

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

PETERIS PILDEGOVICS AND SIA NORTH STAR

v.

KINGDOM OF NORWAY

(ICSID Case No. ARB/20/11)

PROCEDURAL ORDER No. 9

APPLICATION REGARDING ALLEGED CONFLICT OF INTERESTS

Members of the Tribunal

Sir Christopher Greenwood, GBE, CMG, KC, *President*
The Honourable Yves L. Fortier, CC, OQ, KC, *Arbitrator*
Professor Donald M. McRae, CC, ONZM, FRSC, *Arbitrator*

Secretary of the Tribunal

Mr Govert Coppens

23 February 2023

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I. Procedural History

1. On 13 December 2022 the Claimants' counsel wrote to the Tribunal referring to two alleged conflicts of interest which they considered may have arisen with regard to the employment by the Kingdom of Norway ("**Norway**") of the law firm Wikborg Rein and the accountants KPMG AS. The Claimants maintained that they had been unaware that either Wikborg Rein or KPMG AS had performed work for Norway in connection with the present case until they received Norway's Statement of Costs dated 2 December 2022. The Claimants also referred to what they described as an earlier conflict of interests arising out of Norway's use of the Latvian office of the Glimstedt Law Firm ("**Glimstedt**"). The Claimants did not at that stage request any action from the Tribunal but merely reserved their rights.
2. Norway responded by letter dated 19 December 2022 denying that there was any conflict of interests and enclosing correspondence between the Parties on this subject.
3. On 31 January 2023, the Claimants sent a further letter to the Tribunal in which they applied for the exclusion of Wikborg Rein and KPMG AS as advisors to Norway and reserved their right to request disclosure of all documents relating to the retainers between those firms and Norway. In addition, the Claimants asked the Tribunal to exclude Glimstedt from further advising Norway unless Norway confirmed that Glimstedt had not advised Norway since June 2022.
4. In light of this letter, the Tribunal invited a response from Norway which was given in a letter dated 10 February 2023. Norway stated that it had abstained from seeking advice or assistance from Glimstedt since June 2022 and "*has not requested, and will not request, any further assistance from Glimstedt ZAB SIA in the present dispute*". Norway did not accept that there was any conflict of interest in the case of either Wikborg Rein or KPMG AS and declared that it would not refrain from using their services unless the Tribunal so ordered.

II. The Powers of the Tribunal

5. In their letter of 31 January 2023, the Claimants contended that the Tribunal has the power to regulate all matters of procedure and that this power extends to excluding counsel or advisers chosen by a party in the event that there is a conflict of interest.

Norway has not disputed that this power exists. Nevertheless, the Tribunal must satisfy itself of the existence and ambit of that power.

6. The powers of the Tribunal in respect of procedural matters are governed by the ICSID Convention, the ICSID Arbitration Rules and the BIT between Latvia and Norway. None of these makes any express provision for addressing potential conflicts of interest.

7. Article 44 of the ICSID Convention provides, in its last sentence, that

If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

8. ICSID Arbitration Rule 19 provides that

The Tribunal shall make the orders required for the conduct of the proceeding.

9. In addition, ICSID Arbitration Rule 39 gives the Tribunal power to make orders for provisional measures if necessary to preserve a party's rights.

10. The Tribunal considers that these provisions give it a wide power to regulate matters which might affect the integrity of the proceedings. It notes that other ICSID tribunals have used these powers to take measures which they considered necessary to protect that integrity.¹ Those tribunals have held that their powers extended to excluding counsel or advisers in cases where they considered that there existed a conflict of interest.²

11. The Tribunal agrees that it has that power but it is one not lightly to be exercised, given that in principle a party has the right to choose for itself its legal and other advisers. The Tribunal agrees with the *Fraport* tribunal that, where the issue concerns one party's employment of a lawyer or other adviser who had previously acted for the other party, the test is whether there is a real risk that a party's lawyer or other adviser may have

¹ See, e.g., *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Order of 6 May 2008 ("*Hrvastka*") (CL-0581).

