

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Omega Engineering LLC and Oscar Rivera
v.
Republic of Panama**

(ICSID Case No. ARB/16/42)

PROCEDURAL ORDER No. 5

Members of the Tribunal

Mr. Laurence Shore, President of the Tribunal
Dr. Horacio A. Grigera Naón, Arbitrator
Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

8 October 2020

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The Tribunal has considered correspondence dated 24 and 29 September 2020, and 1, 4, 6, and 7 October 2020.

The Tribunal here provides rulings and directions on the applications and matters contained in the above correspondence.

1. Claimants seek admission to the record of 12 documents (24 September and 1 October), four of which are unopposed by Respondent and eight of which are opposed (29 September).

(i) The four unopposed documents, A through D, are hereby admitted.

(ii) Of the 8 opposed documents, two are decisions of the Panamanian Supreme Court of Justice (E and F in the 24 September letter), one is an Executive Decree (G), and one contains articles from the Commercial Code ((L). These documents could have been included with Claimants' previous submissions in this arbitration, and Respondent makes this point in arguing that the "exceptional circumstances" requirement for late admission in PO 1 has not been satisfied.

As to the two Supreme Court decisions, Respondent also observes that Justice Troyano could have dealt with these in his 17 January 2020 Report if he thought they were significant. Claimants argue, in response, that without these decisions the Tribunal might be misled as to the content of the law on a material issue in dispute, and exceptional circumstances are not merely reserved for chronologically new evidence.

On balance, while E and F are certainly not new, and while the Tribunal takes no view at this time whether they are needed to explicate the law on a material issue in dispute, the Tribunal considers that Justice Arjona can readily address these decisions in the event that he and Respondent deem them potentially relevant and, as a general matter, there is a lesser burden for adducing late legal authorities. *Accordingly, E and F are admitted to the case record.*

G is along the same lines – a public document. Claimants state, moreover, that this document points to an issue of credibility that their final submission on jurisdiction was not meant to consider. Respondent points out, however, that the relationship between Messrs. Varela and Zarak was specifically addressed in Claimants' final submission. Still, because this is a public document and is being proffered as a matter of testing credibility and Mr. Zarak is available to address it, *the Tribunal will admit G, especially in view of the absence of Mr. Varela.*

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L presents a less compelling case for admission. If Claimants had deemed the three articles as relevant, particularly since other sections were adduced by Respondent, they could have done so before now. Additionally, Claimants' use of PO1 section 11.3 is not entirely correct; as Respondent correctly notes, it relates to translation of a document already submitted, and that is not precisely the case with L (Respondent submitted articles that it had deemed relevant, and not the entire Commercial Code). However, it would also be reasonable for a witness referring to certain parts of a Code to be shown other parts of the same Code. ***In this respect, as an evidentiary matter, it is appropriate to admit L.***

Four of the opposed documents, H, I, J, K, are chronologically new newspaper or magazine or journal stories (June 2020) about Mr. Varela. With or without Mr. Varela being examined, the Tribunal considers these documents to have insufficient probative value for admission at this late date. ***H-K are therefore excluded from the case record.***

The Claimants are invited to submit by **9 October 2020** the electronic versions of the admitted documents with the corresponding exhibit number.

2. Respondent has informed us (1 October) that Mr. Varela will not appear for examination, since he is a subject in ongoing Panamanian criminal investigations. On 7 October Claimants responded, arguing, *inter alia*, that the Tribunal should strike his witness statement or otherwise accord his evidence no weight. The Tribunal takes note of Claimants' application, and will consider further with the Parties the matter of Mr. Varela's witness statement and submissions that Respondent has made based on Mr. Varela's witness statement. The Tribunal also notes Claimants' position on costs in relation to a member of the "American Academy of Trial Lawyers" [the Tribunal is aware of an organization called "American College of Trial Lawyers"] preparing for cross-examination of Mr. Varela.
3. On 4 October Claimant applied for admission to the record of a civil complaint filed on 29 September 2020. Respondent opposed (letter of 6 October). On 7 October, while maintaining their request that the complaint be added to the record, Claimants offered, in the alternative, that a stipulation be accepted that, "on 29 September 2020 "an . . . action was brought by Punela against JR Bocas" in the Panamanian courts regarding the latter's breach of the April 2013 Promise of Purchase and Sale Agreement." The Tribunal suggests that the Parties consider whether they can accept a slightly modified stipulation, as set out below, in which basis the application to admit the document to the record would be withdrawn, though the Parties' correspondence on this issue will of course be included:

