

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Standard Chartered Bank (Hong Kong) Limited

v.

United Republic of Tanzania

(ICSID Case No. ARB/15/41)

PROCEDURAL ORDER NO. 6b

TRIBUNAL'S DECISIONS ON THE RESPONDENT'S APPLICATION DATED 2
NOVEMBER 2017 RELATING TO THE CLAIMANT'S DISCLOSURE OBLIGATIONS
UNDER PO 5b

Members of the Tribunal

Professor Lawrence Boo, President of the Tribunal
David Unterhalter SC, Arbitrator
Dr. Kamal Hossain, Arbitrator

Secretary of the Tribunal

Aurélia Antonietti

15 January 2018

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I. BRIEF PROCEDURAL BACKGROUND

1. On 11 September 2017, the Tribunal issued Procedural Orders 5a (“**PO 5a**”) and 5b (“**PO 5b**”) on production of documents by the Respondent, respectively the Claimant.
2. By application dated 2 November 2017 relating to the Claimant’s disclosure obligations under PO 5b (the “**Respondent’s Application**”), the Respondent informed the Tribunal that the Claimant had listed 1607 documents in a privilege log¹ (the “**Privilege Log**”) as well as redacted nearly one third of the newly produced documents, indicating the basis for the redactions in an attached index² (the “**Index of New Documents**”), and sought the following orders from the Tribunal:³
 - (i) allow Respondent to submit the version of Entry SCBHKIA(1)-0135 originally produced by Claimant on 6 October 2017;
 - (ii) order Claimant to produce to Respondent:
 - (a) Entries Nos. 758, 760, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 775, 776, 777, 778, 779, 781, 784, 785, 786, 787, 788, 789, 790, 792, 795, 797, 800, 801, 802, 803, 804, 805, 806, 807, 809, 810, 812, 813, 814, 819, 821, 822, 826, 827, 828 and 829 in the Privilege Log, which are documents responsive to Request No. 16 that Claimant improperly withheld when it was clear that it had waived any potentially applicable privileges;
 - (b) Entries Nos. 14 to 19, 60, 64, 74, 78, 80, 82, 83, 87, 112, 183, 281, 330, 333, 3335, 341, 342, 351, 352, 357, 390, 401, 404-405, 410, 418-419, 449, 461, 462, 509, 519, 534, 558, 561, 563-565, 578, 581, 583-584, 588, 593-594, 596-597, 603, 607, 611, 631, 651-653, 655, 660, 691, 694, 706, 714, 718, 720, 734 and 744 in the Privilege Log that were improperly withheld by Claimant on the basis of “Litigation” privilege;
 - (c) Entries Nos. 89, 541 to 546, 834, 835, 838, 844, 846, 849, 850, 852, 958, 959, 992 and 1353 in the Privilege Log that Claimant improperly withheld on the basis of “Without Prejudice” privilege;
 - (iii) order Claimant to un-redact the following documents set out in the Index of New Documents:

¹ Annex 01 to the Respondent’s Application: Index of Privileged Documents

² Annex 02 to the Respondent’s Application: Index of Newly Extracted Documents

³ Respondent’s Application, para. IV.