² See, in addition to *Hrvatska, Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25, Annulment Proceeding), Decision of 18 September 2008 ("*Fraport*") (CL-0580); *Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia* (ICSID Case No. ARB/17/36), Procedural Order No. 2 of 5 December 2018 (CL-0582); *Theodore David Einarsson, Harold Paul Ainarsson, Russell John Einarsson, and Geophysical Service Incorporated v. Government of Canada* (ICSID Case No. UNCT/20/6), Decision of 24 February 2022 (CL-0583).

received confidential information from the other party which may be of significance in the proceedings and might prejudice the fair trial of the case.³

12. Moreover, it is important to be clear about the limits of the Tribunal's powers. It is not a regulatory body with the power to determine whether or not a lawyer or other adviser has violated the professional code of conduct by which that lawyer or other adviser is governed, still less does it have the power to impose sanctions upon a lawyer or other adviser. Nor, at this stage of the proceedings, is the Tribunal concerned with whether or not costs incurred for the services of the particular lawyer or other adviser can be recovered; that is a question for a later stage of the proceedings. At present, the Tribunal's duty is to safeguard the integrity of the proceedings and its powers may be used only for that purpose.

III. Application to the Present Case

A. Glimstedt

13. As stated above, in their letter of 31 January 2023, the Claimants requested:

*That Glimstedt be excluded from further advising Norway in the present proceedings if Norway does not promptly confirm that the firm has not further advised Norway since June 2022 and will not do so.*⁴

14. In its letter of 10 February 2023, Norway responded:

*Regarding the first bullet point in the Claimants' request to the Tribunal (Glimstedt), as set out in the letter 19 December 2022, Norway decided in June 2022 to imminently abstain from requesting any future advice or assistance from the Latvian law firm Glimstedt ZAB SIA on the ICSID dispute, as a courtesy to the Claimants' concerns. Norway has not requested, and will not request, any further assistance from Glimstedt ZAB SIA in the present dispute.*⁵

15. The Tribunal considers that Norway's response provides the assurance which the Claimants seek and that, consequently, there is no need for the Tribunal to take action regarding Glimstedt.

³ *Fraport (CL-0580)*, para. 42.

⁴ Claimants' letter to the Tribunal of 31 January 2023, p. 13.

⁵ Norway's letter to the Tribunal of 10 February 2023, p 2.

B. Wikborg Rein

16. The position regarding Wikborg Rein is more complicated. The Claimants' allegation here concerns Wikborg Rein's role in representing UAB Arctic Fishing (a Lithuanian company) in criminal proceedings in the Norwegian courts in 2017 relating to allegedly illegal snow crab fishing in Norwegian waters. The Claimants argue that:

*By acting as counsel for Arctic Fishing, Wikborg Rein obtained confidential information from Arctic Fishing and, incidentally, is likely to have obtained information about Peteris Pildegovics, SIA North Star and related persons or businesses, such as Seagourmet and/or Mr. Levanidov, especially considering the place where the Juros Vilkas was fined, in Baatsfjord. This information may constitute an undue advantage for Norway in the present proceedings which would trigger a conflict of interest.*⁶

17. The Claimants maintain that the risk is enhanced because UAB Arctic Fishing's vessel, the *Juros Vilkas*, was fined while docked at Baatsfjord, where Seagourmet's factory is located and where Mr Pildegovics's company, Sea & Coast, is based. UAB Arctic Fishing was one of Sea & Coast's clients.⁷
18. In addition, the Claimants refer to the fact that, on 27 February 2017, UAB Arctic Fishing and North Star had sent a joint notice of dispute to Norway under Norway's investment treaties with Latvia and Lithuania and that "[i]n this context, North Star and Arctic Fishing necessarily shared confidential information".⁸
19. Norway responds that there is no evidence of a connection between UAB Arctic Fishing and either Mr Pildegovics or North Star other than that they once deposited a joint notice of dispute which was not followed up, each company later commencing separate proceedings against Norway.⁹
20. Norway adds that it had a framework agreement with Wikborg Rein between 2014 and 2018 for the acquisition of legal services which was replaced with a new framework

⁶ Claimants' letter to the Tribunal of 31 January 2023, p. 7.

⁷ Claimants' letter to the Tribunal of 31 January 2023, p. 7.

⁸ Claimants' letter to the Tribunal of 31 January 2023, p. 7.

⁹ Norway's letter to the Claimants of 19 December 2022, pp. 1-2, appended as Annex C to Norway's letter to the Tribunal of 19 December 2022.

agreement in April 2019 under which Norway commissioned Wikborg Rein's services in the present case on 25 May 2021.¹⁰

21. Norway also states:

*Wikborg Rein's engagement with UAB Arctic Fishing concerned a criminal case against the company for illegal crab fishing by its vessel "Juros Vilkas" on the Norwegian Continental Shelf. Norway has been informed by Wikborg Rein that none of the lawyers involved in the present dispute were involved in the criminal case, nor did any of them know about its existence or have at any point in time accessed that case file.*¹¹

22. The Tribunal is disturbed by the fact that Wikborg Rein's involvement in the present proceedings came to light only in Norway's costs submissions filed after the hearing on jurisdiction and merits. Procedural Order No. 1, paragraph 8.1, requires that a Party shall notify the Tribunal promptly of any additional counsel. While Wikborg Rein appears to have been retained by Norway not to present the case (no member of that firm appeared at the hearing) but to assist with background work, the scope for conflict of interest issues to arise with the employment of a law firm means that the spirit, if not the letter, of paragraph 8.1 is applicable here. In addition, it is unclear precisely what Wikborg Rein's role in the present proceedings has been.

23. Nevertheless, the Tribunal is not satisfied that the Claimants have made out a case sufficient to justify a decision to exclude Wikborg Rein from the case. UAB Arctic Fishing is not associated with either Mr Pildegovics or North Star in the sense of being a "*related person or business*". The fact that the prosecution of UAB Arctic Fishing is in some way connected with Baatsfjord and that the company is a client of another of Mr Pildegovics's companies does not appear sufficient to warrant the conclusion that Wikborg Rein's lawyers who acted in the proceedings are likely to have obtained confidential information about Mr Pildegovics or North Star.

¹⁰ Norway's letter to the Claimants of 19 December 2022, p. 2, appended as Annex C to Norway's letter to the Tribunal of 19 December 2022.

¹¹ Norway's letter to the Claimants of 19 December 2022, p. 2, appended as Annex C to Norway's letter to the Tribunal of 19 December 2022.

24. The Claimants' allegation that, by acting as counsel for UAB Arctic Fishing, Wikborg Rein may "*incidentally*" have obtained information about Mr Pildegovics, North Star or related persons or businesses is too vague. There is no indication that either Claimant or related person or business actually shared confidential information with UAB Arctic Fishing or that there is a real risk that this information was then shared by UAB Arctic Fishing with its counsel in the criminal case.
25. The fact that North Star and UAB Arctic Fishing sent a joint Notice of Dispute to Norway at a time when the criminal proceedings were taking place is also insufficient in itself. Wikborg Rein was not involved in preparing that Notice. The Claimants maintain only that, since North Star "*necessarily shared confidential information*" with UAB Arctic Fishing, there is a risk that some of that information may have been passed by UAB Arctic Fishing to Wikborg Rein in the course of the criminal proceedings.
26. The Tribunal considers that there is an important difference between a case in which a lawyer or other adviser retained by one party has previously acted for the other party and a case in which that lawyer or other adviser has acted for an unrelated enterprise. In the latter situation, it is not enough merely to allege that a connection between the other party and that enterprise may have led to unspecified confidential information coming into the possession of the lawyer or other adviser. If a tribunal is to take the drastic step of excluding from the case that lawyer or other adviser, something more is required to show that there is a real risk to the integrity of the proceedings.
27. The Tribunal therefore rejects the Claimants' request that Wikborg Rein be excluded from the proceedings.

C. KPMG AS

28. With regard to the role of KPMG AS, the Claimants make two separate complaints: first, that KPMG AS acted as auditor of Seagourmet's accounts between 2009 and 2014 and may have acquired confidential information of value to Norway for the present proceedings in the course of that work; and, secondly, that a KPMG partner,

Mr Michael Peer, carried out a preliminary damages assessment for North Star in respect of the present case in 2018.¹²

29. The Tribunal considers that the second of these allegations is the more important. Norway has said surprisingly little about this matter. In its letter of 19 December 2022 to the Claimants' counsel (which was copied to the Tribunal as Annex D to Norway's letter to the Tribunal of the same date), Norway states that "[t]he preliminary damages analysis does not seem to be included or mentioned in the Claimants' submissions, and Norway has no prior knowledge of such analysis".¹³ Beyond that Norway says only that its agreement to use the services of KPMG AS in the present case was concluded under a framework agreement in existence since 2015.
30. With their letter to the Tribunal dated 31 January 2023, the Claimants produced the cover page of the preliminary damages assessment but stated that the assessment as a whole was subject to litigation privilege. The cover page¹⁴ bears the title "*DRAFT Calculations of estimated potential damages of SIA North Star due to suspension of its fishing activity in the Barents Sea by the Kingdom of Norway*". It carries the KPMG logo and is dated 3 May 2018. The cover page states that "[t]he preparation of the calculations and review of the material was led by Michael Peer, Partner, KPMG, Forensic, Central and Eastern Europe".
31. In its letter to the Tribunal of 10 February 2023, Norway maintained its position set out in the letter of 19 December 2022 and did not add any further detail.
32. The Tribunal notes that Norway has not denied that Mr Peer carried out the preliminary damages analysis for the Claimants. That allegation was first made on 19 December 2022 and Norway has had ample time to confirm all details with KPMG AS and the broader KPMG network.

