UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

In re Application of the Fund for Protection of Investor Rights in Foreign States pursuant to 28 U.S.C § 1782 for an Order Granting Leave to Obtain Discovery for use in a Foreign Proceeding	19 Misc. 00401 (AT)

DECLARATION OF RAMUNAS AUDZEVICIUS

Ramunas Audzevicius declares as follows pursuant to 28 U.S.C. § 1746:

1. I am a partner at the law firm Motieka & Audzevičius in Vilnius, Lithuania. My curriculum vitae is attached to this Declaration as Exhibit A.

2. I make this Declaration in support of the October 1, 2019 *Ex Parte* Application Pursuant to 28 U.S.C. § 1782 for an Order Granting Leave to Obtain Discovery for Use in a Foreign Proceeding, made by the Fund for the Protection of Investor Rights in Foreign States (respectively "the Application" and "the Applicant"). Counsel for the Applicant have asked me to review and clarify certain assertions concerning the content of Lithuanian law asserted in the September 30, 2019 Declaration of Mr. Gintaras Kukauskas ("Kukauskas Decl."). I do so based on my experience as an attorney admitted to the practice of law in the Republic of Lithuania for 17 years and in the litigation and arbitration of complex disputes involving issues of "bank secrecy" under Lithuanian law.[1]

3. As I explain at greater length below, Mr. Kukauskas is wrong to suggest that the Court's ordering the discovery sought by the Applicant would violate Articles 19 and 43 of the Lithuanian

[1] I take no position as to whether a federal district court in the United States should apply Lithuanian law to the discovery sought by the Application or the manner in, or extent to which, it should do so.

Law on the Bank of Lithuania. *See* Kukauskas Decl. ¶¶ 10-12, 14. Mr. Kukauskas is also incorrect in his assertion that all of the documents and information sought through the Application "should . . . remain confidential and immune from compelled disclosure in any fora." Kukauskas Decl. ¶ 14. That is because there is no absolute bank secrecy under Lithuanian law or under the European law which is a part of Lithuanian law. To the contrary, litigants—including the Bank of Lithuania—may be required, under Lithuanian law, to produce material analogous to that sought by the Applicant here. In addition, Mr. Kukauskas significantly overstates the scope of the bank secrecy and financial market supervision protections from disclosure under Lithuanian law. He also ignores relevant Lithuanian judicial decisions that allow litigants access to reports of temporary administrators appointed by the Bank of Lithuania, as well as pertinent provisions of European law.

4. I expand on each of these points below.

Article 19

5. Mr. Kukauskas asserts that "Article 19 of the Law on the Bank of Lithuania states that any person who accessed documents and information subject to 'banking secrecy,' . . . has a duty to keep those documents confidential," and that "[a] person who discloses such information without any legal basis may be subject to criminal liability under the laws of Lithuania." *See* Kukauskas Decl. ¶ 10. He continues to assert that "all the information which the ex parte application seeks" is barred from production by Article 19.[2] That is not correct.

[2] An English-language version of Lithuania's Law on the Bank of Lithuania published on the website of the Lithuanian Central Bank is attached to my Declaration as Exhibit B.

6. In fact, Article 19(5) of the Law on the Bank of Lithuania makes clear that information constituting a bank secret *may* be disclosed in litigation, subject to the "provisions of the laws of the Republic of Lithuania ensuring protection of commercial secrets."

7. Those provisions are found at Article 10^1 of the Code of the Civil Procedure of the Republic of Lithuania ("Code of Civil Procedure"). In relevant part, Article 10^1(2) of the Code of Civil Procedure provides that if there is a reason to believe that a commercial secret may be disclosed in a proceeding, a court shall at the request of participants in a case or *sua sponte* issue a protective order determining the specific persons entitled

> (i) to access the case file containing information constituting the commercial secret or potential commercial secret, to make extracts, transcripts and copies of the case file; (ii) attend closed court hearings at which information constituting the commercial secret or potential commercial secret may be disclosed, and get access to the transcripts of such hearings; (iii) obtain a certified copy of a court Judgment or Ruling disclosing information constituting the commercial secret or potential commercial secret.

8. Article 10^1(3) of Code of Civil Procedure also provides that:

> "the number of persons identified . . . cannot be greater than it is necessary to ensure a person's right to a judicial remedy and to a fair trial. These persons must include at least the following: (1) if a participant in the case is a natural person, a natural person itself and his or her representative; (2) if a participant in the case is a juridical person, - at least one natural person acting in the case on behalf of the juridical person and juridical person's representative."