- (a) Entries SCBHKIA(1)-0021, 0022, 0027, 0033, 0038, 0039, 0041, 0044, 0052, 0053, 0054, 0056, 0057, 0060, 0077, 0080, 0081, 0087, 0091, 0094, 0096, 0098, 0099, 0104, 0111, 0112, 0118, 0124, 0125, 0127, 0128, 0129, 0131, 0135, 0137, 0138, 0139, 0145, 0148, 0150, 0152, 0155, 0165, 0171, 0172, 0182, 0183, 0191, 0195, 0198, 0217, 0232, 0236 and 0246 that Claimant improperly redacted on the basis of “Legal Advice” or “Legal” Privilege;
 - (b) Entries SCBHKIA(1)-0001, 0008, 0009, 0010, 0011, 0017, 0021, 0026, 0030, 0033, 0040, 0041, 0054, 0056, 0060, 0081, 0082, 0083, 0085, 0087, 0095, 0100, 0101, 0104, 0109, 0111, 0112, 0114, 0131, 0135, 0139, 0144, 0147, 0148, 0150, 0152, 0162, 0165, 0171, 0172, 0173, 0179, 0182, 0183, 0191, 0195, 0200, 0201 and 0260 that Claimant improperly redacted by claiming they were “Commercially Sensitive”;
 - (c) Entries SCBHKIA(1)-0030, 0038, 0039, 0040, 0041, 0054, 0056, 0060, 0081, 0085, 0087, 0091, 0095, 0101, 0109, 0111, 0114, 0129, 0131, 0133, 0135, 0139, 0147, 0150, 0152, 0162, 0178 and 0260 that Claimant improperly redacted on the basis of “Without Prejudice” privilege;
 - (iv) order Claimant to submit a new privilege log (in the form of the template attached as Annex-7 to this letter) conforming with Procedural Order No. 5b and international arbitration standards (i.e., giving the date of the document, identifying all the individuals to whom it has been sent (including cc’s) and providing a brief description of the subject matter of the document with the necessary information and explanation why it claims privilege) over both the non-disclosed and redacted documents in order to allow Respondent to ascertain whether the bases for the various types of privilege and commercially sensitive confidentiality claims invoked are justified.
3. On 7 November 2017, the Claimant informed the Tribunal that it also intended to make an application to the Tribunal in respect of the Respondent’s document production, and proposed to do so by 17 November 2017, its resources being currently focussed on preparing its Reply Memorial.
 4. On 16 November 2017, the Tribunal took note that the Claimant also intended to serve an application by 17 November relating to the Respondent’s disclosure obligations under PO 5a. The Tribunal noted that these applications were not steps anticipated in the

procedural timetable or in POs 5a and 5b, but that it would nevertheless await the Claimant's application, which shall be served by 17 November 2017, and make appropriate directions thereafter.

5. On 17 November 2017, the Claimant served an application relating to the Respondent's disclosure obligations under PO 5a (the "**Claimant's Application**"). The Tribunal deals with the Claimant's Application in a separate Procedural Order No. 6a.
6. On 21 November 2017, the Tribunal directed *inter alia* that the Claimant shall respond to the Respondent's Application by 1 December 2017, that the Respondent shall respond to the Claimant's Application by 2 January 2018 and that no rejoinder would be permitted by either party.
7. On 1 December 2017, the Claimant served its response to the Respondent's Application (the "**Claimant's Response**"). It submitted that the Tribunal should make no order in response to the Respondent's Application and requested the Tribunal to order the Respondent to make no further reference to the inadvertently unredacted version of document SCBHKIA(1)-0135 in the course of this arbitration.⁴
8. These directions contain the Tribunal's decisions on the Respondent's Application. In reaching its decision, the Tribunal has considered the Respondent's grounds for requests in the Respondent's Application and the annexes thereto, as well as the Claimant's Response and the annexes thereto.

II. RESPONDENT'S REQUEST RELATING TO THE CLAIMANT'S PRIVILEGE LOG

9. The Respondent requests that the Tribunal "order Claimant to submit a new privilege log (in the form of the template attached as Annex-7 to this letter) conforming with Procedural Order No. 5b and international arbitration standards (i.e., giving the date of the document, identifying all the individuals to whom it has been sent (including cc's) and providing a brief description of the subject matter of the document with the necessary information and explanation why it claims privilege) over both the non-disclosed and redacted documents in order to allow Respondent to ascertain whether the bases for the various types of privilege and commercially sensitive confidentiality claims invoked are

⁴ Claimant's Response, para. 74.

justified”.⁵

10. The Respondent contends that the Privilege Log is incomplete and does not comply with standards applicable in international arbitration. According to the Respondent, a privilege log should contain a description of the document, its date, author and any recipients, and should explain what privilege is invoked and why. The Respondent complains that the Claimant provided only some of the requirements in its Privilege Log, i.e. the date of the document, the sender and recipient’s e-mail addresses and what type of privilege is invoked, but failed to give any description of the subject matter of the documents, and did not provide any explanation “as to a specific type of privilege that applies to the relevant document”. The Respondent further complains that the Claimant did not specify the identity and position, or role of the people copied in the relevant communications and did not explain whether a recipient is merely copied or is an actual addressee of the communication. According to the Respondent, the additional information which it argues should have been submitted by the Claimant is key to ascertain whether the privileges invoked are justified or not.⁶
11. Finally, the Respondent submits that the new Privilege Log should be made in the form of the template attached as Annex-7 to the Respondent’s Application.⁷
12. The Claimant, on the other hand, alleges that the usage of privilege logs is unusual in international arbitration and that there are no “standards applicable in international arbitration” to privilege logs. The Claimant further contends that the Tribunal did not order production of a privilege log including the detail that the Respondent now complains are missing. The Tribunal only ordered that the Claimant should clearly identify the responsive document and the basis for the purported privilege in the event it invokes privilege. The Claimant contends that its Privilege Log complies with these requirements. It clearly identifies the responsive documents it refers to and the basis for the purported privilege “by reference to a head of privilege which is well-recognised and understood under English law and in common law jurisdictions generally”. Regarding the template provided for by the Respondent, the Claimant notes that if the Respondent desired a particular format, it should have made that request before the Claimant carried

