meet the required advance payment and its own costs necessary for the preparation and the attendance of the hearing. On August 24, 2009, counsel for the Respondent confirmed that the Respondent did not oppose the request for postponement.
21. On August 27, 2009, the Tribunal informed the Parties that the September hearing was postponed and invited the Claimant to indicate, by September 11, 2009, when it would be in a position to make the advance payment. By letter of September 11, 2009, the Claimant requested an additional 30-day period to respond to that request.
22. On September 17, 2009, pursuant to Administrative and Financial Regulation 14(3)(d), the Centre informed the Parties of the default of the Claimant, and invited either Party to make the outstanding advance payment of USD 150,000.
23. On October 21, 2009, the Secretary General moved that the Tribunal stay the proceedings for non-payment of advances. On November 4, 2009 the Tribunal stayed the proceedings.
24. On November 16, 2009, counsel for Claimant, King & Spalding, informed the Tribunal that it withdrew as counsel and requested the Tribunal to address all further correspondence for the Claimant to Mr. Valerian Simirica.
25. On April 22, 2010, the Secretary to the Tribunal informed the Parties that, unless the outstanding payment was received, the Secretary-General of ICSID would consider moving that the Tribunal discontinued the proceeding on the basis of Administrative and Financial Regulation 14(3)(d). The Secretary of the Tribunal invited the Parties' observations concerning such discontinuance by May 3, 2010.
26. On April 23, 2010, counsel for the Respondent replied that, in view of the Claimant's failure to advance the required funds and its "evident abandonment of the case," the Respondent did not oppose the discontinuance of the proceeding. The Claimant did not file any observations.

27. On May 18, 2010, the Secretary General of ICSID moved that the Tribunal discontinue the proceedings in this case.

Discussion

28. The Tribunal first notes that the proceeding has been stayed since November 4, 2009, and that as a consequence, on May 18, 2010, the Secretary-General of ICSID moved that the Tribunal discontinue the proceeding.
29. It is clear under Administrative and Financial Regulation 14(3)(b) that there is no requirement for the Centre to provide any service in connection with a proceeding or to pay the fees, allowances or expenses of the members of any Commission, Tribunal or Committee, unless sufficient advance payments have been previously made. The Tribunal refers in that respect to Administrative and Financial Regulations 14(2) and (3), which provide *inter alia* that:

(2) All payments, including reimbursement of expenses, to the following shall in all cases be made by the Centre and not by or through either party to the proceeding:

- (a) members of Commissions, Tribunals and Committees;
- (b) witnesses and experts summoned at the initiative of a Commission, Tribunal or Committee, and not of one of the parties;
- (c) members of the Secretariat of the Centre, including persons (such as interpreters, translators, reporters or secretaries) especially engaged by the Centre for a particular proceeding;
- (d) the host of any proceeding held away from the seat of the Centre pursuant to Article 63 of the Convention.

(3) *In order to enable the Centre to make the payments provided for in paragraph (2), as well as to incur other direct expenses in connection with a proceeding (other than expenses covered by Regulation 15):*

- (a) the parties shall make advance payments to the Centre as follows:
 - (i) initially as soon as a Commission or Tribunal has been constituted, *the Secretary-General shall, after consultation with the President of the body in question and, as far as possible, the parties, estimate the expenses that will be incurred by the Centre during the next three to six months and request the parties to make an advance payment of this amount;* (emphasis added)

[...]

(b) the Centre *shall not be required* to provide any service in connection with a proceeding or to pay the fees, allowances or expenses of the members of any Commission, Tribunal or Committee, unless sufficient advance payments shall previously have been made; (emphasis added)

30. Notwithstanding the above, the Centre and the Members of the Tribunal have continuously provided services and incurred expenses in connection with this proceeding since it first began on November 2, 2007.
31. More importantly, Administrative and Financial Regulation 14(3)(d) provides that the Secretary-General of the Centre may, after notice to and as far as possible in consultation with the parties, move that the Tribunal discontinue the proceeding, if it has been stayed for non-payment of an advance for a consecutive period in excess of six months. Indeed, Administrative and Financial Regulation 14(3)(d) provides that:

(d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by the Secretary-General, as soon as a request for payment is made by him. *If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secretary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding;* (emphasis added)

32. With the above Regulations in mind, the Tribunal must therefore proceed to the discontinuance of this case. In reaching its decision, the Tribunal is particularly mindful that the required advance payment from the Claimant has been outstanding since July 24, 2009, the proceeding has not advanced since August 2009, and that the proceeding has been formally suspended for non-payment of advances for more than six months.

Decision

THEREFORE, having regard to the above, the Tribunal hereby decides, in accordance with Regulation 14(3)(d) of the Administrative and Financial Regulations of the Centre, to discontinue the proceeding for lack of payment of the second advance to defray the expenses of the hearing on the merits and further proceedings.



Professor Hans van Houtte
President of the Tribunal

Date: 28 June 2010



Mr. Horacio A. Grigera Naón
Member of the Tribunal

Date: 2 July 2010



Professor Brigitte Stern
Member of the Tribunal

Date: 16 June 2010