¹² Claimants' letter to the Tribunal of 31 January 2023, pp. 11-12.

¹³ Norway's letter to the Claimants of 19 December 2022, appended as Annex D to Norway's letter to the Tribunal of 19 December 2022, p. 1.

¹⁴ C-0340.

33. The Tribunal concludes from the exhibited cover page and Norway’s lack of a denial or explanation that KPMG did indeed provide a preliminary damages assessment for North Star relating to the present dispute.
34. In these circumstances, the Tribunal considers that there is a clear conflict of interest and a real risk that Norway, however inadvertently, may have come into possession of confidential information from North Star relating to the present case. The Tribunal agrees with the Claimants that “[w]orking on both sides of the same dispute is a plain conflict of interest of the most blatant form”,¹⁵ even if the work for one side was of a preliminary character. While prior work for a party on a different issue may not give rise to a conflict of interest, there is a clear and very concerning conflict where a lawyer or other adviser has worked for one party in relation to the very dispute for which they are now engaged by that party’s adversary.
35. The Tribunal accepts that KPMG is a very large enterprise and that Mr Peer, and probably the members of the team which he appears to have led in preparing the damages analysis, belong to a different part of KPMG from KPMG AS. However, the Tribunal does not consider that that fact is sufficient to remove the real risk of North Star’s confidential information coming into the possession of Norway through KPMG or informing KPMG AS’s work for Norway. The Tribunal has been given no information about the relationship between different parts of KPMG or what measures have been taken to ensure that information obtained by one part is not communicated to another. Even had it been given such information, a considerable concern would have remained since it is difficult to see how a large accounting enterprise, one of whose specialities is forensic and disputes accounting, can be treated differently from a law firm with branches in different countries.
36. The Tribunal does not doubt Norway’s statement that it had no prior knowledge of Mr Peer’s analysis for North Star (see paragraph 29, above). It is, however, very surprised that, once the existence of that earlier analysis had been revealed by the Claimants, Norway offered no further details of the relationship between Mr Peer and

¹⁵ Claimants’ letter to the Tribunal of 31 January 2023, p. 11.

KPMG AS and no assurances of any kind but asserted that it would consider itself free to continue employing KPMG AS in the present case.

37. Accordingly, the Tribunal grants the Claimants' request for an order that "*all entities within the KPMG network, and in particular KPMG AS, be excluded from advising Norway in the present arbitration.*"¹⁶

IV. Miscellaneous Matters

38. The Tribunal's decision makes it necessary briefly to address two other matters.
39. First, the Claimants have reserved their position regarding a possible application for disclosure of documents, while stating that "*Claimants would not object to any decision of the Tribunal to sua sponte order the production*" of documents produced by KPMG and Wikborg Rein.¹⁷ The Tribunal considers that it would be inappropriate at this stage to make any such order. If the Claimants wish to make an application for disclosure in light of the present decision, they are free to do so.
40. Secondly, the present decision should not be taken as any indication of the Tribunal's view on issues of jurisdiction or merits, or of the position which it may take at a future stage regarding costs.

V. Decision

41. For the reasons given above, the Tribunal DECIDES that:
- (a) no decision is required as regards the Glimstedt Law Firm;
 - (b) the Claimants' request for an order that "*the Wikborg Rein law firm be excluded as counsel or adviser for Norway in the present arbitration*" is rejected;
 - (c) the Claimants' request for an order that "*all entities within the KPMG network, and in particular KPMG AS, be excluded from advising Norway in the present arbitration*" is granted and Norway is directed not to make any further use of those entities in the present arbitration; and

¹⁶ Claimants' letter to the Tribunal of 31 January 2023, p. 13.

¹⁷ Claimants' letter to the Tribunal of 31 January 2023, pp. 12-13.

- (d) the costs of the present application are reserved and will be addressed in the Tribunal's final Award.

[signed]

Sir Christopher Greenwood, GBE, CMG, KC
President of the Tribunal
23 February 2023