⁵ Respondent’s Application, para. IV.

⁶ Respondent’s Application, para. I.

⁷ Respondent’s Application, para. I.

out the document review.⁸

13. The Claimant further submits that it would be disproportionate for the Tribunal to order it to produce a new Privilege Log. The Claimant contends that the document review involved more than 450 hours of work, which resulted in the production of a substantial volume of responsive documents. Ordering the Claimant to repeat the document review in order to provide further detail in the Privilege Log would cause significant further time and expenses and would be disproportionate to any benefit to be gained by the Respondent insofar as the information already contained in the Privilege Log is sufficient to identify why privilege has been claimed.⁹

Tribunal's Decision

14. The Tribunal is cognisant of the long history of contentious proceeding between the parties and the other related entities and had made the disclosure's orders in Procedural Order 5b with the specific direction that the Claimant should "clearly identify the responsive document and the basis for the purported privilege claimed" and as such may withhold such production.
15. In making such a direction, the Tribunal intends to give each party the initial benefit of its assertion to privilege as there is not practical purpose or economic sense for the Tribunal to examine each of such assertions.
16. Having looked into the Privilege Log and the Index of New Documents (Annexes 01 and 02 to the Respondent's Application), the Tribunal is satisfied that both indexes sufficiently set out the respective assertions of privilege in respect to each of the documents listed. They are fully compliant with the direction made in Procedural Order 5b. No further direction for a "privilege log" more specifically requested by the Respondent would be required.

III. RESPONDENT'S REQUESTS RELATING TO THE CLAIMANT'S CLAIMS OF PRIVILEGE IN THE PRIVILEGE LOG

A. Legal Advice Privilege

⁸ Claimant's Response, para. 15-22.

⁹ Claimant's Response, para. 23-27.

17. The Respondent requests that the Tribunal order the Claimant to produce Entries Nos. 758, 760, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 775, 776, 777, 778, 779, 781, 784, 785, 786, 787, 788, 789, 790, 792, 795, 797, 800, 801, 802, 803, 804, 805, 806, 807, 809, 810, 812, 813, 814, 819, 821, 822, 826, 827, 828 and 829 of the Privilege Log, which are documents responsive to Request No. 16 that the Claimant withheld while, according to the Respondent, it had waived any potentially applicable privileges with regard to these documents.¹⁰
18. The Respondent submits that a document addressed to or coming from a lawyer is only privileged if the communication is created for the purposes of providing legal advice, and that internal communications are not privileged simply because a lawyer is copied in such. The Respondent also contends that communications with lawyers discussing business strategy and negotiations are not protected by legal advice privilege.¹¹
19. According to the Respondent, many documents in the Privilege Log for which the Claimant invokes legal advice privilege are in fact internal communications of the Claimant, communications between the Claimant and other entities that are not law firms or communications with entities the nature of which is not specified by the Claimant. The Respondent contends that in many of these communications, neither internal nor external counsel is a sender or addressee and that it is not indicated whether they relate to legal advice or are merely discussing business strategies.¹²
20. The Respondent also complains that the Claimant asserts legal advice privilege with respect to documents which are responsive to the Respondent's request for production No. 16 ("**Request 16**"), but that the Claimant had clearly waived said privilege by submitting Exhibits C-133 and C-175 in this arbitration, which fall within the Respondent's request for production No. 16. According to the Respondent, the Claimant should not be allowed to "cherry pick" the documents it wishes to produce since it has waived privilege over the whole category.¹³
21. The Claimant, on the other hand, contends that legal advice privilege also covers the "continuum of communication" between lawyer and client. Simply because a document

¹⁰ Respondent's Application, para. IV.