9. Article 10^1(4) of the Code of Civil Procedure further provides that:

> The court when applying restrictions set out in [Article 10^1(2) of the Code of the Civil Procedure of the Republic of Lithuania] shall take into account the need to ensure a person's right to a judicial remedy and to a fair trial, the legitimate interests of the parties and other participants of

> the case, and damages that may result from the application or non-application of those restrictions.

10. In short, information constituting a "bank secret" is not immune from disclosure under Lithuanian law; rather, where such information is to be disclosed subject to Lithuanian law, a court should take appropriate steps to protect it.

Article 43

11. Mr. Kukauskas similarly gives an incomplete picture of Article 43(2) of the Law on the Bank of Lithuania. Mr. Kukauskas is correct insofar as he states that Article 43(2) provides that "[i]nformation received by the Bank of Lithuania for the purposes of financial market supervision may not be disclosed publicly, transferred to any third party or made available in other way, except where the Law on the Bank of Lithuania provides otherwise." Kukauskas Decl. ¶ 12.

12. But Mr. Kukauskas fails to acknowledge the many ways in which the Law on the Bank of Lithuania does provide otherwise. In particular, Article 43(7)(2) of the Law on the Bank of Lithuania provides that "[i]nformation received by the Bank of Lithuania for the purposes of financial market supervision may be transferred to the court where the information is necessary in hearing the ***cases regarding bankruptcy or forced liquidation of a financial market participant under supervision***" (emphasis added). I understand that the Applicant seeks discovery for use in an arbitration pursuant to a Treaty between the Republic of Lithuania and the Russian Federation in which the claims precisely concern the forced liquidation of a financial market participant under supervision by the Lithuanian authorities.

13. As with information covered (or also covered) by Article 19, a court upon the request of one of the parties or *sua sponte* shall issue a protective order pursuant to Article 10[1] of the Code of Civil Procedure with respect to financial market supervisory material covered by Article 43(2).

14. It follows that neither Article 19 or 43 precludes disclosure of the material to which they apply. Rather, Lithuanian law simply requires that appropriate protections be put in place with respect to covered material.

Scope of Bank Secrecy and Financial Market Supervisory Material

15. It is important to emphasize that Articles 19 and 43 apply to specific kinds of information and, correspondingly, that these provisions *do not apply* to other kinds of information. According to Articles 19(2) and 43(2) of the Law on the Bank of Lithuania and Article 55(1) of the Law on Banks of the Republic of Lithuania, only information about (i) a bank's clients, their personal data, the services provided to them or their assets or (ii) information illegal disclosure or loss of which could have negative consequences on the functioning of the Bank of Lithuania and its activities, and could harm legitimate interests of other persons is properly considered a "bank secret."[3]

16. Mr. Kukauskas also fails to acknowledge that under the Bank of Lithuania's regulations, significant amounts of information are supposed to be disclosed to the public. He asserts, *see* Kukauskas Decl. ¶ 11(b), that "information constituting 'bank secrecy' of the Bank of Lithuania includes . . . [d]ata of financial statements of financial market participants supervised by the Bank of Lithuania and/or ECB " but that is not correct. In fact, financial statements of financial market

[3] *See* Articles 19(2) and 43(2) of the Law on the Bank of Lithuania and Article 55(1) of the Law on Banks of the Republic of Lithuania.

participants supervised by the Bank of Lithuania, including Bank Snoras, are supposed to be public pursuant to Articles 11.1 – 11.4 of Resolution No. 03-136 of the Board of the Bank of Lithuania dated July 31, 2014 "On the Requirements of Information Disclosed to the Public". It establishes that the following information must be disclosed to the public: (i) a bank's balance sheet report; (ii) report on profit and loss; (iii) information on asset quality; (iv) information on compliance with prudential requirements; (v) profitability, and other information on the bank's financial stability.[4]

Additional Observations

17. I take the opportunity to make some additional observations that may be of value to the Court in considering the Application.

18. *First*, I note that the recent decision of the Court of Appeals of Lithuania in Civil Case No. 2-1381-790/2018 of September 13, 2018 addressed the issue of the case participants' access to the report of the temporary administrator of a credit institution appointed in the case by the Bank of Lithuania, after the Bank of Lithuania initiated bankruptcy proceedings against the financial institution Credit Union Taupkase ("Taupkase"). As it did with Snoras, the Bank of Lithuania appointed a temporary administrator prior to initiating the bankruptcy of Taupkase and instructed that temporary administrator to issue a Report on Taupkase's status. The Bank of Lithuania then relied upon that Report as a basis to initiate bankruptcy proceedings against Taupkase.

