

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gavrilović and Gavrilović d.o.o.

v

Republic of Croatia

(ICSID Case No. ARB/12/39)

**PROCEDURAL ORDER NO. 4:
DECISION ON FURTHER ISSUES AS TO DOCUMENT PRODUCTION**

Members of the Tribunal

Michael C. Pryles, President of the Tribunal

Stanimir A. Alexandrov, Arbitrator

Matthias Scherer, Arbitrator

Secretary of the Tribunal

Lindsay Gastrell

Assistant to the President of the Tribunal

Albert Dinelli

23 June 2015

Introduction

1. On 6 May 2015, by Procedural Order No. 3, the Tribunal made orders in relation to the Parties' respective document production obligations in this arbitral proceeding.
2. On 5 June 2015, the Claimants wrote to the Tribunal, copying the Respondent, raising four issues in relation to document production that they said required resolution by the Tribunal.
3. On 9 June 2015, having been invited to do so by the Tribunal, the Respondent replied to the issues raised by the Claimants and raised a further issue for the Tribunal's determination.
4. On 11 June 2015, in an unsolicited submission, the Claimants made various additional submissions in relation to these matters.
5. On 16 June 2015, and pursuant to a grant of permission by the Tribunal to do so, the Respondent replied to the Claimants' letter dated 11 June 2015.
6. This Procedural Order No. 4 is made by the Tribunal to resolve the five issues the subject of the above correspondence. (As will appear below, for various reasons, three of these issues do not require, or no longer require, resolution.)
7. The Tribunal has, of course, carefully considered the submissions of the Parties set out above in determining these issues. It is unnecessary to set out those submissions in any detail, save where they are relevant in relation to each issue.
8. We now turn to our decision in relation to each of those five issues.

Issue (1): “Document-Level PDFs”

9. In their letter dated 5 June 2015, the Claimants seek an order that the Respondent re-submit the files in the Respondent’s disclosed documents as “document-level PDFs”. The issue arises in circumstances where, in relation to a number of categories of document production, the Respondent has produced a compilation of numerous documents into one large file, rather than single “document-level” documents. In their letter, the Claimants point, for example, to one PDF file of 2,504 pages, which appears to consist of dozens of documents without any indication of where one ends, and the next begins. Three other examples are also given.
10. The Claimants submit that this form of production is contrary to document production conventions and to Article 3.12 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”), which requires that copies of documents “conform to the originals”. The Claimants also point to the general principle of “good faith” which they say requires production in the form of “document-level PDFs” by the Respondent. In factual support of their application, the Claimants include photographic examples of two documents, which appear to show document fasteners (such as staples or paper clips) having been used in relation to some documents which appear within the large single PDF disclosed by the Respondent.
11. In its letter dated 9 June 2015, the Respondent submits that such production is “neither required by law nor practical need, nor is it necessarily how the originals are kept”. By way of particularisation, it says that there is no obligation in the IBA Rules, or in Tribunal’s Procedural Orders, or anywhere, for electronic copies of documents to be provided as separate “document-level PDFs”. It says further that, consistently with Procedural Order No. 2, the copies provided fully conform to the original documents. The Respondent also explains that the electronic copies have been labelled with unique identifiers that allow the Claimants to match the documents to particular Requests. Therefore, their submission, as summarised in their later letter dated 16 June 2015, is that “the documentation provided by

the Respondent is a complete reproduction of the originals and fully Bates-stamped, with every single page identified according to the Claimants' separate Requests. Nothing more can be demanded of the Respondent".

12. The Respondent responds to each of the specific categories identified by the Claimants, saying that all such documents have been produced in the form they were maintained. Returning to the example referred to at paragraph 9 above, the Respondent's contention is simply that the "complete court criminal file and the connected state attorney's file" relating to the prosecution of Mr Ivica Papeš (being the Claimants' Request No. 10) is found in two ribbon-tied bundles; thus, it is entirely permissible to produce them in this manner, having assigned each page an identifier.
13. In their letter dated 11 June 2015, in addition to making various other submissions, the Claimants explain:¹

This practice of combining multiple documents into single PDF files ... poses enormous difficulties for the Claimants to review the documents before their next filing ...

... [This situation] severely impacts Claimants['] due process rights to a fair hearing.