¹¹ Respondent's Application, para. II.A.

¹² Respondent's Application, para. II.A.

¹³ Respondent's Application, para. II.A.

is not an item of correspondence between lawyer and client does not mean that it cannot be subject to legal advice privilege.¹⁴

22. With regard to Request 16, the Claimant denies that it has waived its claim to legal advice privilege by submitting Exhibits C-133 and C-175. The Claimant also denies that it has “cherry picked” any waiver of privilege in this arbitration. Exhibit C-133 is an email from counsel for the Mechmar Liquidators to counsel for the Claimant which contains neither legal advice to the Claimant, nor any request by the Claimant for such advice. Similarly, C-175 is an email from Mr Nyika, who acted as counsel for Ms Martha Renju and as Tanzanian counsel for the Claimant, to the English counsel for the Claimant. The Claimant relied only on the first part of this email, which provides a factual account of events which took place during a hearing. The second part of this email contains references to assessments of the likely consequences of events at the hearing and the next steps required. The Claimant contends that these sentences are not privileged and that in any case, it doesn’t rely on this part of the email. Further, even if certain aspects of C-175 were privileged, the Claimant contends that it would not follow that any privilege over other documents would have been waived by the Claimant’s reliance on the first part of Exhibit C-175. Further, a collateral waiver of privilege requires to identify the “transaction” in respect to which the disclosure has been made and to consider whether the whole of the material relevant to that particular “transaction” has been disclosed. According to the Claimant, the “transaction” in relation to Exhibit C-175 was a single report of factual information regarding the events at a single hearing. As the whole of Mr Nyika’s report is disclosed, no further disclosure is required to ensure that the entire “transaction” is on the record and therefore no further waiver of privilege is required. Therefore, the Claimant submits that it remains entitled to withhold from disclosure other privileged documents responsive to Request 16.¹⁵

Tribunal’s Decision

23. The Tribunal takes the view that internal communications of the Claimant, and communications between the Claimant and other entities whether with law firms or otherwise but relating to legal advice received, or opinions expressed, or discussions of such advice or strategy all constitute the continuum of the legal advice given and should

¹⁴ Claimant’s Response, para. 28-31.

¹⁵ Claimant’s Response, para. 33-44.

not be deprived of its character of legal privilege.

24. In relation to documents identified as responsive to Request 16 which the Respondent argues that the disclosure of C-133 and C-175 in response to Request 16, constituted a waiver of any privilege of the other documents identified as being responsive to Request 16 in the Privilege Log, the Tribunal accepts the Claimant's clarification that C-133 and C-175 are not privileged and no privilege was claimed. This would therefore not affect its claim for privilege over the documents identified in the Privilege Log as being responsive to Request 16.

B. Litigation privilege

25. The Respondent requests that the Tribunal order the Claimant to produce Entries Nos. 14 to 19, 60, 64, 74, 78, 80, 82, 83, 87, 112, 183, 281, 330, 333, 3335, 341, 342, 351, 352, 357, 390, 401, 404-405, 410, 418-419, 449, 461, 462, 509, 519, 534, 558, 561, 563-565, 578, 581, 583-584, 588, 593-594, 596-597, 603, 607, 611, 631, 651-653, 655, 660, 691, 694, 706, 714, 718, 720, 734 and 744 of the Privilege Log that the Claimant withheld on the basis of "Litigation" privilege.¹⁶
26. The Respondent contends that litigation privilege applies only to communications between parties or their solicitors and third parties when litigation is in progress or reasonably contemplated, the communications are made with the sole or dominant purpose of conducting that litigation and the litigation is adversarial, as opposed to investigative or inquisitorial. According to the Respondent, it is doubtful whether the dominant purpose of the communications listed under "Litigation Privilege" in the Privilege Log was to obtain legal advice for this particular arbitration. As the arbitration could not have been reasonably contemplated before the issuance of the Utamwa J Order on 5 September 2013, the Claimant cannot claim litigation privilege before that date.¹⁷
27. The Claimant, on the other hand, contends that it is well-established under English law that the general principle is "once privileged, always privileged" and that therefore, documents created for the dominant purpose of one proceeding will remain privileged in any subsequent litigation. The Claimant also notes that this case has involved a complex

¹⁶ Respondent's Application, para. IV.