19. The court of first instance acceded to the request of the Bank of Lithuania decided to mark the report of the temporary administrator of Taupkase as non-public and prevented the case

[4] *See* Articles 11.1 – 11.4 of Resolution No. 03-136 of the Board of the Bank of Lithuania dated July 31, 2014 "On the Requirements of Information Disclosed to the Public".

participants from accessing it. On appeal, however, the Court of Appeals of Lithuania ruled that the parties' right to access a part of the case file had been unduly restricted, since only information that was exclusively related to the bank's client data was rightfully treated as non-public. The rest of the information, even though it constituted a bank secret, had to be made available to the case participants. In particular, the court explained that "laws . . . related to the protection of the information received for the purposes of financial market supervision should be applied systematically and taking into consideration the purposes of affording such protection."[5]. The Court of Appeals also observed that "the aim of the protection of the information received for the purposes of financial market supervision is, first and foremost, to safeguard the data related to the clients of the credit institutions when supervisory authority supervises the activities of banks and other credit institutions."[6] As such, the Court of Appeals concluded that the parties' access to documents containing details about the clients of the credit institution should remain restricted but that the rest of the case file was to be produced.[7] The *Taupkase* case demonstrates that, from the perspective of Lithuanian law, Mr. Freakley's report and related materials may be produced albeit possibly subject to a protective order.[8] It follows that Mr. Kukauskas is wrong to assert otherwise and that his statement ignores recent Lithuanian case law.

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[5] *See* para. 20 of the Decision of the Court of Appeals of Lithuania in Civil Case no. 2-1381-790/2018 of September 13, 2018.

[6] *See* para. 20 of the Decision of the Court of Appeals of Lithuania in Civil Case no. 2-1381-790/2018 of September 13, 2018.

[7] *See* para. 21 of the Decision of the Court of Appeals of Lithuania in Civil Case no. 2-1381-790/2018 of September 13, 2018.

[8] Decisions of the Court of Appeals of Lithuania in Civil Case no. e2A-689-464/2018 of December 18, 2018 and Civil Case no. 2A-890-370/2016 of December 23, 2016 specifically dealt with production of Mr. Freakley's Report. In both cases, the court declined to order

20. The Court of Appeals' decision in the *Taupkase* case also clarified that the burden of demonstrating that material which it seeks to protect from disclosure on bank secrecy grounds is on the party resisting disclosure.[9] It follows that the Bank of Lithuania that must justify, on a case-by-case basis, that Articles 19 or 43 provides a basis to apply the provisions of the laws of the Republic of Lithuania ensuring protection of commercial secrets.[10]

Mr. Kukauskas neglects relevant points of European law

21. As noted above, Article 43 of the Lithuanian Law on the Central Bank states that material subject to Article 43 may be transferred "to the court where the information is necessary in

production, but based its decision solely on the fact that the applicant in that case had failed to show that the information that was being requested was relevant to the case at hand. In Civil Case no. 2A-890-370/2016 and no. e2A-689-464/2018 claimants sought to annul the bond contracts of July 22, 2011 and October 27, 2011 they entered with Snoras. Claimants based their claims on the statement that Snoras was insolvent by the time they concluded their bond contracts. Claimants stated in their briefs that Mr. Freakley's Report would show Snoras' insolvency at the dates they entered into bond agreements. In both cases the Court of Appeals decided that Mr. Freakley's Report analyzes the situation of Snoras from November 16, 2011 to November 24, 2011 and therefore it is not relevant in analyzing Snoras' status of July 22, 2011 or October 27, 2011. Likewise, the ruling of the Court of Appeals of Lithuania in the Civil Case no. 2-720/2012 dated May 3, 2012 dealt with the issue of marking the report of Mr. Freakley as non-public given that it was received by the Bank of Lithuania for the purposes of financial market supervision. Although the court in that case refused to grant access to the Mr. Freakley's Report, the Report was submitted to the court. In any event, as discussed above, the case law of the Court of Appeals in relation to production of the Reports of temporary administrators developed since 2012. The more recent ruling in *Taupkase*, discussed in paragraphs 18-20 above, granted access to participants to the Report of the relevant temporary administrator.

[9] *See* para. 21 of the Decision of the Court of Appeals of Lithuania in Civil Case no. 2-1381-790/2018 of September 13, 2018.

