

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ACP Axos Capital GmbH

v.

Republic of Kosovo

(ICSID Case No. ARB/15/22)

PROCEDURAL ORDER NO. 3

Members of the Tribunal

Mr. Philippe Pinsolle, President of the Tribunal

Dr. Michael Feit, Arbitrator

Mr. J. Christopher Thomas QC, Arbitrator

Secretary of the Tribunal

Ms. Celeste Mowatt

5 July 2017

Introduction

1. On 6 March 2017, the Tribunal issued Procedural Order No. 2 containing its decision on the Redfern Schedules and the production of documents.
2. Claimant sent a letter to the Arbitral Tribunal dated 14 June 2017, attaching correspondence between the parties dated 23 May 2017 and 2 June 2017. In this letter, Claimant sought clarification from the Tribunal regarding the proper scope of the Order, in particular, relating to privilege and commercial confidentiality. As Claimant was at the time preparing its Reply Memorial, it requested that it be permitted to make limited additional submissions to take account of any further documents arising from an order of disclosure of further documents.
3. On 16 June 2017, Claimant submitted its Reply on Merits and Quantum and Counter-Memorial on Jurisdiction and Admissibility.
4. Respondent replied to Claimant's letter on 21 June 2017, attaching two appendices, addressing the points raised by Claimant in its letter. In its letter, Respondent requested that the Tribunal reject Claimant's allegations of breaches of the Tribunal's order in the document production phase of the arbitration.
5. Claimant then sent a letter dated 28 June 2017 whereby it repeated its positions stated in its letter of 14 June 2017.
6. Respondent sent an email on 1 July 2017 indicating that it maintains the position stated in its letter of 2 June 2017 and 21 June 2017 and noting that it has nothing further to add at this stage.

Issues to be decided

The issues to be decided by the Tribunal are the following:

Privilege

7. Claimant requests that the Tribunal clarify certain points related to privilege.
8. First, in its letter of 14 June 2017, Claimant seeks confirmation that “[d]ocuments are only privileged if, and to the extent that, they contain ‘legal advice’ that has been provided by ‘external legal counsel’”.
9. Respondent indicated in its letter of 21 June 2017 that it only disclosed documents that were prepared “without input” from Respondent's external legal counsel.
10. Regarding documents copied to legal counsel, the Tribunal notes with respect to Claimant's Document Production Requests 5, 17, 32, 35, and 36, Respondent indicated that it withheld as privileged correspondence that was copied to Respondent's counsel.

Procedural Order No. 3

11. The Tribunal wishes to clarify that sending correspondence in copy to counsel does not suffice to create legal privilege. The document in question must contain legal advice or seek legal advice in order for privilege to attach to it.
12. The Tribunal therefore invites Respondent to confirm by **11 July 2017** that it has not withheld correspondence solely on the basis that it was copied to counsel of Respondent and that all documents withheld contain requests for or the giving of legal advice.
13. Second, in the same letter, Claimant seeks a clarification from the Tribunal that documents “*containing procedural, technical, financial, commercial, strategic or other advice should be disclosed irrespective of who provided that advice*”. This request concerns specifically documents issued by Hunton & Williams.
14. Claimant considers it “*very unlikely that all communications with Hunton & Williams ... would meet the requirement for legal privilege as set down by the Tribunal*”.
15. Respondent, however, confirmed in its letter dated 21 June 2017 that it was assisted by attorneys from Hunton & Williams and that these attorneys provided legal services. The Tribunal accepts Respondent’s representation. In light of this confirmation, the Tribunal dismisses Claimant’s request for clarification of this point.
16. Finally, with respect to privilege, Claimant seeks clarification that where “*documents contain direct citations of legal advice received from the Respondent’s external legal counsel, but also other responsive content, then the document should be produced in redacted form, with such redactions limited only to the direct citations of legal advice. However, redaction should not be permitted in respect of comments or advice upon next steps or consequences in relation to that legal advice*”.
17. In its letter of 21 June 2017, Respondent addressed this issue directly. It indicated that:

As Kosovo has repeatedly explained, the Transaction Advisers did not act as legal advisers, but rather consulted all legal matters with Kosovo’s external legal counsel (e.g., Gowlings, Kalo and others). As a result, and in accordance with Procedural Order No. 2, communications of the Transaction Advisers which may contain their advice have already been produced. On the other hand, communications of the Transaction Advisers seeking legal advice from, or receiving legal advice from, Kosovo’s external legal counsel are legally privileged and barred from production.