¹⁷ Respondent's Application, para. II.B.

history of connected litigations and arbitrations and that the Respondent has already, through Tanesco, sought to deploy the documents produced by the Claimant in this arbitration in the separate PPA Arbitration. The Respondent's approach therefore seems to be that documents covered by litigation privilege in the PPA Arbitration would not be protected from production in this arbitration, but that the Respondent is then free to use the documents produced in this arbitration in other proceedings, thereby circumventing the Claimant's legitimate claims to litigation privilege.¹⁸

Tribunal's Decision

28. The history of contentious proceedings between the parties and related entities arising from the same underlying issues, makes it extremely difficult to distinguish as to whether any particular document produced in one set of proceedings is not related to another or this arbitration. To ensure that any privilege is not compromised, the Tribunal will not order a party to make any disclosure of any document in these related proceedings to be disclosed for use in this arbitration except those to which Parties have mutually so agreed to be produced.

C. Without prejudice privilege

29. The Respondent requests that the Tribunal order the Claimant to produce Entries Nos. 89, 541 to 546, 834, 835, 838, 844, 846, 849, 850, 852, 958, 959, 992 and 1353 of the Privilege Log that Claimant withheld on the basis of "Without Prejudice" privilege.¹⁹
30. The Respondent submits that "Without Prejudice" privilege allows each party to make concessions and admissions in settlement negotiations with the other party without fear that those would be admitted in evidence, and cannot be used as basis for withholding documents relating to one party's internal communications discussing ongoing settlement negotiations or proposed settlement offers. The Respondent alleges that at entries Nos. 89, 541 to 546, 834, 835, 838, 844, 846, 849, 850, 852, 958, 959, 992 and 1353, the Claimant invokes "Without Prejudice" privilege in relation to internal communications or other types of communications that are potentially discussing ongoing settlement negotiations or proposed settlement offers or referring to negotiations

¹⁸ Claimant's Response, para. 45-50.

¹⁹ Respondent's Application, para. IV.

with entities other than the Respondent.²⁰

31. The Claimant submits that the Respondent's request in relation to "Without Prejudice" privilege rests on an incorrect understanding of the law and should be dismissed. According to the Claimant, the public policy basis of the "Without Privilege" privilege is to encourage parties to settle their disputes without recourse to litigation and it would be entirely undermined if internal communications and documents created for the purpose of preparing for or reporting on settlement negotiations were not privileged.²¹

Tribunal's Decision

32. The Tribunal accepts that the "Without Prejudice" privilege is borne out of the public policy of encouraging disputing parties to engage in good faith settlement to avoid contentious proceedings. So long as the documents are related to genuine attempts to resolve the matters in difference, they are privileged. In the Tribunal's view, this extends to a party's internal communications discussing ongoing settlement negotiations or proposed settlement offers.

IV. RESPONDENT'S REQUESTS RELATING TO REDACTIONS OF DOCUMENTS BY THE CLAIMANT

33. The Respondent complains that the Claimant has improperly redacted almost one third of the newly produced documents. According to the Respondent, the redactions are excessive and often do not permit to identify or fully understand the produced documents.²² The Claimant, on the other hand, denies that it has applied excessive redactions.

A. Documents redacted on the basis of "Legal" or "Legal Advice"

34. The Respondent requests that the Tribunal order the Claimant to un-redact Entries SCBHKIA(1)-0021, 0022, 0027, 0033, 0038, 0039, 0041, 0044, 0052, 0053, 0054, 0056, 0057, 0060, 0077, 0080, 0081, 0087, 0091, 0094, 0096, 0098, 0099, 0104, 0111, 0112, 0118, 0124, 0125, 0127, 0128, 0129, 0131, 0135, 0137, 0138, 0139, 0145, 0148, 0150, 0152, 0155, 0165, 0171, 0172, 0182, 0183, 0191, 0195, 0198, 0217, 0232, 0236 and 0246

²⁰ Respondent's Application, para. II.C.

²¹ Claimant's Response, para. 51-56.