[10] *See* Articles 19 and 43 of the Law on the Bank of Lithuania.

hearing the cases regarding bankruptcy or forced liquidation of a financial market participant under supervision." Article 43 implements provisions of European law which forms part of Lithuanian law.[11]

22. Indeed, Article 54(2) of the Directive 2004/39/EC of the European Parliament and of the Council of the European Union on markets in financial instruments of 21 April 2004 ("MiFID I") determined:

> Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.

23. On May 15, 2014 Directive 2014/65/EU of the European Parliament and of the Council of the European Union on markets in financial instruments ("MiFID II") was passed. Article 54(2) of MiFID I thereupon became Article 76(2) of MiFID II.

24. The provisions of Article 76(2) of MiFID II are implemented by Article 43(2)(7) of the Law on the Bank of Lithuania which provides

> Information received by the Bank of Lithuania for the purposes of financial market supervision may be transferred to the court where the information is necessary in hearing the cases regarding bankruptcy or forced liquidation of a financial market participant under supervision."

25. I note that the reference to "civil or commercial proceedings" in MiFID I and II encompasses arbitration proceedings. This is clear in the official translation of Article 54(2) of MiFID

[11] Article 2 of the Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union provides that "European Union rules are applicable directly and in case of collision have priority against rule of the Republic of Lithuania." *See also* Article 288(3) Treaty on the Functioning of the European Union ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressee . . .").

I and Article 76(2) of MiFID II, both of which expressly stipulate "*gali būti atskleista civilinio teismo proceso ar arbitražo metu*" (eng. "may be divulged in civil court proceedings or arbitral proceedings").

26. European law also precludes the argument, *see* Kukauskas Decl. ¶ 14, that "[a]ll the documents and information sought through the Application are regarded as 'information received by the [Bank of Lithuania] for the purposes of financial market supervision' under Article 43.2 . . . and as subject to 'bank secrecy' under Article 19 . . . and, therefore, should remain confidential and immune from compelled disclosure in any fora."

27. In fact, in *Bundesanstalt für Finanzdienstleistungsaufsicht v. Ewald Baumeister*, the Court of Justice of the European Union ("CJEU") rejected such a blanket approach, explaining that:

> it cannot be inferred (…) that it is mandatory that all information relating to the supervised entity and communicated by it to the competent authority, and all statements of that authority in its supervision file, including its correspondence with other bodies, be deemed to be confidential.[12]

28. Instead, the CJEU provided clear guidelines as to how to decide whether the information related to the insolvent credit institution should be withheld:

> It also follows from those considerations that the general prohibition on the disclosure of confidential information . . . applies to information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of investment firms that the EU legislature established in adopting Directive 2004/39.[13]

[12] Decision of Court of Justice of European Union dated 19 June 2018, case No. C-15/16, ¶ 34.

[13] Decision of Court of Justice of European Union dated 19 June 2018, case No. C-15/16, ¶ 35.

29. Mr. Kukauskas puts forward no evidence to demonstrate that disclosure of the information the Applicant seeks to access would affect adversely the interests of the person who provided such information to the Bank of Lithuania or the proper functioning of the system for monitoring the activities of investment firms. Against this backdrop, there is no support for Mr. Kukauskas's claim that "all the documents and information . . . are regarded as "bank secrecy" . . . and . . . should remain confidential and immune from compelled disclosure." *See* Kukauskas Decl. ¶ 14.

30. Third and finally, I note that Mr. Freakley's Report was issued in November 23, 2011, almost 8 years ago. In *Bundesanstalt für Finanzdienstleistungsaufsicht v. Ewald Baumeister* the CJEU considered a case where the financial information held by the competent authorities was at least five years old. Noting the passage of time, the CJEU held that Article 54 of MiFID I

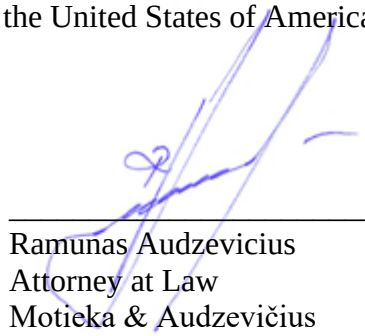
> must be interpreted as meaning that information held by the competent authorities that could constitute business secrets, but is ***at least five years old, must, as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature*** unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties.[14] (emphasis added)

31. Mr. Kukauskas does not explain why the requested information is now of more than historical value except as evidence in the Applicant's arbitration against the Republic of Lithuania.

[14] Decision of Court of Justice of European Union dated 19 June 2018, case No. C-15/16, ¶ 57.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 15, 2019 in Vilnius.



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