In this context, Kosovo confirms it has produced all responsive documents, such as presentations and reports, prepared solely by the Transaction Advisers and thus not covered by privilege as defined in Procedural Order No. 2. As explained in Kosovo’s Privilege Log of 23 March 2017, Kosovo has also produced documents prepared by the Transaction Advisers incorporating legal

advice from Kosovo's external legal counsel after redacting privileged information from documents.

For the sake of completeness, it should be noted that some documents and communications refer to the "Transaction Advisers," often abbreviated as the "TA," without making a distinction between legal advisers, the Strategic Adviser and the Transaction Advisers. As a consequence, although certain documents produced by Kosovo mention memoranda or submissions "prepared" by the Transaction Advisers, these were actually prepared by Kosovo's external legal counsel. An email communication between Mr. Kreshnik Gashi and Kosovar authorities dated 31 July 2013, produced by Kosovo on 2 June 2017 and appended to this letter, illustrates the point. Although the email refers to a memorandum prepared by the Transaction Advisers ("TA Memo"), the referenced document is actually a legal memorandum prepared by Gowlings protected by legal privilege. (emphasis added)

18. The Tribunal finds that Respondent's position is clear. As with the previous request, the Tribunal has no reason to doubt the accuracy of the representations made by Respondent's counsel. The Tribunal also notes that Claimant's suggestion that Respondent may have redacted "*comments or advice upon next steps or consequences in relation to that legal advice*" is speculative. Furthermore, the Tribunal finds Claimant's distinction between legal advice and comments in relation to legal advice rather difficult to implement in practice given that commenting on legal advice necessarily means that such advice must be disclosed.
19. The Tribunal therefore dismisses this request.

Commercial Confidentiality

20. With respect to Claimant's Document Production Request No. 18, Claimant requests that the Tribunal order the disclosure of the Annexes and all other relevant contracts that fall under the scope of Request No. 18, notwithstanding Respondent's claim to commercial confidentiality.
21. In its letter of 21 June 2017, Respondent responded to this request stating that it voluntarily produced the agreement between PTK and Dardafon, but that Dardafon expressly stated that it does not waive confidentiality with respect to the Annexes to the agreement, which are covered by a Non-Disclosure Agreement provided in Article 14 and Annex 8 of the Agreement. Respondent attached Dardafon's letter to this effect.
22. The Tribunal notes that it has no jurisdiction over the Non-Disclosure Agreement between PTK and Dardafon. The Tribunal also notes that both parties to this agreement have a common interpretation of their Non-Disclosure Agreement, namely that a party may refuse to provide its consent for the production of said agreement and other or all parts of the principal contract. In the absence of elements establishing wrongful collusion or fraud, the Tribunal sees no reason to depart from this joint interpretation.

23. The Tribunal finally notes that both parties to the Non-Disclosure Agreement consider the information requested to be confidential.
24. As a result, the Tribunal dismisses Claimant's request in this regard.

Limited Additional Submissions

25. In its letter of 14 June 2017, Claimant requests that, should the Tribunal order the disclosure of further documents and/or that its clarification of the application of legal privilege results in further disclosures, Claimant be permitted to make limited additional submissions and/or supplement its Reply submission to take account of such documents as appropriate.
26. The Tribunal has ordered that Respondent clarify that it did not withhold documents solely on the basis that the counsel of Respondent was copied. Depending on this clarification, the Tribunal may or may not order the production of further documents responsive to the relevant requests.
27. The Tribunal has dismissed all other requests from Claimant. Pending the Tribunal's decision regarding the documents withheld on the basis that the counsel of Respondent was copied, the Tribunal does not grant leave to Claimant to make additional submissions.

Decision

28. The Tribunal therefore issues the following order:
- a. Respondent is invited to confirm by **11 July 2017** that it has not withheld correspondence solely on the basis that it was copied to counsel of Respondent and that all documents withheld contain requests for or the giving of legal advice.
 - b. The issue of limited additional submissions by Claimant is reserved for the time being.
 - c. All other requests by Claimant are dismissed.

[signed]

Philippe Pinsolle
President of the Tribunal
Date: 5 July 2017