²² Respondent's Application, para. III.

of the Index of New Documents that Claimant redacted on the basis of “Legal Advice” or “Legal” Privilege.²³

35. The Respondent submits that many documents redacted on the basis of “Legal” or “Legal Advice” are communications which do not seem to have been made to or come from a legal adviser for the purpose of seeking or obtaining legal advice. In addition, the redactions are so extensive that it is impossible for the Respondent to assess whether the Claimant’s assertions are valid without further explanations by the Claimant.²⁴
36. The Claimant contends that it is normal practice in international arbitration for documents to be redacted where they contain a mixture of relevant and privileged content, or content which is irrelevant and commercially sensitive. According to the Claimant, it has identified the basis for the redaction to comply with the spirit of the Tribunal’s directions and was under no obligation to provide any further explanations. The Claimant also submits that the remedy sought by the Respondent, i.e. an order to produce the un-redacted documents, amounts to a fishing expedition. The Claimant also argues that the Respondent deploys an incorrect understanding of the “Legal Advice” privilege invoked by the Claimant (see above paragraph 21).²⁵

Tribunal’s Decision

37. The Tribunal accepts that where documents contain both privileged and non-privileged content, the disclosing party may disclose the documents with redactions of the parts to which privilege is claimed. This would be preferred rather than to refrain from their disclosure. To the extent that any party suggests that such redactions are excessive or too extensive, the Tribunal would consider the extent of the same if and when reliance by any party is sought in the course of the evidential hearing.

B. Documents redacted on the basis of “Commercial Sensitivity”

38. The Respondent requests that the Tribunal order the Claimant to un-redact Entries SCBHKIA(1)-0001, 0008, 0009, 0010, 0011, 0017, 0021, 0026, 0030, 0033, 0040, 0041, 0054, 0056, 0060, 0081, 0082, 0083, 0085, 0087, 0095, 0100, 0101, 0104, 0109, 0111,

²³ Respondent’s Application, para. IV.

²⁴ Respondent’s Application, para. III.A.

²⁵ Claimant’s Response, para. 59-61.

0112, 0114, 0131, 0135, 0139, 0144, 0147, 0148, 0150, 0152, 0162, 0165, 0171, 0172, 0173, 0179, 0182, 0183, 0191, 0195, 0200, 0201 and 0260 of the Index of New Documents that the Claimant redacted on the basis that they were “Commercially Sensitive”.²⁶

39. The Respondent contends that the Claimant has failed to provide enough information or explanation to show that the redactions were justified. According to the Respondent, irrelevant commercially sensitive information is limited to certain information such as “the financial inner workings of a company” and “formulas, know-how, trade secrets or other proprietary information”. Further, the Claimant should clearly explain which “negative repercussions” could result from disclosure of the information, provided that the document in question is relevant.²⁷
40. The Claimant argues, on the other hand, that there is no clearly defined scope for commercial sensitivity. The Claimant also submits that it was not obliged to provide any further explanation of the reasons why the documents identified as redacted on ground of commercial sensitivity fell within that category and that it would be disproportionate to order it to repeat large parts of its document review to provide more detailed explanations. Also, requesting an order to produce the documents in unredacted form amounts to a fishing expedition.²⁸

Tribunal’s Decision

41. The Tribunal accepts that the Claimant, as a bank, may have to safeguard its rights and confidentiality of its customers, and that documents could be so redacted on the basis of commercial sensitivity of information.
42. To the extent that any party suggests that such redactions are excessive or too extensive, the Tribunal would consider the extent of the same if and when reliance by any party is sought in the course of the evidential hearing.

C. Documents redacted on the basis of “Without Prejudice”

43. The Respondent requests that the Tribunal order the Claimant to un-redact Entries

²⁶ Respondent’s Application, para. IV.

²⁷ Respondent’s Application, para. III.B.

²⁸ Claimant’s Response, para. 60, 62-64.

SCBHKIA(1)-0030, 0038, 0039, 0040, 0041, 0054, 0056, 0060, 0081, 0085, 0087, 0091, 0095, 0101, 0109, 0111, 0114, 0129, 0131, 0133, 0135, 0139, 0147, 0150, 0152, 0162, 0178 and 0260 of the Index of New Documents that the Claimant redacted on the basis of “Without Prejudice” privilege.²⁹

44. The Respondent contends that the Claimant is not using the “Without Prejudice” privilege appropriately for the same reasons as described above (see paragraph 30).³⁰ The Claimant also objects to this request.³¹

Tribunal’s Decision

45. The Tribunal accepts that documents might be redacted on the basis of the “Without Prejudice” privilege, and that this extends to parties’ internal communications discussing ongoing settlement negotiations or proposed settlement offers (see above, para. 32). To the extent that any party suggests that such redactions are excessive or too extensive, the Tribunal would consider the extent of the same if and when reliance by any party is sought in the course of the evidential hearing.