14. The Tribunal is inclined to agree. It is not prepared to accept, and does not accept, that a PDF numbering 2,504 pages (to use the example at paragraph 9 above) cannot be separated into its various constituent documents. It is hard to believe, and the Tribunal does not accept, that such files are not comprised of separate, divisible documents. Indeed, the Respondent does not seriously contend that the documents have not been in some separated form in the past – it is telling, in the Tribunal's view, that the Respondent made no submissions to contradict the plain existence, at one time, of fasteners between various documents, as evidenced by the photographic examples of two documents contained in the Claimants' letter dated 5 June 2015. The Tribunal also notes, as the Claimants identify, that most, if not all, of the documents are in Croatian. While that fact is not sufficient, in and of

¹ At p 4.

itself, to found the order sought, it seeks to emphasise the difficulty facing the Claimants in this case if the Respondent is permitted to produce documents in the form it has produced them.

15. Accordingly, the Respondent should be ordered to provide, as soon as possible, all documents so far produced as “document-level PDFs”, limited to cases where it has not already done so. The Tribunal considers it is unnecessary to further stipulate to the Respondent how such division is to occur. Obviously, if the documents are, or were, fastened together by staples, that would provide a useful guide as to the parameters of the document, but, otherwise, the Tribunal considers that the division of thousands of pages into their constituent separate documents should be possible by reference to the contents of the documents to be produced.

Issue (2): Parts of documents obscured

16. In their letter dated 5 June 2015, the Claimants seek an order that the documents labelled R 007800 to R 007808 be reproduced without strips of paper obscuring parts of them. In response, the Respondent offered to re-scan those documents to offer more legible copies. Copies of those documents were provided to the Claimants (and, unnecessarily, to the Tribunal) on 17 June 2015.
17. In these circumstances, the Parties having resolved the issue themselves, it is unnecessary for the Tribunal to make any order in relation to Issue (2).

Issue (3): Transcripts or other summaries of the interrogation of Mr Slavo Boras

18. In Procedural Order No. 3, the Tribunal ordered the Respondent to produce:

Summaries, minutes or other notes memorializing any interview(s) of Slavo Boras by State Attorney during 2013 or 2014 that relate to the bankruptcy of the Five New LLCs

("Claimants' Request No. 7").

19. In their letter dated 5 June 2015, the Claimants point to the fact that, in one document that was produced in response to Claimants' Request No. 7 (namely, a transcript of the State Attorney's interrogation of Mr Boras on 3 September 2014), there was reference to a previous interrogation "a few days before". No copies of any other interviews or transcripts of that interrogation were produced.
20. The Respondent's response to this application is that there are no other transcripts answering the Claimants' Request No. 7, emphasising that the Request concerns only interviews "by the State Attorney" and not "by the police". It follows, the Respondent says, that the Claimants are seeking to reopen and rewrite the lengthy document production process that has led to very specific document production orders.
21. By the time of the Claimants' (unsolicited) letter dated 11 June 2015 (and the Tribunal's agreement to its admission to the record), it appeared that the issue between the Parties had narrowed – put simply, it was whether an interrogation by the police (as distinct from the State Attorney) should be produced.
22. In this regard, their letter dated 11 June 2015 points to Article 206h of the Croatian Criminal Procedure Act which they say makes clear that when police interrogate a witness about potential involvement in a crime being investigated by the State Attorney, it does so on behalf of the State Attorney. In response, the Respondent does not accept the Claimants' characterisation of this aspect of Croatian law. Instead, it says that Article 206h "simply provides that the State Attorney *may* order the police to collect evidence or conduct inquiries" (emphasis added). It appears to the Tribunal that further factual material would be required for it to understand whether, in this case, Article 206h is properly invoked. It cannot, on the basis of what is presently before it, be satisfied that the relevant interrogation

was conducted *by the State Attorney*, as Request No. 7 requires, on the basis (as asserted by the Claimants) that the police did so on behalf of, or for, the State Attorney.

23. But, this conclusion does not dispose of Issue (3) in its entirety. The Claimants' letter dated 11 June 2015, relevantly seeks an order, in the alternative, that the Claimants' Request No. 7 be modified to include interviews by the State Attorney, *or any other investigative body who assisted the State Attorney*.

24. In response, the Respondent contends as follows (at p 3 of its letter dated 16 June 2015):

[T]he Claimants ... now want to rewrite, at this late stage in the document production phase, their document request and the Tribunal's Procedural Order No. 3 issued on that basis. Artificial complaints are not an opportunity to reopen, singly rewrite, a party's past requests. That is neither fair nor procedurally efficient. The lengthy, procedural calendar, is precisely meant to prevent such open-ended fishing expeditions as the Claimants now wish to embark on. Having undergone the burdensome process and fully complied with its obligations under Procedural Order No. 3, the Respondent reserves all its rights, including the right to seek reimbursement of the unnecessary costs of having to reply to the Claimants' unfounded and repetitious complaints.

25. The Tribunal has carefully considered these submissions. It considers it appropriate that the Claimants be permitted to extend their Request No. 7 to include the words: "or by any other investigative body who assisted the State Attorney". The Tribunal notes that the Respondent does not contend that there is any reason why the amendment sought would result in the production of irrelevant, or privileged, documents. Instead, it relies exclusively on procedural matters. In an appropriate case, such arguments may be persuasive, but there is no question that, here, the amendment sought is confined in nature. It is not made on the eve of the hearing, nor does the Respondent point to any specific prejudice. Indeed, insofar as it identifies any prejudice, it points to unnecessary costs that could be expended – these can be adequately compensated, if appropriate, by an appropriate order as to costs. The Tribunal is not persuaded that the Claimants' application can properly be described as an "open-ended fishing expedition". Nor is it satisfied that the inclusion of these words amounts to a wholesale rewriting of the Request. As the Claimants' Request No. 7 relates

to a category that was found to be relevant to the case, it would be contrary to the spirit of the Tribunal's acceptance, in Procedural Order No. 3, of that Request for the documents now to be excluded. Put another way, the Tribunal is satisfied that the documents are relevant, whether the interrogation was conducted by the State Attorney or "or by any other investigative body who assisted the State Attorney".

Issue (4): The bankruptcy file of the five Gavrilović LLCs

26. In their letter dated 5 June 2015, the Claimants "ask that the Tribunal take note of the Respondent's confirmation that it has produced for [the Claimants'] inspection ... or has already submitted in this arbitration, all documents in its possession that are, were, or normally would be part of the bankruptcy file of the five Gavrilović LLCs". These documents comprise the Claimants' Request No. 24.
27. The Tribunal notes that, despite a catalogue of criticisms of the Respondent's alleged non-production in relation to the Claimants' Request No. 24, no order is actually sought by the Claimants. As far as the Tribunal is concerned, that is the end of the matter – it would not be appropriate to make an order where none is sought.
28. The Tribunal does, however, note for completeness that the Respondent says in its letter dated 9 June 2015 that "it has provided the Claimants with all documents in its possession, custody or control answering Claimants' Request 24".²

² Repeating a previous statement to this effect in its letter dated 4 June 2015 (which was before the Tribunal as C-254).

Issue (5): Alleged deficiencies in the Claimants' document production

29. The fifth, and final, issue relates to alleged deficiencies in the Claimants' document production. This issue was raised by the Respondent in its letter dated 9 June 2015, where it notes that the Claimants had failed to produce any document in respect of the Respondent's Request Nos. 6, 35, 36 (other than 36(iv)), 37 and 38. The Respondent contends that, in particular, Request Nos. 35, 36, 37 and 38 capture documentation "essential for the Respondent to fully assess and respond to the Claimants' damages assessment". In those circumstances, they seek an order that the Claimants comply with Procedural Order No. 3 and produce documentation responsive to the Respondent's Request Nos. 6, 35, 36 (other than 36(iv)), 37 and 38.
30. In response, on 11 June 2015, the Claimants describe this request as "superfluous" in circumstances where "Procedural Order No. 3 already contains such orders, of which the Claimants are well aware, *and with which they have complied*" (emphasis added).
31. In light of that confirmation, it is unnecessary for the Tribunal to make any further orders in relation to this issue. The Respondent has said, in its letter dated 16 June 2015, that it "reserves its right to respond in full to [the matters the subject of the Claimants' letter dated 11 June 2015] and asks the Tribunal to draw all appropriate inferences from the Claimants' failure to produce the ordered documentation". Of course, those submissions, if ultimately pressed, will be properly considered by the Tribunal, but there is no warrant to say anything further now, or to make any orders in relation to Issue (5).

Decision

32. For these reasons, the Tribunal makes the following orders.

(1) The Respondent re-submit, as soon as possible, all documents so far produced as "document-level PDFs", limited to cases where it has not already done so.

(2) Request No. 7 of the Claimants' Requests for Production of Documents be amended to read:

Summaries, minutes or other notes memorializing any interview(s) of Slavo Boras by State Attorney or by any other investigative body who assisted the State Attorney during 2013 or 2014 that relate to the bankruptcy of the Five New LLCs.

and the Respondent provide, as soon as possible, those documents that answer the revised Request No. 7.

33. Any submissions as to the costs of this application can be made, if desired, before the Tribunal decides the question of the costs of the arbitration.

For and on behalf of the Tribunal,

[signed]

Michael Pryles
President of the Tribunal
Date: 23 June 2015