D. Respondent’s Request relating to Entries SCBHKIA(1)-0131 and SCBHKIA(1)-0135

46. The Respondent requests to be allowed to submit the unredacted version of Entry SCBHKIA(1)-0135 of the Index of New Documents originally produced by the Claimant on 6 October 2017.³²
47. In support of its assertions of improper use of redactions by the Claimant, the Respondent cites the Claimant’s documents listed as Entries SCBHKIA(1)-0131 and SCBHKIA(1)-0135, which are internal emails of the Claimant, and share a “Latest Update” section which appears to be the same in both documents. Both documents contain redactions, but while paragraph 6 of the “Latest Update” section is redacted in Entry SCBHKIA(1)-0131, it is unredacted in Entry SCBHKIA(1)-0135. After the Respondent pointed out to the Claimant that this passage did not fall into any of the invoked privileges, the Claimant replied that disclosure of that passage was an oversight and that the passage was

²⁹ Respondent’s Application, para. IV.

³⁰ Respondent’s Application, para. III.C.

³¹ Claimant’s Response, para. 59-60.

³² Respondent’s Application, para. IV.

privileged. It also requested that the Respondent refrain from disclosing it to the Tribunal. While the Respondent did not disclose this document to the Tribunal with the present application, it seeks an order to allow it to do so.³³

48. According to the Respondent, the passage is neither irrelevant nor commercially sensitive and is not privileged, which the Tribunal will realise should the Respondent be allowed to produce it. The Respondent argues that producing this document is relevant in the context of the Respondent's Application, because it demonstrates that the justifications used by the Claimant to withhold or redact documents are flawed, and that the Respondent "is right in expressing its concerns that many other redactions and claims for privilege advanced by Claimant are similarly baseless".³⁴
49. The Claimant complains that it was inappropriate for the Respondent to make any reference whatsoever to this document in the Respondent's Application, since disclosure of this passage was due to an oversight. According to the Claimant, in circumstances where privileged documents are inadvertently disclosed, it is best practice for counsel to resolve the issue without involving the Tribunal. The Claimant also contends that the passage in question addresses its settlement strategy and records legal advice concerning ongoing proceedings. Therefore, it is subject to legal privilege, "Without Prejudice" privilege and is commercially sensitive. Further, that the Respondent seeks to rely on the redaction of this passage to establish that other redactions and claims for privilege are purportedly baseless is unfounded, and does not render the passage in question relevant to the substantive issues in this arbitration. Therefore, the Claimant submits that the Tribunal should order the Respondent to make no further reference to the unredacted version of document SCBHKIA(1)-0135 in this arbitration.³⁵

Tribunal's Decision

50. The Tribunal notes that the Claimant has explained that the un-redacted version of the document SCBHKIA(1)-0135 reflects "SCB HK's settlement position, in order to facilitate internal discussion of SCB".³⁶ As such the Tribunal will accept that the disclosure of the unredacted version of the document SCBHKIA(1)-0135 was

³³ Respondent's Application, para. III.D.

³⁴ Respondent's Application, para. III.D.

³⁵ Claimant's Response, para. 67-71.

³⁶ Annex 04 to Respondent's Application: Letter from Claimant to Respondent dated 23 October 2017.

inadvertent. The Tribunal directs that no further reference should be made to the un-redacted version.

V. ORDERS

51. While the Tribunal has given to each party the initial benefit of its assertion to privilege, the Tribunal would nevertheless investigate such an assertion if and when there are circumstances to suggest that documents are being improperly withheld or excessively redacted, amounting to an abuse of the right so asserted.
52. Based on the arguments made on behalf of the Respondent, the Tribunal finds no basis to suggest that the Claimant has abused this process. If it subsequently transpires in the course of the full presentation of the evidence before the Tribunal that privilege could not be supported for any of the documents for which it is asserted, the Tribunal would direct further specific production or draw such inferences as may be appropriate.
53. On the bases set out above,
 - a. The Tribunal makes No Order on the Respondent's Application dated 2 November 2017.
 - b. The Respondent is directed not to make any further reference to the un-redacted version of the document SCBHKIA(1)-0135.

On behalf of the Tribunal

[signed]

Lawrence Boo
President of the Tribunal

Date: 15 January 2018